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# THE BRECHNER REPORT

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## Financial disclosures missing for public officials

TALLAHASSEE – Since January, government watchdog group Integrity Florida has released a series of reports on Florida’s open government system.

It has electronically posted more than 600 documents, including the personal financial disclosure filings of Florida legislators and top state officials from 2010 and 2011, according to *WFSU*.

As of September 5, 632 state and local elected officials had not filed their

financial disclosure forms for 2012, resulting in \$15,800 in fines, according to the *Florida Center for Investigative Reporting*.

There are also 66 current and former Florida officials and employees who owe the state a combined \$87,199.03 in fines for filing disclosures late, Integrity Florida wrote in a recent report.

Integrity Florida has been calling on the Florida Legislature to create penalties for late-filers, including

“automatic fines withheld from the government wages (or government contract payments)” or liens on personal property, according to the *FCIR*.

The group has also suggested the state require public employees and officials to file their financial disclosure document forms, which are subject to the Public Records Law, electronically as well as make them “publicly available online in a searchable, updatable and downloadable format,” the *FCIR* reported.

*Source: WFSU, Florida Center for Investigative Reporting*

**OPEN  
GOVERNMENT**

## City wins records lawsuit against former employee

GAINESVILLE – The city of Gainesville did not violate the state’s Public Records Law by requiring a former employee to pay nearly \$40,000 for public records.

Erin Friedberg requested all emails sent and received from her city email account so that she could pursue an employment discrimination complaint she filed against the city, according to *The Gainesville Sun*.

Friedberg was terminated from her position as the city’s visual arts

coordinator in November 2010.

Friedberg filed suit in January after city officials told her it would cost more than \$39,000 for staff to review the emails and redact exempt information such as Social Security, credit card and bank routing numbers, *The Gainesville Sun* reported.

In the public records lawsuit, Friedberg argued that the fee was “exorbitant” and was being used by the city to deny access to those records.

In May, the city reduced the amount to about \$13,000 once it determined fewer emails would be involved, according to the paper.

The final order, written by Judge Toby S. Monaco for the 8th Judicial Circuit in Alachua County, ruled in favor of the city of Gainesville, finding that officials had not violated the law.

*Source: The Gainesville Sun*

**ACCESS  
RECORDS**

## Lawsuit challenges school board religious policy

SARASOTA – The mother of a Hillsborough County elementary school student is asking a federal court to overturn a school board policy banning the distribution of religious material at school.

U.S. Magistrate Elizabeth A. Jenkins for the U.S. District Court for the Middle District of Florida heard oral arguments in the case in which the principal of Roland H. Lewis Elementary prohibited a student from passing out flyers inviting other students to an Easter Egg hunt, according to the *Tampa Bay Times*.

The flyers were confiscated by a substitute teacher and returned to the boy, who has been identified in court documents as J.G., with a note from the principal stating, “We are not allowed to pass out fliers (sic) related to religious events or activities. Thank you for your understanding.”

School board policy prohibits the distribution of proselytizing material by outside groups at school, the *Sarasota Herald Tribune* reported. According to the board’s attorney, the flyers were clearly generated by the boy’s church.

The boy’s mother filed suit, arguing

that the policy constitutes a violation of her son’s First Amendment rights.

“Students do not shed their First Amendment rights when they go to school,” said attorney J. Matthew Sharp of Alliance Defending Freedom, one of the Christian legal groups representing the boy in court.

Courts have previously ruled that distribution of such material during non-instructional hours is permissible as long as there is not substantial disruption to school activity, according to the *Herald Tribune*.

*Source: Tampa Bay Times, Sarasota Herald Tribune*

**FIRST  
AMENDMENT**

## Marco Island residents sue for building records

COLLIER COUNTY – Three residents of the city of Marco Island filed a public records lawsuit against the city for refusing to comply with a request for building records.

The residents say the city refused to produce certified copies of documents of the city's review "of (building) drawing, plans and blueprints along with revisions, reviewer notes and

comments, and reviewer approval and-or rejection signatures or initials" relating to the construction of their Marco Island home, according to the *Marco Island Sun Times*.

In response to their request, the city said it could not provide copies of the building plans because the plans are copyrighted but that the residents' attorney could make copies of the plans

at Marco City Hall.

Two of the residents, Regina and Timothy Dayton, said they've spent about \$300,000 to fix "deficiencies" in their home because applicable building codes and permit requirements were not enforced nor proper inspections completed during the construction, reported the *Sun Times*.

Source: *Marco Island Sun Times*

## State high court orders hospital purchasers to produce records

TALLAHASSEE – The Florida Supreme Court ordered the purchasers of a state-owned hospital building and adjoining property to turn over financial records in the lawsuit over the hospital's sale.

Florida National College of Hialeah (FNC) purchased the hospital from the state for \$4.4 million in 2001, *The Associated Press* reported. The college subsequently assigned its rights to American Educational Enterprises, which sued the state after a lender determined the property's value at only \$2.85 million.

