THE
BRECHNER REPORT

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Appeals court denies access to jail recordings

FORT LAUDERDALE – The 4th District Court of Appeal has ruled that telephone conversations of inmates recorded by law enforcement are not public records unless they serve an investigative purpose. The ruling overturned a trial judge's order for the Broward County Sheriff's Office to produce the recordings after removing any confessional portions.

ACCESS RECORDS

The calls at issue involved three teenage boys facing second-degree murder charges in an Oct. 12, 2009, attack on another teen. Matthew Bent, Denver Jarvis and Jesus Mendez, all 16-years-old, are accused of dousing Michael Brewer with rubbing alcohol and then setting him on fire.

The *South Florida Sun-Sentinel* had previously made a public records request to the Broward Sheriff's Office for recordings of the defendants' phone conversations while in jail. Circuit Judge Carlos Rebollo ruled June 30 that the recordings could be released after any parts that were confessional in nature were redacted.

Attorneys for the defendants appealed the ruling to the 4th District Court of Appeal. The court found that the recordings were not public records because they were not investigative material and therefore "do not perpetuate or formalize knowledge in connection with official action." The court called the phone calls "purely personal" and stated that "an accused child should be able to consult with a parent without the communication becoming a public record."

Sun-Sentinel attorney David Bralow called the decision "a huge retraction of the public's right of access."

Source: South Florida Sun-Sentinel

Sealed election results opened, new commissioner sworn in

ANNA MARIA – In Manatee County's first recall election, Anna Maria City Commission member Harry Stoltzfus was recalled by a 31-vote margin. The results of the Sept. 7 election were initially sealed.

Circuit Judge Ed Nicholas ordered the results sealed while Stoltzfus appealed the petition for the recall election. However, the 2nd District Court of Appeal overturned the stay, and new commissioner Eugene E. Aubry was sworn into office.

The recall petition alleged that Stoltzfus had violated the Open Meetings Law and sent inflammatory emails regarding commercial development on Pine Avenue in Anna Maria.

In June, the Florida Commission on Ethics dismissed ethics charges against Stoltzfus related to the e-mails.

Source: Bradenton Herald

Supreme Court agrees to hear case on FOIA privacy exemption

WASHINGTON – The U.S. Supreme Court has agreed to hear a case on a federal Freedom of Information Act (FOIA) exemption. The case pits the Federal Communications Commission against AT&T over whether corporations can claim the "personal privacy" exemption to avoid disclosure under Exemption 7(c) of FOIA.

The case, *Federal Communications Commission v. AT&T, Inc.* (09-1279) comes from the 3rd U.S. Circuit Court of Appeals in Philadelphia.

The FCC investigated AT&T for possible over-billing; a third-party requested records related to that investigation. The FCC was set to release the files, but AT&T sued to block disclosure.

The 3rd Circuit agreed with AT&T's contention that "personal privacy" protections from disclosure extended to corporations.

Source: The Associated Press

Lawn mower chat leads to infractions

ASTATULA – Two members of the Astatula Town Council have been charged with non-criminal violations of the Sunshine Law. Mayor Hillard "Shep" Shepard and council member Katherine "Tatty" Morgan reportedly met in March to discuss the purchase of lawn mowers for the town.

ACCESS MEETINGS

The Town Council subsequently voted to purchase two lawn mowers for $17,199.98. Chief Assistant State Attorney Ric Ridgway said that Shepard and Morgan were not aware they violated the Open Meetings Law. The civil infraction is punishable by a fine of up to $500.

Astatula is a town of less than 2,000 people located near Orlando.

Source: Orlando Sentinel

ACCESS MEETINGS CONTINUED

Martin economic board agrees to transparency

STUART – A business development group in Martin County has agreed to abide by the Open Meetings and Public Records Laws following the settlement of a lawsuit seeking access.

The Martin County Business Development Board initially argued that it was a private, non-profit entity and was not subject to Florida's Sunshine laws. Attorney Virginia Sherlock filed suit against the board in May, claiming that the board is subject to the Open Meetings and Public Records Laws.

The board receives approximately $625,000 per year from Martin County and is the county's official economic development group, according to Sherlock's suit.

The board announced its new public meeting and records policy after voting to settle the lawsuit.

It cited a Florida Attorney General Opinion on economic development agencies that came out after the suit was filed as its reason for complying with open government laws.

As part of the agreement, the board will pay Sherlock's court costs and attorney's fees.

Source: TCPalm.com

St. Augustine anniversary plans bring Sunshine woes

ST. AUGUSTINE – The 450th anniversary of the city of St. Augustine and the plans surrounding the celebration have raised Sunshine Law issues for city commissioners.

First, the St. Augustine mayor canceled his participation in a two-week trip to Spain with other commissioners in order to avoid the appearance of impropriety. The trip involved a four-city tour of Spain that was originally slated to cost the city $25,000.

