
THE BRECHNER REPORT

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Venice hit with record fee award in Sunshine suit

VENICE – The city of Venice has been ordered to pay more than \$775,000 in legal fees in connection with an open government lawsuit filed last year by a citizen activist, the largest fee award in an open government case.

Anthony Lorenzo, of the nonprofit Citizens for Sunshine, alleged violations of the Public Records and Open Meetings Laws by members of the Venice City Council. The violations centered on the use of private e-mail accounts to discuss city business.

Lorenzo and the city settled the suit in

March 2009, but attorney fees remained a sticking point, and in September, Judge Robert Bennett presided over a hearing on the legal fee issue. Brechner Center Executive Director Sandra F. Chance served as an expert witness at the hearing.

ACCESS RECORDS

Lorenzo's attorneys sought a multiplier that could have resulted in fees of more than \$2 million, but Bennett denied the request. He also denied legal fees for the time spent since the settlement litigating the attorney's fee issue, citing a lack of authority in Florida law.

Federal rules permit these types of

attorney fee awards, and Bennett noted that such a system "would clearly promote involvement in public interest cases by lawyers who might be unwilling to become involved in this type of litigation knowing that substantial time and energy may be expended in litigating their own fees." Lorenzo was represented by Andrea Mogensen and the law firm Carlton Fields.

The city will also have to pay its own legal bills in excess of \$600,000. The city's liability insurance only covers \$10,000 of those fees.

Source: Sarasota County Circuit Court, Sarasota Herald Tribune

NCAA records on custodial site ruled public

TALLAHASSEE – The 1st District Court of Appeal has ruled that the records received by Florida State University attorneys via a National Collegiate Athletic Association (NCAA) Web site are public records.

A hearing transcript and an NCAA response to FSU's appeal of penalties proposed by the NCAA were the documents requested by several media organizations. The university also sought public disclosure of the documents.

The documents were accessed by lawyers representing FSU in the dispute via a password-protected Web site that

was maintained by the NCAA. The disciplinary action stems from allegations of cheating among student athletes.

The court reasoned that because "the documents at issue in this case were examined by lawyers for a public agency . . . and used in the course of the agency's business" they are public records under Florida law.

The NCAA argued that viewing of a document by a state agent does not equate to "receiving" the document under Florida's Public Records Law. "If it was received, that is enough," Judge Philip J. Padovano wrote for the court.

The NCAA also cited the Family Educational Rights and Privacy Act (FERPA) as reason to keep the documents secret, but the court ruled that the disciplinary documents did not fall under FERPA's definitions of student records.

Florida Attorney General Bill McCollum said the ruling "emphasizes the importance of applying the public records laws to new and evolving technologies," according to *The Associated Press*.

McCollum's office intervened in the suit. The NCAA has appealed to the Florida Supreme Court.

Source: 1st DCA, The Associated Press

Doctor awarded \$10M in libel suit against paper

ST. PETERSBURG – A doctor who alleged he was defamed in three *St. Petersburg Times* articles has been awarded \$10.1 million in damages. Dr. Harold L. Kennedy, former chief of medicine at Bay Pines Veterans Affairs Medical Center, sued Times Publishing Co., the *Times*' parent company, in 2005.

Kennedy alleged that three December 2003 articles about his reassignment from his position as chief of medicine damaged his reputation and were defamatory. The

newspaper argued that the published information was true.

The author of the articles, Paul de la Garza, died in 2006. The *Times* tried to use his notes to defend its case, but the judge did not allow them in the trial.

Kennedy, who now lives in St. Louis, was awarded \$5.1 million in compensatory damages and \$5 million punitive damages. "He was not given a fair shake by the defendant," said

LIBEL

Kennedy's attorney, Timothy Weber, during closing arguments in the case.

Times Executive Editor and Vice President Neil Brown was "very disappointed" by the jury's decision and stood by the paper's work. "We believe our reporting and editing of these stories met the highest journalistic and ethical standards," Brown said, according to the *Times*.