The state then requested American produce documents related to FNC's financing of the property to defend against claims of economic damage, according to the decision.

American asked the 3rd District Court of Appeals in Miami to quash the state's request on the basis that the request was overbroad and violated American's privacy because it was only asking for the difference between the sale price and its value.

The 3rd District Court of Appeals agreed, but the Florida Supreme Court reversed.

According to the Court's decision, the information contained in the documents was "relevant to the disputed issues," and because American had "not demonstrated irreparable harm through its disclosure," the information could be released.

Source: *The Associated Press, Board of Trustees of the Internal Improvement Trust Fund v. American Educational Enterprises, LLC*

## TECHNOLOGY

### Justice Dept. use of devices up 64 percent

WASHINGTON, D.C. – The U.S. Department of Justice's use of electronic devices to intercept phone numbers, email address and online information has increased by 64 percent since 2009, according to a study of records released under a Freedom of Information Act request, according to *The Associated Press*.

The American Civil Liberties Union reported that data showed the combined number of court orders for so-called pen registers, which records all numbers dialed from a particular phone number, and trap and trace devices, which records the numbers of inbound callers to suspected criminal phones, rose from 23,535 in 2009 to 37,616 in 2011, according to *The AP*. Court orders targeting email and network communications data rose from 360 to 1,661 during the same time period.

According to the Department of Justice, the devices are not used to capture phone conversations or email contents, *The AP* reported.

The standard for obtaining a court order to conduct such surveillance is far less than the standard to obtain a warrant to conduct a physical search in that it must only be relevant to the investigation, as opposed to requiring probable cause, according to *The AP*.

Source: *The Associated Press*

## Judge orders Tallahassee to release red-light camera ticket information

TALLAHASSEE – A contractor hired by the city of Tallahassee must disclose red-light camera ticket information, including the names of those who received a violation.

The Tallahassee Democrat filed a lawsuit against the city and ACS State & Local Solutions in 2011 after city officials refused to produce a list of those who received a notice of violation, according to the paper. The list included about 17,000 individuals who had received a violation since the program began.

Officials refused to release the list, arguing that releasing the names was a violation of the Driver's Privacy Protection Act, the *Democrat* reported.

U.S. District Judge Robert L. Hinkle of the Northern District of Florida ordered the names released, ruling that the records were public under the state's Public Records Law.

"It is declared that the Driver's Privacy Protection Act does not prohibit the City of Tallahassee and its contractor ACS State and Local Solutions, Inc. from disclosing red-light ticket violation notices – or excerpts of the information they contain—in response to an otherwise valid public-records request," Hinkle wrote in his judgment.

He declined to award the newspaper attorneys' fees, the *Democrat* reported.

Source: *Tallahassee Democrat*

## Grassroots group files lawsuit to retrieve missing emails and texts

ORANGE COUNTY – A grassroots organization filed a lawsuit against Orange County over allegations that county officials violated Florida’s Sunshine Law.

Citizens for a Greater Orange County filed suit, claiming that emails and text messages sent between county officials and lobbyists about a paid sick-time ballot measure were deleted, according to *WFTV.com*. The lawsuit is asking officials to turn over the missing records.

The group also said they feel some of the people who made secret contact with the commissioners may have influenced their votes, according to *WFTV.com*.

Although some of the messages have been recovered, officials may have to rely on a court order to gain access to the rest, the *Orlando Sentinel* reported.

If officials intentionally deleted the text messages, it would constitute a violation of Florida’s Public Records Law, according to Jon Kaney, general counsel for the First Amendment Foundation.

Volunteers spent months gaining signatures to place the sick-time initiative, which would require businesses to grant sick time to their employees, on the November ballot, according to the *Orlando Sentinel*.

Source: *WFTV.com, Orlando Sentinel*

## Vernon ordered to pay attorney fees in Sunshine lawsuit

VERNON – A judge ruled that the city of Vernon will have to pay \$3,900 in attorney fees and costs for violating the state’s Sunshine Law.

According to the ruling, the city must now pay the fees for failing to follow the requirements of conducting a closed session and for failing to produce for inspection a transcript of the closed session, the *Washington County News* reported.

The *Washington County News* and its former parent company, Florida Freedom Newspapers, filed suit against the city after the mayor and city attorney failed to respond to a request for the transcript. In the suit, the paper argued that council members improperly held an executive session in April.

In his ruling, Judge Christopher N. Patterson for the 14th Judicial Circuit ordered the city to produce the transcript of the session and pay the fees within 30 days, according to the *Washington County News*.

Source: *Washington County News*

## Bradford OKs social media policy

BRADFORD COUNTY – Bradford County officials approved a social media policy for its employees that governs the use of websites such as Facebook and Twitter.

