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# THE BRECHNER REPORT

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September 2008

## Senate approves controversial wiretapping bill

WASHINGTON – The U.S. Senate approved a bill expanding the government’s ability to conduct surveillance without obtaining a warrant.

The FISA Amendments Act, approved by a vote of 69 to 28,

also gives telecommunications companies that participated in the National Security Agency’s secret wiretapping program retroactive immunity. The program, approved by President George Bush

weeks after the Sept. 11 attacks, allowed the NSA to wiretap the international communications of Americans suspected of links to Al Qaeda without a court order.

The version of the bill passed included concessions by both Democrats and Republicans. While it broadened the executive branch’s ability to wiretap terrorist suspects, it reduced the role of a secret intelligence court in overseeing operations.

“Even in an election year, we can come together and get important pieces of

legislation passed,” said President Bush, according to *The New York Times*.

Public interest groups, however, decried the bill. “We will fight this unconstitutional grant of immunity in the courtroom and in the Congress, requesting repeal of the immunity in the next session, while seeking justice from the Judiciary,” vowed Electronic Frontier Foundation Staff Attorney Kurt Opsahl, according to the *Electronic Frontier Foundation*.

Sources: *The New York Times* and the *Electronic Frontier Foundation*

**PRIVACY**

## Court orders Google to turn over YouTube data

SAN FRANCISCO – A federal judge ordered Google to give Viacom the IP address and login name of every individual who watched videos on YouTube, the largest video site on the Internet.

Viacom requested the data to determine how many of the videos people watched on YouTube infringe on its copyright.

Privacy advocates fear the order will expose the viewing habits of tens of millions of people. In April 2008 alone, 82 million U.S. residents watched 4.1

billion video clips on YouTube.

Although the companies say they cannot use IP addresses to determine an individual’s identity, technology experts have found this information before by comparing the addresses to records of other online activities.

Viacom and Google said they plan to

obtain a protective order and protect users’ anonymity.

“We are investigating techniques, including anonymization, to enhance the security of information that will be produced,” said Michael Fricklas, Viacom’s general counsel, according to *The New York Times*.

Viacom agreed it would provide the data only to outside experts advising Viacom on enforcing its rights against YouTube and Google.

Source: *The New York Times*

**PRIVACY  
and  
ACCESS**

## Medical groups sue to prevent release of errors

SARASOTA – Florida doctors and hospitals sued three state agencies in federal court to keep records of medical errors from the public.

Thirty-seven Florida hospital groups and the Florida

**ACCESS  
RECORDS**

Medical Association sued the Department of Health, the Agency for Health Care Administration and the Attorney General’s Office, claiming federal medical privacy laws trump state law.

Amendment 7 to the Florida Constitution lets patients access records

by any “health care facility or provider relating to any adverse medical incident.”

The medical groups said the law conflicts with the 1986 federal Health Care Quality Improvement Act, which enabled hospitals to report malpractice cases and revocations of hospital privileges to the National Practitioner Data Bank confidentially.

The Attorney General’s Office filed a response saying the HCQIA allows disclosure by parties authorized under state law.

The groups also claimed satisfying the over 400 requests already filed would be costly and time-consuming because

HIPAA, the federal medical privacy law, requires removing all patient-identifying information before disclosure.

While supporters say enforcing the law will reveal mistakes hidden by doctors and insurers, the medical groups and some safety advocates say the law will discourage reporting errors and violate standing confidentiality agreements.

“We feel strongly that it is not fair to open up records that were held confidential by previous court actions over 30 years,” said Bill Bell, general counsel for the Florida Hospital Association.

Source: *Sarasota Herald-Tribune*

## Google maps Florida counties

SARASOTA – Google enabled any internet user to virtually tour nearly every road in Sarasota, Manatee and Charlotte counties.

The maps are extremely detailed and show citizens engaged in daily business. The level of detail has caused controversy in some of the larger cities, including San Francisco, where Google photographers caught a woman in her underwear.

Google Maps gives users a street-level, 360-degree panoramic image of almost every street, in an experience akin to standing on a street corner and turning in a circle.

The maps were only available in major

cities until Google expanded its coverage by 37 areas.

Google addressed individuals' privacy concerns by blurring all faces on the southwest Florida maps.

"You're used to getting a certain amount of anonymity in your life. But when it's captured like that and preserved forever, it is intimidating," said Electronic Frontier Foundation Media Relations Coordinator Rebecca Jeschke, according to the *Sarasota Herald-Tribune*.

Google Maps cannot capture certain images such as gated neighborhoods.

Source: *Sarasota Herald-Tribune*

## FBI improperly obtains phone records of terrorism reporters

WASHINGTON – The FBI apologized to editors at *The New York Times* and *The Washington Post* for violating FBI procedures to obtain reporters' telephone records four years ago.