However, after Mayor Joe Boyles stepped down from the trip due to Open Meetings concerns, other commissioners backed out as well. The downsized trip was set to include only one city commissioner and two staffers, lowering the cost to about $6,000.

The commission has also given responsibility for planning the 450th anniversary celebration to the First America Foundation. The non-profit was founded in July and had no record of event planning, according to *Folio Weekly*. Commissioners voted to give First America $275,000 to plan the 2015 event.

City Attorney Ron Brown told *Folio Weekly* that the First America contract was not required to be put out for a public bid and would not be subject to the Open Meetings Law. Brown characterized the relationship as a contract for services.

But Jim Rhea of the Florida First Amendment Foundation cautioned that if the city has delegated a city function to the non-profit, the Open Meetings Law would apply.

Donald Wallis, registered agent for First America, promised that it would make efforts to be transparent.

Source: Folio Weekly (Jacksonville), The St. Augustine Record

ACCESS RECORDS CONTINUED

Jail points to federal law in denying records request

MACCLENNY – An organization that provides legal assistance to prisoners is suing the Baker County Sheriff's Office over records related to immigrant detainees.

Florida Institutional Legal Services previously requested records under Florida's Public Records Law. The records requested were a roster of individuals housed at the jail who were detained by Immigration and Customs Enforcement (ICE), incident reports related to those detainees and a copy of the contract between ICE and the Sheriff's Office.

The Sheriff's Office refused to turn over the records, citing the federal Privacy Act.

An April letter from a Sheriff's Office corrections chief stated that after discussing the request with a Jacksonville ICE representative, he was advised that the records could not be released due to Privacy Act restrictions.

Also at issue is a rule promulgated by the U.S. Justice Department in 2002, forbidding state officials to release information about immigration detainees.

The Baker County Sheriff's Office houses about 175 immigration detainees for ICE.

Source: The Press (Baker County), The Florida Times-Union

Pasco County moves to "cloud" e-mail storage

PASCO COUNTY – A new e-mail management system in Pasco County might prove beneficial to public records requesters.

The county has moved its e-mail system to the "cloud," meaning that instead of being maintained on-site, it will be stored online through a third-party service.

Pasco is using an e-mail archiving system by Mimecast in hopes of quicker, more accurate response to public records requests.

"As a public entity, it is critical that we be able to respond to record requests in a timely fashion—we simply cannot delay in sharing needed information," Pasco County technical architect Kristine Johnson said.

"Before Mimecast, finding the right messages was taking too much time and energy away from other key IT tasks that needed attention," she added.

Mimecast also touts reduced risk and lower costs as benefits of its software systems.

Source: KMWorld.com

Federal judges approve pilot camera study

WASHINGTON – The U.S. Judicial Conference has agreed to allow cameras in the courtroom for a pilot study in federal courts.

The study was prompted by changes in technology allowing for less obtrusive cameras as well interest from members and lawmakers, according to appeals court Judge David Sentelle.

Federal judges conducted a similar, 3-year study in the 1990s which overall had positive results but did not remove the longtime ban on televising federal proceedings.

COURTS

Appeals courts have been able to decide whether to allow cameras since 1996; lower federal courts remain under the ban. The U.S. Supreme Court does not permit cameras.

Details of the pilot program are still being developed, but the study will only include civil trials; either party can elect to keep cameras out; and recording faces of witnesses or jurors will be prohibited.

Source: The Associated Press

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Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
College of Journalism and Communications
University of Florida, Gainesville, FL 32611-8400
http://www.brechner.org
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Exec. Director/Exec. Editor
Christina M. Locke, J.D., Editor
Alana Kolifrath, Production Coordinator

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Obama signs bill reversing SEC FOIA exemption in reform law

WASHINGTON – President Obama signed into law a bill that reversed prior legislation that created what many called a new exemption from the Freedom of Information Act (FOIA) for the Securities and Exchange Commission (SEC).

Congress passed the Dodd-Frank Financial reform bill over the summer, which included a provision, section 929I, that exempted the SEC from disclosing information related to much of its regulatory and oversight duties.

Open government advocates and some lawmakers responded immediately with a call to repeal the exemption, claiming it was too broad.

Project on Government Oversight Director of Public Policy Angela Canterbury called the language "a recipe for more coverups at the agency that failed to catch Bernie Madoff," adding that "Congress has done well in removing this cloak of secrecy that was sought by the SEC."

SEC Chairman Mary Schapiro pressed lawmakers to keep the language in the bill, arguing that it only formalized existing practices.

Source: Reporters Committee for Freedom of the Press, The Wall Street Journal

Media wins access to records in Jupiter capital murder trial

WEST PALM BEACH – Records from the murder trial of Paul Michael Merhige are open to the public, according to a ruling of Circuit Judge John Hoy.

Merhige is accused of killing four family members on Thanksgiving in 2009.

Merhige's twin sisters, aunt and 6-year-old cousin were all shot to death at a Jupiter home. Police searched for him for 38 days before finding him in Long Key, Fla.