According to Will Sexton, county attorney, the policy prohibits employees and volunteers from using social media sites in the course of their employment unless it is specifically authorized by the county, the Bradford County Telegraph reported.

The policy also states that the

county has the right to monitor and review postings on social media websites and that employees and volunteers have no expectation to privacy while using county-owned or leased equipment, according to the Telegraph.

### TECHNOLOGY

Employees and volunteers

are also prohibited by the policy from taking photographs, videos or other recordings while on duty unless directed to do so by their supervisor, according to the paper.

Source: Bradford County

### THE BRECHNER REPORT

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## Lawsuit claims Sarasota public art commission violated Sunshine Law

SARASOTA – Sarasota City Commission members agreed to settle a lawsuit over allegations the steering committee violated the state’s Open Meetings Law.

The lawsuit, filed by the Public Art Chairman George Haborak and the Sarasota-based nonprofit group, Citizens for Sunshine, claimed the steering committee and two steering committee members – artist Virginia Hoffman and city planner Clifford Smith – violated the state’s Sunshine Law by failing to provide public

### ACCESS MEETINGS

notice of a meeting to discuss and authorize a \$55,000 project to produce a themed public art exhibit, the *Sarasota Patch* reported.

City commission members voted to settle the lawsuit by paying \$6,000 in legal fees out of public art funds and voiding the project.

The Public Art Commission may also be dissolved following a vote from city commission members, according to the *Sarasota Patch*.

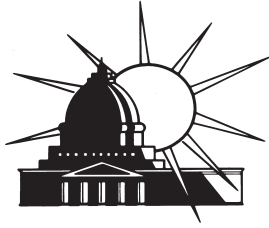
Source: *Sarasota Patch*

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## Privacy and images of death: A new constitutional right?

In accord with a small but growing national trend to protect from public disclosure by government agencies certain graphic images and sounds, Florida last year adopted a statute – Section 406.136 – that generally exempts from release “a photograph or video or audio recording that depicts or records the killing of a person,” unless a showing of good cause is made before a judge.

The big news from 2012 is that what was previously percolating as a common law interest and statutory privacy right over images of death and autopsy photographs – see Florida Statute Section 406.135 for the state’s codification of the Earnhardt Family Protection Act – is now gaining constitutional traction at the federal level.

Specifically, the U.S. Court of Appeals for the 9th Circuit broke constitutional ground in May 2012 in *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012).

### The Back Page

By Clay Calvert

a familial privacy right over images of the dead. Authored by Alex Kozinski, the chief judge of the 9th Circuit, the unanimous three-judge opinion concluded that the federal constitutional right to privacy, rooted in the word “liberty” within the Due Process Clause of the 14th Amendment, includes “the power to control images of a dead family member” and a mother’s “right to privacy over her child’s death images.”

The dispute in *Marsh* centered on autopsy images of Phillip Buell, a two-year-old boy who died of severe head trauma. Several of those images were copied by a former deputy district attorney named Jay Coulter, who successfully prosecuted the man accused of killing the toddler. When that conviction was later thrown out, however, Coulter attached one of the images to a memorandum entitled “What Really Happened to Phillip Buell” that he sent to two news media outlets in southern California.

Although neither news organization ran the autopsy image, Phillip Buell’s mother, Brenda Marsh sued the County of San Diego and Coulter upon learning of its release. She alleged San Diego and Coulter violated a federal privacy right to control



Clay Calvert

the public dissemination of a family member’s death images. Marsh said she feared the image would find its way to the Internet and that she would suffer emotional distress.

This tension between privacy and technology proved pivotal for the 9th Circuit. As Judge Kozinski wrote, “Marsh’s fear is not unreasonable given the viral nature of the Internet, where she might easily stumble upon photographs of her dead son on news websites, blogs or social media websites. This intrusion into the grief of a mother over her dead son – without any legitimate governmental purpose – ‘shocks the conscience’ and therefore violates Marsh’s substantive due process right.”

Although noting that no other court had recognized a substantive due process privacy right encompassing the power to control images of a dead family member, Judge Kozinski leaned heavily upon dicta in Justice Anthony Kennedy’s 2004 opinion in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004). While *Favish* pivoted on a federal FOIA dispute involving the scope of Exemption 7(C), Kennedy wrote for a unanimous court that a “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law.” Some commentators at the time suggested that *Favish*’s recognition of a familial privacy interest over death-scene images in the FOIA context would later be expanded to other areas of the law, and Kozinski, who clerked for Kennedy when the latter was on the 9th Circuit, proved them right.

Whether courts in other circuits continue to transform common law interests and statutory rights into constitutional ones when it comes to images of the dead remains to be seen. In the meantime, however, access advocates should be troubled by the expansion to the realm of constitutional law of a right – a right on par in the 9th Circuit, at least, with the right to choose to have an abortion – that protects emotional tranquility and happy memories of the deceased.

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