Justice Department Inspector General Glenn Fine discovered that the FBI improperly secured records from three writers and a researcher in Jakarta, Indonesia. All were reporting on Islamic terrorism in Southeast Asia.

The FBI declined to say why they sought the records.

Typically, to obtain reporters' phone records, FBI agents must secure approval by the attorney general or another top official. The FBI instead used an "exigent circumstances" letter to collect the information for national security reasons and promised to follow up with a subpoena. No subpoenas were issued.

"No investigative use was made of the records, and they have now been removed from the FBI's databases," said FBI spokesperson Michael P. Kortan, according to *The Washington Post*.

Source: *The Washington Post*

## FOIA study shows little to no progress in response issues

CHICAGO – A FOIA study found federal agencies and departments made little to no improvements in responding to requests since President George Bush's 2006 order to improve FOIA service.

The Coalition of Journalists for Open Government found that federal agencies rejected 40 percent of FOIA requests – the highest denial rate since agencies started reporting this data 10 years ago.

The government also reduced the number of staff handling FOIA requests by eight percent and the FOIA processing

budget by three percent.

CJOG found that while the overall backlog fell from 39 to 33 percent, it was mostly due to huge reductions at agencies like Housing and Urban Development, which reduced its backlog from 188 to 10 percent. Eleven of the 25 agencies maintained, or even worsened, their backlog.

CJOG said the agencies "blew an opportunity" to reduce the backlog because the number of FOIA requests dropped by 63,000 from 2006 to 2007, according to *Editor & Publisher*.

Source: *Editor & Publisher*

**FREEDOM  
OF INFORMATION**

## Government sued for data tracking

WASHINGTON – Two civil liberties groups sued the U.S. government under FOIA for records about its use of cell phones as tracking devices.

Eight months after the American Civil Liberties Union filed a FOIA request with the Department of Justice and received no response, the ACLU and the Electronic Frontier Foundation sued in federal court. The ACLU sought documents, memoranda, and guides on the government's tracking policies.

The ACLU filed its request after an article in *The Washington Post* revealed officials requested and obtained this data from the courts, sometimes without showing probable cause.

The U.S. government asserted it only tracks criminal suspects. "Law enforcement has absolutely no interest in tracking the locations of law-abiding citizens," said Justice Department spokesman Dean Boyd, according to *The Post*.

Source: *The Washington Post*

## County puts documents on Web site

PALM BEACH COUNTY – County commissioners provided preliminary budget documents online in an effort to inform the public about budgeting.

Commissioners put all documents

**ACCESS  
RECORDS**

used in the decision-making process online,

at <http://www.pbcgov.com>. Clicking the FY-2009 budget link gives users workshop agendas, the proposed budget overview, line item expenditures and revenues by department, and budgets for previous years.

Commissioners also streamed and archived budget workshops on the site.

Source: *Boca Raton News*

## DEP meeting raises Open Meetings concerns

NAPLES – Two Collier County advisory board members raised Open Meetings Law concerns by attending a Department of Environmental Protection permit meeting that was not formally noticed.

Coastal Advisory Committee members David Buser and Jim Burke attended a DEP meeting on the management of Clam Bay, a North Naples estuary. For months, controversial issues about the management, use, and maintenance of

Clam Bay have come before the CAC.

Buser and Burke have prominent roles in the controversy.

The Open Meetings Law requires the public be notified when two or more members of the same board meet to discuss issues that could come before the board for action.

Although the county did not formally notice the DEP meeting, some stakeholders heard about and attended the meeting.

Buser, Burke, and meeting attendee Coastal Zone Management Director Gary McAlpin said CAC issues were not discussed at the DEP meeting.

In response to CAC member Tony Pires' questions about whether the DEP meeting violated the Open Meetings Law, McAlpin said "I think your point is well taken but from a staff perspective there was no CAC business discussed there," according to the *Naples Daily News*.

Source: *Naples Daily News*

## Secret negotiations keep company in St. Petersburg

ST. PETERSBURG – In a series of negotiations shielded from public view, city and county officials approved millions of dollars in tax incentives to persuade a high-tech company to stay in the Bay area.

Officials put together a \$34.4 million incentive package for Jabil Circuit, one of the Bay area's largest high-tech employers. City and county officials approved the deal but withheld the details from the public.

Hours before a City Council meeting, the Jabil package was quietly added to the agenda among dozens of routine matters. Council members approved the package without discussing what they were voting on.

"When I voted on it I didn't

even know who it was. I thought it was Raytheon at first," said Council Member Karl Nurse, according to the *St. Petersburg Times*.

The County Commission also approved the deal in two separate meetings without explicitly identifying Jabil.

Some officials defended their actions because the meetings did not violate the letter of the Open Meetings Law.

"I can't take everything to referendum or hold a public hearing on everything. We would never get anything accomplished," said Council Member Jeff Danner, according to the *Times*.

In exchange for the package, Jabil agreed to hire 858 new employees.

