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# THE BRECHNER REPORT

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## Program promotes access to federal court rulings

WASHINGTON, D.C. – A system providing the public free, text-searchable, online access to court opinions is now available to all federal appellate, district and bankruptcy courts.

The system, called Federal Digital System, or FDsys for short, was approved by the Judicial Conference, the policy-making

### COURTS

body of the federal courts, and provides free access to publications from all three branches of the federal government via the Internet, according to *The Third Branch News*.

The system pulls opinions nightly from courts' Case Management/Electronic Case Files (CM/ECF) systems and sends them to the

Government Printing Office where they are processed and posted on the FDsys website. Twenty-nine courts participated in the original pilot and now all courts may opt to participate in the program.

Presently, more than 600,000 opinions dating back to 2004 are available, *The Third Branch News* reported.

Source: *The Third Branch News*

## FDLE investigates commission texting controversy

ORANGE COUNTY – The Florida Department of Law Enforcement is investigating a controversy surrounding text messages sent and received during an Orange County Commission meeting.

Former state House candidate Sean Ashby filed a criminal complaint with the State Attorney's Office against Orange County Mayor Teresa Jacobs and commissioners following a September 2012 meeting about a proposed sick-time initiative, according to *CFNews Channel 13*.

The lawsuit claims at least some of the text messages deleted during the meeting were from people pushing to have the initiative quashed, *CFNews*

*Channel 13* reported.

One of the commissioners named in the suit, Jennifer Thompson, is particularly under fire for deleting texts, including 32 that day that were part of a conversation with a Walt Disney World lobbyist, one of the companies fighting the initiative. The proposal would require private companies to provide sick leave.

Jacobs has since directed county administrators to look into ways to preserve text messages as public records. She has also asked commissioners to ban lobbying via text message and voicemail

in Orange County and to prohibit using personal email accounts and cell phones to conduct county business, according to *CFNews Channel 13*.

"The public deserves and expects a transparent Orange County government.

The FDLE inquiry requested by the State Attorney should provide an independent review of the facts and I will do whatever I can to help

expedite this process," Jacobs said in a statement, according to *CFNews Channel 13*.

Source: *CFNews Channel 13, WFTV.com Channel 9*

### ACCESS MEETINGS

## Groups challenge public meeting prayers

WASHINGTON, D.C. – Lawsuits in at least five states, including Florida, are challenging the constitutionality of allowing prayers at public meetings.

Lawmakers who defend the prayers argue they're following a long tradition of prayer before public meetings started by our nation's founders, according to *The Associated Press*. They argue residents don't have to participate and that prayer adds solemnity to the meeting and "serves as a reminder to do good work," *The AP* reported.

"It's a reassuring feeling," said Lakeland Mayor Gow Fields of the city's pre-meeting prayers, which have led to

### FIRST AMENDMENT

ongoing conflict with a Florida atheist group, according to *The AP*.

The city's commission meetings now begin with a disclaimer that any prayer offered before a meeting is the "voluntary offering of a private citizen" and is not endorsed by the commission, according to *The AP*.

Others say the prayers are an inappropriate mix of church and state.

In 2008, the U.S. Court of Appeals for the 11th Circuit, overseeing Florida, Georgia and Alabama, upheld a Georgia county's practice of inviting a rotating group of clergy members to give prayers before its meetings. The prayers were

predominantly Christian, *The AP* reported.

At least one other court has held that prayers before legislative meetings must be nondenominational or nonsectarian, which means the prayer cannot include words specific to a single religion.

The U.S. Supreme Court in 1983 held that offering a prayer before a legislative meeting does not violate the First Amendment Establishment Clause, which prohibits the government from favoring one religion over another, according to *The AP*.

Some groups believe it's only a matter of time before the issue ends up in front of the Supreme Court once again, *The AP* reported.

Source: *The Associated Press*

## FHP lawsuit claims unauthorized database access

MARTIN COUNTY – A Florida Highway Patrol trooper has filed a federal privacy lawsuit against more than 100 police officers and agencies, including the Florida Department of Highway Safety and Motor Vehicles, claiming unauthorized access to personal information in the driver's license database.

The lawsuit names eight law enforcement officers and deputies from three agencies on the Treasure Coast and seeks more than \$1 million in damages,

according to the *Stuart News*.