In April, Public Defender Carey Haughwout sought to have the evidence sealed, arguing that releasing it would affect Merhige's constitutional right to a fair trial. Media outlets, including *The Palm Beach Post*, argued that the evidence was a matter of public record.

Merhige could face the death penalty if convicted.

Source: The Palm Beach Post

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NFL cracks down on Tampa bars streaming games during blackout

TAMPA – The National Football League (NFL) has warned eight Tampa-area sports bars to stop airing live video feeds of blacked-out Tampa Bay Buccaneers games or face a copyright lawsuit. NFL rules call for a ban on local broadcasts of football games if the home stadium is not sold out 72 hours before kickoff.

The NFL contends that by airing the internet feeds, the bars infringed on NFL's television copyrights. If the establishments comply, no further action is usually taken, NFL spokesperson Dan Masonson told *The Tampa Tribune*. However, the bars could face lawsuits for up to $150,000 for each incident if they continue.

Buccaneers co-chairman Joel Glazer said that last year the team bought back unsold tickets at a lower price in order to avoid blackouts, but would not be doing that this season. The slow economy and poor team performance are some factors that are causing a large number of blackouts among NFL teams nationwide, according to *USA Today.*

Source: The Tampa Tribune, USA Today

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Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
Gainesville, FL 32611

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Suits reveal pattern of overbilling by ME districts

A typical autopsy report may be four to nine pages long, so a person who requests a copy under Florida's Public Records Law shouldn't face fees in excess of 15 cents per page, or less than $1.50, in typical cases. But this hasn't been the case; 10 of the 24 medical examiner districts in Florida were, or still are, charging unlawful automatic flat fees as high as $25 for a single copy of an autopsy report, regardless of its length or the amount of time it takes to produce.

Susan Tillotson Bunch

Ana-Klara H. Anderson

This year, the five medical examiner districts that charged the most egregious flat fees settled cases brought against them by citizens who argued the automatic fees were unlawful denials of their constitutional and statutory right to public records. As a result of the settlements, Districts 3 (Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee), 4 (Clay, Duval, Nassau), 10 (Hardee, Highlands, Polk), 16 (Monroe), and 21 (Glades, Hendry, Lee) all amended their fee policies to be compliant with the Public Records Act.

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By Susan Tillotson Bunch & Ana-Klara H. Anderson

These districts also paid the plaintiffs' attorney's fees, totaling more than $34,000, and Districts 3 and 4 agreed to refund citizens who request reimbursement. Despite the costly settlements, several other medical examiner districts are still not in compliance with the Public Records Law, continuing to charge the public automatic flat fees for copies of non-exempt autopsy reports, ranging from $2 to $5. While not as egregious as those in the districts that were sued, these fees are no less unlawful.

At least two medical examiner districts that were not the subject of a lawsuit challenging their fee schedules have appeared to come into compliance since the litigation against the other districts ensued. District 22 (Charlotte County) was charging an automatic flat fee of $22 for a copy of an autopsy report. After receiving an inquiry regarding its fee schedule in February – while other districts across the state were responding to public record lawsuits – it suddenly, and without prompting, eliminated its problematic flat fee and subsequently agreed to refund flat fees that were not authorized by the Public Records Act. District 19 (Indian River, Martin, Okeechobee, St. Lucie) also rescinded its automatic flat fee of $5 after receiving a notice of the lawsuits against the other state medical examiners and their subsequent settlements.

Just how long some medical examiner districts have been charging unlawful fees for autopsy records isn't clear. The 24 medical examiner districts in Florida operate independently of each other and under individually devised fee schedules, resulting in fee disparities between the districts.

While most of the medical examiner districts in Florida appear to be in compliance with the Public Records Act, the offending districts appear to be taking advantage of the fact that the most frequent requestors of autopsy records are insurance companies and law firms. This opportunist practice is evidenced by the fact that some medical examiner offices ask whether the requestor is "from a law firm or insurance agency."

While many districts have adopted a policy of not charging family members or next of kin for the reports, there is no statutory authority for charging anyone an automatic flat fee for the records, regardless of their status as family, non-family, everyday citizens or legal or insurance representatives.

By now, one would think that the chief medical examiners of all of the various districts would be aware of these lawsuits, and as a result, self-regulating and ending the unlawful practice of automatic flat fees. But, to date, several districts continue to charge unlawful flat fees.

Ultimately, the price tag for conditioning access to public records on the payment of illegal fees is much more costly to Florida's taxpayers than abiding by the law. The expectation is that each of the state's medical examiner districts will eventually follow Florida's Public Records Law – and that the public won't have to foot the bill in order to make that happen.

Susan Tillotson Bunch, Esq. is a partner, and Ana-Klara H. Anderson, Esq., Ph.D., is an associate with Thomas & LoCicero PL in Tampa, which represented the plaintiffs in the lawsuits against the medical examiner districts for the autopsy records.