
THE BRECHNER REPORT

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New college programs planned at secret meeting

TALLAHASSEE – Nine Florida community colleges became eligible to offer bachelor's degrees as part of a program put together in part during a meeting allegedly held without proper notice.

House Speaker Ray Sansom, who recently became the vice president of Northwest Florida State College, and college president Bob Richburg met with college trustees about the plan. The meeting was scheduled for the day after Easter, and

it was only advertised for one week in a newspaper published 150 miles away from the meeting.

In an e-mail obtained by the *St. Petersburg Times*, Richburg allegedly told Sansom that the meeting was "probably the only way we can do it in privacy but with a public notice here."

The e-mail is "a fairly clear statement of intent to avoid, as much as possible, public attendance and/or oversight," said First Amendment Foundation president

Barbara Petersen, according to the *Times*.

The connection between Sansom and Richburg surfaced recently when Sansom took the unadvertised \$110,000 per year job at Northwest Florida State College in November 2008. Sansom obtained \$35 million in public funding for the college over the past two years.

Critics of the program say it was put together hastily and interferes with community colleges' mission to provide open access to higher education.

Source: St. Petersburg Times

Prop. 8 donors to close records

SACRAMENTO, Ca – Supporters of Proposition 8, the California ballot measure that banned gay marriage, sued to shield campaign finance records from the public because they allegedly have been harassed.

Donors reportedly received threatening phone calls, e-mails and postcards, and some even said their property was destroyed and negative flyers about them were distributed in their hometowns.

Supporters fear the harassment will hinder efforts to obtain future donations.

"No one should have to worry about getting a death threat because of the way

he or she votes," said James Bopp Jr., an attorney representing the two groups supporting Proposition 8, according to *SF Gate*. "This lawsuit will protect the right of all people to help support causes they agree with, without having to worry about harassment or threats."

"The problem with their argument, of course, is that campaign finance laws, both at the state and federal level, have been litigated endlessly now since Watergate and the argument has, in one form or another, been rejected," said First Amendment Coalition Executive Director Peter Scheer, according to *SF Gate*.

Source: SF Gate

FREEDOM OF INFORMATION

Openness a priority for Obama

WASHINGTON, D.C. – On his first day as president, Barack Obama kept transparency at the top of his administration's priority list by issuing two memoranda and an executive order mandating openness and transparency.

With the decrees, Obama undid several policies implemented during the Bush administration designed to make access to the executive branch more difficult.

The executive order allows only the

current president to block the release of presidential documents.

In the memos, the president gave senior officials 120 days to provide recommendations for an Open Government Directive and directed the attorney general to issue new guidelines governing FOIA to heads of executive departments and agencies.

Source: Los Angeles Times and White House Press Office

Man facing criminal libel

FORT COLLINS, Co. – A Colorado man was charged with criminal libel after making disparaging comments on Craigslist about his former girlfriend and her attorney.

LIBEL Between November and December 2007, J.P. Weichel allegedly posted on the site's "Rants and Raves" section that his former girlfriend traded sexual acts for legal services and also stated child services visited the woman about her child's injury.

Police identified Weichel as the suspect after obtaining warrants to search several Web sites, including Craigslist.

Weichel was "just venting," according to his statements in court records.

The criminal libel charge, however, could have a "chilling effect" on free speech, said Denver-based First Amendment attorney Steve Zansberg, according to the *Associated Press*. The law, as written, is unclear, said Zansberg.

Weichel faces up to 18 months in prison.

Source: The Associated Press

Resident sues over commissioner's records

HIGHLANDS COUNTY— In an effort to gain information about the activities of certain Highlands County officials, a citizen filed a lawsuit demanding county records.

Preston Colby alleged County Commissioner Guy Maxcy improperly influenced staff to deny a proposed rezoning of property from agricultural to residential.

The allegation is “ridiculous,” said Maxcy, according to *Highlands Today*. “Absolutely, I have never, ever done that, never have and never will. I have never consulted with anybody with the county to get something changed.”

Colby also claimed that County Administrator Michael Wright, who has already turned over two e-mails about the Central Florida Regional Planning

Council possibly helping the state answer objections to plan amendments, has additional e-mail communications that should be disclosed.

Wright asserted the additional e-mails were personal and exempt from public-records requests.

Colby also seeks reimbursement of his legal fees.

Source: Highlands Today

Federal agencies limit public access to records

WASHINGTON, D.C. – Several federal agencies have taken initiatives aimed at limiting disclosure of information and public access in recent months.

In January, the Department of Education broadened the Family Education Rights and Privacy Act, known as FERPA. The rule requires a redacted record to remain confidential if a person's identity can be determined by people in the school.

In December, the Department of Energy proposed a rule to eliminate the agency's “public interest balancing test,”

which allowed the release of documents otherwise exempt from disclosure. The agency also more than doubled the copying fee to 20 cents per page.