In the suit, Trooper Donna "Jane" Watts claims that the agencies, including the Martin and St. Lucie County sheriff's offices and the Port St. Lucie Police Department, did not monitor its officers and deputies or prevent their continued misuse of the driver's license database.

Inquiries into Watts' personal information began following her patrol stop of an off-duty police officer who was speeding in his marked patrol car in October 2011 on the turnpike in Broward

County, according to the *News*.

A St. Lucie County deputy was suspended for a day after accessing her personal information four times in one day.

"This is an invasion of privacy.

Law enforcement does have access to information most residents don't and with that level of access there should come a certain amount of care. ... This is something that is not supposed to be done," said Watts' attorney Mirta Desir, the *News* reported.

Source: *Stuart News*

## Group's report says RNC security chilled free speech and assembly

NEW YORK – A new report by the National Lawyers Guild says that the level of security maintained at both of the national political conventions blunted free speech.

The New York-based advocacy group sent legal observers in lime-green baseball caps, plus several staff members to the Republican National Convention in Tampa, the *Tampa Bay Times* reported.

Among their findings was that the local police and federal authorities characterization of protesters as "anarchist extremists" discouraged many protesters from coming to the convention and that the amount of officers, armor and horses resulted in intimidation, according to the *Times*.

"The sheer number of police, weaponry and the constant threat of police aggression and arrest had a chilling effect on free speech and

assembly," according to the report's 31-page analysis, the *Times* reported.

Spending \$50 million in federal funds on security for each convention "is an extreme expenditure in an age of austerity," the report also said, according to the *Times*.

"We are concerned that these techniques – while not new – are becoming the 'business as usual' approach to event security," Guild Senior Researcher Traci Yoder told the *Times* in an email.

At the RNC, there were only two arrests, no lawsuits nor any internal affairs complaints filed, among other statistics, according to the *Times*.

"We went out of our way to make sure that folks with a legitimate interest in expressing their First Amendment rights had the ability to do so," said Tampa Mayor Bob Buckhorn, according to the paper.

Source: *Tampa Bay Times*

## Ruling protects talk show speech

TAMPA – A lawsuit pitting two radio talk show hosts against each other ended with a jury verdict in favor of free speech.

The lawsuit, filed by Todd "MJ" Schnitt in 2008, claimed that Bubba the Love Sponge Clem "made false, highly defamatory statements" about Schnitt and his wife on morning radio, according to the *Tampa Bay Times*.

The jury verdict said that although the radio talk may be "distasteful," it is still protected by the First Amendment, the *Times* reported.

Mere name calling is not considered defamatory, said Lyrrisa Lidsky, a University of Florida College of Law professor, according to the *Times*.

"A statement is defamatory if it tends to harm one's reputation in eyes of community, a substantial, respectful part of the community," Lidsky said, according to the paper.

Source: *Tampa Bay Times*, *Tampa Bay Online*

## FIRST AMENDMENT

## Clay County agrees to \$2,000 records settlement

CLAY COUNTY – The Clay County Commission has agreed to settle a public records lawsuit that was filed against the county by Joel Chandler.

In November, Chandler visited the Clay County Animal Care and Control shelter and asked to inspect records related to the two most recent animal-abuse complaints on file, according to *The Florida Times-Union*.

The employee refused, telling Chandler he would have to make a written public records request and provide the county two weeks to respond, County Attorney Mark Scruby wrote in a

Jan. 17 memorandum to the commission, the *Times-Union* reported.

The \$2,000 will go to pay Chandler's

attorneys fees, according to the *Times-Union*.

Although the county has not admitted any wrongdoing, County Manager Stephanie Kopelousos said the county is conducting enhanced training on Florida's public records policies for all county employees, according to the paper.

Source: *The Florida Times-Union*

## ACCESS RECORDS

## Court grants access to user info in Wikileaks probe

WASHINGTON, D.C. – The U.S. Court of Appeals for the 4th Circuit upheld a lower court’s decision that the social media platform Twitter must release non-content account information subpoenaed by the government in its ongoing case against WikiLeaks.

In 2010, government officials subpoenaed information about the accounts of three people connected to WikiLeaks, a website that posts classified information, according to the Reporters Committee for Freedom of the Press.