The newspaper plans to appeal.
Source: St. Petersburg Times

PSC messaging scandal prompts new AG policy

TALLAHASSEE – A controversy over BlackBerry messaging codes given to a Florida Power & Light attorney by Public Service Commission aides has prompted policy changes by Attorney General Bill McCollum.

Two PSC aides were suspended and one fired for providing BlackBerry PIN numbers to FPL attorney Natalie Smith. Each BlackBerry has its own unique eight-character code which can be used

to send messages to other BlackBerry devices, according to the *Palm Beach Post*.

The PIN to PIN messages are a cross between a text message and an e-mail but are not retained by state servers.

FPL is seeking approval from the PSC for an increase in its base rate. PSC commissioners are prohibited from discussing pending rate cases with utility executives, but PSC staffers are not.

The scandal resulted in McCollum's new policy on public records for his office, which will now treat BlackBerry PIN and text messages as public records and automatically retain them on a server.

McCollum has also formed a "Sunshine Technology Team" to explore issues related to open government laws and emerging technology.

Source: *St. Petersburg Times, Palm Beach Post*

Official fined for deleting e-mails

BONITA SPRINGS – A city councilwoman charged with a civil violation of the Public Records Law for deleting city business e-mails from her home computer will pay a fine as part of her agreement with the State Attorney's Office.

Janet Martin pleaded no contest to a civil charge of unintentionally violating the Public Records Law. She will pay a \$250 fine. The maximum fine is \$500.

Bonita Springs Mayor Ben Nelson

defended Martin's actions as a common mistake due to the "complex" nature of Florida's open government laws, according to an article in the *News-Press* (Fort Myers). "I guarantee you every state official has done the same thing Janet Martin is accused of doing," Nelson said.

Martin maintains that she printed and gave to the city e-mails she thought were related to public business, according to the *Naples News*.

Source: *News-Press, Naples News*

Official balks at citizen e-mails

FORT LAUDERDALE – A city advisory board member fed up with e-mails from citizens about a controversial development plan announced that he deleted the e-mails without reading them.

Fred Stresau, a member of the Fort Lauderdale Planning and Zoning Board, was concerned that his private e-mail was made public and his account "clogged up" with correspondence from the public.

City attorney Harry Stewart gave the green light for board members to delete unread e-mails, citing a lack of case law

on the topic. Stewart said that if the e-mails are read, board members must provide a copy of the communications to the city, according to the *Sun-Sentinel* (Fort Lauderdale).

Mayor Jack Seiler suggested city advisory board members get official city e-mail addresses so that all e-mails could be saved on the city's server.

Stresau, whose unread e-mails totaled about 50, said that resident input should be given in public.

Source: *Sun-Sentinel*

Company sues district for records

MARTIN COUNTY – The removal of more than 1,200 files from the computer of a Martin County School district attorney—without warning—is at the center of a lawsuit filed by a Riviera Beach company. The suit filed by Florida Mechanical seeks the production of those files, which it alleges were ordered removed by Superintendent Nancy Kline.

Florida Mechanical also alleges the district still owes it \$235,000 for work performed.

According to Florida Mechanical, Kline ordered all records related to

Florida Mechanical's public records requests made over the summer be deleted in early September.

Kim Sabol, labor and employment representative for the district, said the files need to be reviewed and that the removal would help "preserve the integrity" of a Florida Department of Law Enforcement investigation, according to *Scripps Treasure Coast Newspapers*. The FDLE is investigating fraud allegations in the district's maintenance and facilities departments.

Source: *Scripps Treasure Coast*

Man arrested during meeting settles lawsuit

VENICE – A Venice man arrested at a 2002 meeting of the Venice City Council has settled his lawsuit against the city in connection with the incident.

Herb Levine, now 82, was president of the Venice Taxpayers League when he clashed with city officials, calling them names before being removed from the meeting in handcuffs.

Charges of trespassing, disturbing a lawful assembly and resisting arrest were dropped by the State

**ACCESS
MEETINGS**

Attorney's Office after an investigation. Levine then filed suit against the city, the mayor and the police chief for false arrest, alleging he was injured during the arrest.