Also in December, the Securities and Exchange Commission proposed a rule that would increase fees for processing records.

Other efforts during the Bush administration to limit disclosure of information included the April 2003 adoption of guidelines by the Federal Energy Regulatory Commission that gave the agency discretion to decide which

requesters “need-to-know” information and require them to sign non-disclosure agreements, as well as the December 2006 Environmental Protection Agency initiative that reduced the amount of information reported under its Toxics Release Inventory Program.

According to November 2007 report by the Government Accountability Office, the new rule resulted in more than 3,500 facilities no longer being required to report information about toxic releases.

Source: ProPublica

AG calls for transparency

JACKSONVILLE – Florida Attorney General Bill McCollum urged local governments, law enforcement departments and school districts to “make government transparency their New Year's Resolution,” in his Attorney General newsletter.

“Open government has always been a top priority in the Sunshine State, but we can do better,” wrote McCollum.

McCollum offered some practical guidance, including uploading information to public Web sites and using technology to speed up public records request responses.

McCollum indicated his office would create an easily-accessible and free “enhanced” Web site and online training resources to help entities comply with the law.

A McCollum spokesperson said that McCollum's directive was not aimed at any one particular city.

Source: The Florida Times-Union and Pensacola News-Journal

Reporter protects sources using Fifth Amendment

DETROIT – A reporter invoked the Fifth Amendment in an attempt to keep his sources confidential during a deposition about official misconduct.

Detroit Free Press reporter David Ashenfelter asserted his Fifth Amendment right against self-incrimination after failing to convince a federal judge he had a First Amendment right to keep his sources confidential.

During a deposition, former federal prosecutor Richard Convertino sought to question Ashenfelter about confidential sources he used in a 2004 article on the Department of Justice's investigation of Convertino's misconduct. Convertino sued the DOJ under the Privacy Act for publicizing information about the investigation.

Ashenfelter asserted his Fifth Amendment right after Convertino alleged he was aiding the original crime by refusing to disclose

his sources.

“The First Amendment ought to be enough to protect journalists,” said the *Free Press* in a statement. “They should not have to fear prosecution for serving the public's right to know. They should not have to disclose confidential sources who risk retaliation to come forward with important information.”

Convertino's attorney, Steven M. Kohn, said Ashenfelter has no basis for asserting the Fifth Amendment, and he may ask the judge to hold Ashenfelter in contempt.

A *Washington Times* reporter, William Gertz, successfully asserted the Fifth Amendment right in summer 2008 when he was ordered to testify about his confidential sources.

Source: The Reporters Committee for Freedom of the Press

Names of abused closed

NEW YORK CITY – The Department of Defense does not have to release the names of Guantanamo Bay detainees who alleged military abuse and may have abused other detainees, according to the 2nd U.S. Circuit Court of Appeals.

ACCESS RECORDS CONT.

The three-judge panel denied *The Associated Press'* Freedom of Information Act request for the names and addresses of the detainees' and their family members.

The court overturned a lower court decision and ruled the detainees' names should not be released due to privacy concerns. Public interest in the information did not override the detainees' privacy interests.

Judge Peter Hall said the detainees' rights were broader than prisoners' rights.

Detainees who abused other detainees have greater privacy interests because disclosure of the information could embarrass and humiliate them, he ruled.

Source: The Reporters Committee for Freedom of the Press

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ACCESS MEETINGS

Commissioners violate sunshine

DANIA – Dania Beach city commissioners allegedly communicated over e-mail about city business, which may have violated the Open Meetings Law.

The Miami Herald obtained e-mails showing the commissioners discussed public business outside a noticed public meeting.

Commissioners Patricia Flury and Anne Castro and Mayor Al Jones discussed city business in the e-mails. Commissioners Bob Anton and John Bertino were copied on some of the e-mails.

The commissioners' actions comport with the law because the e-mail

only addressed minor issues that had already come before the commission, said Dania Beach City Attorney Tom Ansbro. Nonetheless, Ansbro instructed the commissioners to stop exchanging e-mails.

"I would have suggested that officials refrain from e-mail communications among themselves, as a matter of practice," said Ansbro, according to *The Herald*.

Former City Manager Ivan Pato claims the commissioners fired him a week before he was set to retire, in part in response to his concerns about possible Sunshine Law violations.

Source: The Miami Herald

PRIVACY

New FERPA rule narrows access

WASHINGTON, D.C. – A new U.S. Department of Education rule threatens to make obtaining public records harder.

Under the new rule, schools must deny open records requests if they reasonably believe the requester knows, or can figure out, the identity of the person about whom the information is requested. Schools and colleges cannot circumvent this requirement just by redacting all personally-identifying information. The published rule is even broader than the one sent around for public comment earlier in the year.

The original rule said redacted documents were confidential if the community could determine the individual's identity.

The published version, however, said a record is confidential if people in the school could determine the identity. Thus, if an incident is well-known in the school – but not to the public – records about

it are nonetheless confidential under the new rule.