Source: *St. Petersburg Times*

## Commission archives city meetings

MIAMI – Miami City Commission meetings are now broadcast live online and archived for the public to view anytime.

The Commission partnered with Granicus Inc. to improve streaming and archiving services.

The searchable system, at <http://videos.miamigov.com>, includes commission meeting videos and agendas side-by-side on the official City of Miami Web site.

Maintaining the system will cost the city \$19,000 per year.

Source: *Miami Today*

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## Super Bowl fine overturned

WASHINGTON – An appeals court panel ruled that Janet Jackson's infamous Super Bowl "wardrobe malfunction" exposed her breast for too short a time to warrant a \$550,000 fine.

The Federal Communications Commission originally fined CBS Corp.

for airing Jackson's nude breast for nine-sixteenths of a second.

The 3rd U.S. Circuit Court of Appeals held that brief nudity fell under the same category as "fleeting expletives," or isolated instances of foul language. The Supreme Court is set to hear a case on "fleeting expletives" this fall.

CBS praised the decision as "an important win for the entire broadcasting industry," according to *The Palm Beach Post*.

The Parents Television Council and the FCC disagreed. "I continue to believe that this incident was

inappropriate, and this only highlights the importance of the Supreme Court's consideration of our indecency rules this fall," said FCC Chairman Kevin Martin, according to *The Post*.

The halftime show yielded 540,000 complaints.

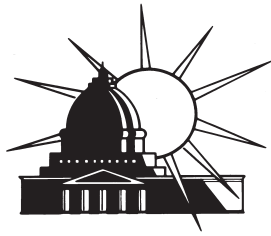
Source: *The Palm Beach Post*

## BROADCASTING

# THE BRECHNER REPORT

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## Declassification proposals unlock the door to our history

The Public Interest Declassification Board (PIDB), an advisory committee established by the U.S. Congress, has been working quietly since 2006 to develop recommendations to fix our broken declassification system. The Board, whose members are selected by the president and the majority and minority leaders from each house of Congress, issued a report in December 2007 entitled "Improving Declassification," which provides important recommendations for reforming the system.

Not surprisingly, the PIDB determined that the classification and declassification process is plagued by excessive secrecy, delay, obstruction, and avoidance. The funds and attention directed at secrecy continue to dwarf the provisions for declassification: in 2007, the government spent

### The Back Page

By Meredith Fuchs

an estimated \$8.65 billion on security classification but only \$44 million on declassification activities. The Board's analysis implicitly acknowledges the problem of allowing the power for creating and holding secrets to rest eternally with a small group of executive branch agencies that may be disinclined to consider the substantial public interests at stake in the release of certain records or the damage to the government's own operations caused by barriers to information sharing.

The Board's report is a useful tool for beginning a much-needed dialogue about our flawed declassification process. The report recommends expediting declassification of the most significant records, such as presidential records and important historical records; making the declassification process more unified across agencies; facilitating declassification of electronic records; and requiring agencies with significant classification activity to establish historical advisory committees with agency personnel and outside experts to report to the agency and make recommendations on declassification priorities.

The improvements suggested by the PIDB, however, do not go far enough. Notably, there is no broad recommendation for comprehensive reform of the system. A piecemeal implementation of the Board's individual recommendations



Meredith  
Fuchs

may not accomplish the necessary change. Moreover, implementing many of its more important proposals would require a considerable increase in resources for the National Archives and Records Administration (NARA).

In January 2009, the new president and the incoming Congress will have an opportunity to address the significant challenges of declassification. A presidential commitment to reducing unnecessary classification, both to enhance our security as a whole and to ensure accountability to the public, is an important first step. But Congress must act legislatively to set a new

paradigm for declassification that ensures that the most important documentation of our nation's history is released in a systematic and timely process that preserves the public's right to know.

An omnibus Historical Records Act (HRA) that would facilitate the declassification of historically significant information in a timely manner, bring greater consistency and efficiency to the declassification process, consider the significant public interest in declassification of historical records, and reduce the burden and delay entailed in the current declassification process could transform the declassification system and open up our nation's documentary history to the public. Agencies should be required to participate in a National Declassification Center that considers the input of an independent body that is statutorily empowered to report on declassification processes and order the release of particular records. Moreover, the standards for reclassification and for declassification of records older than 25 years should be adjusted to make sure past gains are not reversed and to speed up the release of historical records. Finally, agencies should all be required to participate in funding these activities. Each classification decision represents a chain of costs for taxpayers. Declassification will stop the mounting costs and will ensure each agency can better protect the genuine secrets.

The recommendations of the PIDB should not be allowed to fade away unnoticed but instead should be taken up by the next administration and the next Congress. These recommendations are not partisan in any way, but are simply good policies to bring greater accountability and transparency to our history.

*Meredith Fuchs is General Counsel at the National Security Archive.*