After years of litigation, the suit was settled for \$35,000. The *Sarasota Herald Tribune* reports that the city has been reluctant to release information about the settlement, with the city clerk going so far as to redact the settlement figure out of a letter after it had been observed by newspaper employees.

Venice, just hit with a \$775,000 attorney fee bill in an unrelated open government lawsuit, has claimed that making settlement documents public would violate a confidentiality agreement.

Source: *Sarasota Herald Tribune*

Obama reverses visitor log policy

WASHINGTON – The White House has reversed its policy on visitor logs, in a move that could bring more transparency to the policymaking process. The Obama administration had previously refused to release details of White House visitors, continuing the stance held by the Bush administration.

“We will achieve our goal of making this administration the most open and transparent administration in history, not only by opening the doors of the White House to more Americans, but by shining light on the business conducted inside,” Obama said.

Obama was under legal pressure from Citizens for Responsibility and Ethics in Washington, a watchdog group that had sued for access to the visitor logs. CREW has since dropped its suit.

The policy will cover visits starting Sept. 15, with information released every 90-120 days. This means the first release will be posted on the White House Web site approximately Dec. 31. The names of visitors, who they met, and the length of visits are expected to be included in the records.

Names of some visitors will be withheld for national security concerns. Another exception excludes information regarding “purely personal guests” of the president and vice-president.

Source: *The Associated Press*

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Facebook frowned upon in Collier

COLLIER COUNTY – Commissioners in Collier County who are fans of the social networking site Facebook have been warned by the county attorney to avoid the site.

Sites like Facebook and Twitter can be problematic for public officials due to the nature of Florida’s open government laws, according to Collier County Attorney Jeff Klatzkow.

“My conservative opinion is – don’t use it, or else, print out everything,” Klatzkow said, according to the *Naples Daily News*.

The commission asked Klatzkow to advise it on whether Facebook use violates Florida’s Public Records or

Sunshine Law.

Klatzkow coordinated with the county’s information technology department to help ensure that posts and responses are retained. He also cautioned against commissioners becoming

“friends” on Facebook or even befriending the same constituent for fear of inadvertent

communication about public business.

Cyndee Wooley, social media specialist with C2 Communications, suggested commissioners have all Facebook notifications sent to county e-mails or set up a “fan page” where personal messages are not permitted.

Source: *Naples Daily News*

NEW TECHNOLOGY

Challenge to meetings law moot

NEW ORLEANS – A First Amendment challenge to Texas’ Open Meetings Law is moot, according to a ruling by the 5th Circuit Court of Appeal. The full court dismissed the case, brought by former Alpine, Texas, city council members who allegedly violated the Open Meetings Law when they discussed city business via private e-mails.

A federal district court judge upheld the Open Meetings Law, finding that elected officials are not afforded First Amendment protection when acting “pursuant to their official duties.”

However, a three-judge panel of the 5th Circuit overturned that decision in April 2009, directing U.S. District Court Judge Robert Junell to determine whether the Texas Open Meetings Act passed the strict scrutiny test. Under this First Amendment

test, a law must further a compelling government interest and be narrowly tailored in order to be constitutional.

Attorneys general in several states, including Florida, urged the full 5th Circuit to hear the case after the panel’s April ruling, fearing the decision could set the stage for many state Open Meetings Laws to be struck down. The Alpine council members also requested a rehearing.

The en banc rehearing of the case resulted in 16 judges deciding the case was moot. Judge James L. Dennis argued in a dissenting opinion that the case should have been heard because it was an issue likely to come before courts in the future.

Source: *Reporters Committee for Freedom of the Press, Rangra v. Brown*

FIRST AMENDMENT

Congress mulls newspaper tax cut

WASHINGTON – Facing continued losses that led to 15 percent of its work force being cut, the newspaper industry needs a tax break, according to Newspaper Association of America President John Sturm.

“Newspapers need cash now to preserve jobs next year,” Sturm said at a Congressional hearing, according to *The Associated Press*. “It’s really that simple.”