The new rule also has no exception for records about individuals who voluntarily reveal their identities to the media.

The rules also inform the DOE how to interpret the Family Educational Rights and Privacy Act. If a school violates FERPA by failing to enact policies to prevent disclosure of students' information, it can lose federal funding.

Numerous associations, including the Student Press Law Center, the Society of Professional Journalists, and the National Education Writers Association, claim schools already abused FERPA by concealing information such as athletic teams' travel records or college program audit reports.

The DOE implements FERPA, but its interpretation can be overturned if it conflicts with an act of Congress.

Source: Student Press Law Center

DHS calls for improvements

WASHINGTON, D.C. – The Department of Homeland Security issued a Privacy Impact Assessment for the State, Local, and Regional Fusion Center Initiative, identifying a handful of privacy risks presented by the centers.

According to the assessment, fusion centers, which are intelligence data-bases that collect information on citizens, presented a number of privacy concerns including ambiguous lines of authority,

rules and oversight, military and private sector participation, data mining, excessive secrecy, inaccurate and incomplete information, and mission creep.

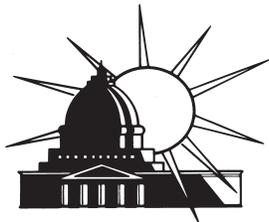
The assessment encouraged fusion centers take steps such as establishing oversight committees, appointing a privacy officer and updating privacy training on privacy policies.

Source: Electronic Privacy Information Center

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FOI worries no reason for Obama to lose BlackBerry

Barack Obama, so far as we know, has two addictions: cigarettes and his BlackBerry cell phone. While his wife leans on him to give up the cigarettes, his staff aides have been insisting he retire the cell phone.

Obama during the presidential campaign was visibly tethered to his BlackBerry, its text and e-mail functions allowing him to receive news and advice unfiltered by political handlers (much to their frustration). Obama's BlackBerry was his means of piercing the communications bubble that inevitably descends on presidents, insulating them from unwelcome news and critical advice.

Since his BlackBerry addiction apparently helped keep Obama grounded during the long slog to the presidency, why give it up now? Not primarily for security reasons: while protecting a president's cell from hackers and foreign intelligence services would be difficult, it is doable. Rather, the BlackBerry had to

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By Peter Scheer

go, according to *The New York Times*, because the prodigious digital record it creates would be subject to public scrutiny through Freedom of Information Act requests and other disclosure requirements.

The BlackBerry didn't pose such problems for Obama as a U.S. Senator because Congress, characteristically, exempted itself from the FOIA. Although the executive branch is often and justly criticized for failing to comply with the FOIA, it is a model of transparency compared to Congress. But back to the president's BlackBerry . . .

Obama will need all the help he can get in managing the presidential workload. It hardly seems in the public interest to deprive him of communications devices and productivity tools that millions of Americans take for granted in their own lives. Does Obama really have to give up his beloved BlackBerry? I think not.

Legally speaking, the status of communications from or to President Obama—that is, whether or not they will end up in the public sector—must be decided on the basis of their content, not the type of device used to send and receive them. If a communication is determined to be a public record, that conclusion will be the same whether the message was delivered by e-mail from a desktop computer in the White House, by IM



Peter Scheer

using a BlackBerry, or on parchment sealed with a wax stamp.

Conversely, presidential communications that needn't be disclosed, either because they're personal and private (e.g., an intimate message from Obama to his wife) or because they are exempt from the FOIA and like laws (e.g., confidential legal advice from the attorney general), don't fall into the public domain just because the files happen to reside in a hand-held wireless device.

Giving up the BlackBerry gains Obama protection only in the limited sense that he will create fewer records than if he used it, and the records he creates will be more likely to be vetted by aides and therefore cleansed of potentially embarrassing content. Although both "gains" will be lost if, like a smoker who switches to filter cigarettes, Obama ends up merely replacing his BlackBerry with a laptop.

These putative benefits hardly seem worth it. If ever there was a public official who doesn't need a censor, who is able to choose his words carefully even in candid moments, who is acutely aware of the potential impact of what he says and edits himself accordingly—it is Obama.

Obama should reject the advice of his aides and resume use of his BlackBerry for essentially all communications not requiring a high degree of security. A further recommendation: He should promise to make public all his communications on the BlackBerry going forward.

Such a commitment would establish Obama's open-government credentials while earning him considerable capital with the news media. Moreover, the contrast with Capitol Hill secrecy could be used to put pressure on Congress to repeal its indefensible exemption from the FOIA. Shame can be a powerful incentive for reform.

As addictions go, Obama's BlackBerry dependence is a pretty good one.

Let's hope he stays hooked.

Peter Scheer, a lawyer and journalist, is the executive director of the California First Amendment Coalition.

*Editor's note- In late January, the White House announced Obama will be able to keep his BlackBerry with only senior staffers and close friends having access to his e-mail address.