Sturm’s suggestions included allowing newspapers to use current losses to

offset profits from the previous five years. Current law allows losses to be carried back for two years, but some newspapers have not posted profits in the past two years. Expanding the time period to five years would allow newspapers to get money back from taxes previously paid.

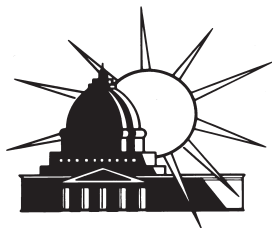
The hearing was conducted by Rep. Carolyn Maloney, who is sponsoring a bill that would make it easier for newspapers to convert to nonprofits.

Source: *The Associated Press*

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Military policy threatens quality of war coverage

Floridians understand the tension between access to images of death and concerns for familial privacy. The battle over autopsy photos of a famous racecar driver who died in a crash at the 2001 Daytona 500 prompted then-Gov. Jeb Bush to quickly sign legislation keeping autopsy photos closed to the public unless a judge approves their release.

The photos were sought by several media outlets not for the gore-and-sensational factor, but instead to determine whether a certain head-and-neck support device might have saved Dale Earnhardt's life had he been wearing it. With all due respect to NASCAR fans and Teresa Earnhardt, the widow of the seven-time Winston Cup champion, an even more serious battle over images of death is now brewing.

In particular, it involves restrictions on images of dead American soldiers.

The Back Page

By Clay Calvert

a military unit in Afghanistan now includes a prohibition against any photographic or video coverage of U.S. troops killed in action." That agreement took effect in late September 2009.

The practice of embedding itself has been controversial.

While journalists gain up-close access to fighting by riding along in armored vehicles with U.S. troops, some feared those same journalists would become, however slowly and subtly it might be, co-opted in their reporting by the troops shielding them from harm's way on a daily basis. It would take much moxie, after all, to report negatively on the very men who, to paraphrase Demi Moore's line in *A Few Good Men*, say "nothing is going to hurt you, not on my watch."

But this show-no-death policy brings a more tangible worry to the equation, just as the war in Afghanistan appears to be growing worse for the United States. The new policy provides in relevant part that the "media will not be allowed to photograph or record video of U.S. personnel killed in action."

We all know that death occurs in war. That much is obvious. So why, then, all the fuss over hiding images of death? The answer is obvious.



Clay Calvert

The Reporters Committee for Freedom of the Press in October 2009 reported that "the agreement journalists must sign to become embedded with

As John Kifner put it in a Nov. 30, 2003 article in *The New York Times*, "modern war has given us iconic images that both shape and reflect our views of conflict. Consider, for example, the difference among some famous photographs burned into the nation's memory – the picture of the triumphant marines raising the flag over Iwo Jima toward the end of World War II and then a grim triptych from Vietnam: images of a police chief shooting a Vietcong prisoner in the head, a naked, screaming little girl burned by napalm running down a road and a helicopter lifting off the roof of the American embassy, leaving Vietnamese allies behind as Saigon fell."

More recently, it was the image captured by AP photographer Julie Jacobson in August 2009 of a fatally wounded Marine who was struck by a rocket-propelled grenade in a Taliban ambush in Afghanistan that sparked the current controversy. The AP's defense of that image is found online at http://www.ap.org/fallen_marine. Images of war and, especially, images of death during war thus are powerful.

Apparently sensing the error of its ways, the military on Oct. 15, 2009 issued more relaxed rules for embedding with American forces at Regional Command-East at Bagram Air Field in Afghanistan. The new rules provide that "media will not be prohibited from viewing or filming casualties; however, casualty photographs showing recognizable face, nametag or other identifying feature or item will not be published. In respect to our family members, names, video, identifiable written/oral descriptions or identifiable photographs of wounded service members will not be released without the service member's prior written consent."

If a wounded soldier who is photographed later dies, then the photographs cannot be released until next of kin first have been notified of the passing of their loved one.

This Oct. 15 revision clearly represents a step forward to balance the interests between familial privacy and public access to images that tell the reality of war. We all, however, must remain vigilant in making sure that further attempts to shield the horrors of battle are rebuffed.

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