The American Civil Liberties Union and the Electronic Frontier Foundation, arguing on behalf of the account holders,

claimed that the subpoena violated the account holders’ rights to privacy and also that the account holders should be able to know why the government wanted their information, according to the appellate court decision.

U.S. Circuit Judge Roger L. Gregory wrote that the Electronic Communications Privacy Act allows the government to seek non-content account information without a warrant or probable cause and that the government did not need to inform users why they are accessing their information.

In upholding the lower court, Gregory also ruled that the need to keep the investigation a secret outweighed the right

of public access.

The lower court, in considering the stated public interests, “found that the government’s interest in maintaining the secrecy of its investigation, preventing potential subjects from being tipped off, or altering behavior to thwart the government’s ongoing investigation, outweighed those interests,” Gregory wrote in his order.

“Because secrecy is necessary for the proper functioning of the criminal investigations at this [] phase, openness will frustrate the government’s operations,” according to Gregory.

Source: RCFP.org

## Media ask DOJ to rescind Marshals Service policy

WASHINGTON, D.C. – Thirty-eight media organizations, including The New York Times Company and *The Associated Press*, have written to U.S. Attorney General Eric H. Holder Jr., in the U.S.

Department of Justice (DOJ), asking that a newly enacted

Marshals Service policy blocking the release of federal criminal booking photographs be overturned.

The letter from the media organizations was prompted by a Marshals Service memo stating that it

would no longer comply with Freedom of Information Act requests for booking photographs as required under appellate court precedent, according to the Reporters Committee for Freedom of the Press.

In the 1996 opinion of *Detroit Free Press v. Department of*

*Justice*, the U.S. District Court for the 6th Circuit held that federal booking photographs must be released under FOIA when a named, indicted criminal suspect has appeared in open court and court proceedings are ongoing,

according to the Reporters Committee.

The Court also found that, under such circumstances, an individual has no right to privacy in such records.

According to the Marshals Service memo, recent appellate court decisions recognize that individuals may have some level of privacy in their booking photographs under FOIA, according to RCFP.org.

The Marshals Service has often limited the *Detroit Free Press* holding to apply only to FOIA requests originating from within the 6th Circuit.

Source: RCFP.org

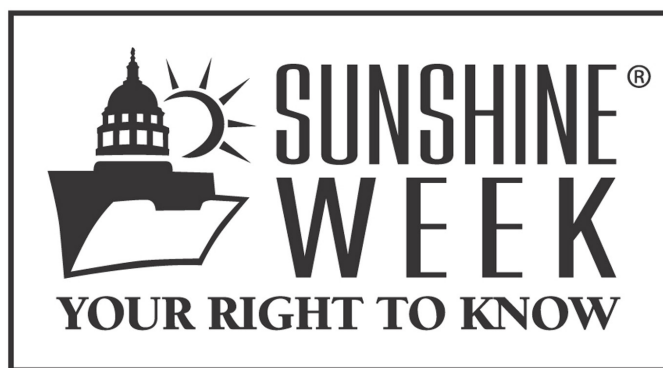
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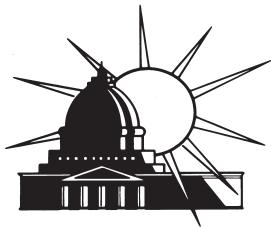
Sunshine Week, a national initiative to promote a dialogue about the importance of open government and freedom of information is March 10-16, 2013. Show your support for open government by asking elected officials to sign the Brechner Center’s Open Government Pledge. To learn more about the program and download the pledge, visit [www.brechner.org](http://www.brechner.org).

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## High court mulls records access across state lines

Freedom of Information cases involving public records usually revolve around refusal by one official or another to release records that someone else believes are “open,” or the speed – or lack thereof – of responding to FOI requests.

Most recently, a national debate has centered on whether publicly available gun permit records ought to remain that way, or should be largely closed to public view for the safety of permit holders. But a challenge before the U.S. Supreme Court this term puts a new spin – or several new spins – on issues regarding public access to public records held by the states.

The issue involves a Virginia law that limits access to public agency records to Virginia citizens. The law is being challenged by Mark McBurney, who once lived in Virginia but later moved to Rhode Island; and Roger Hurlbert, who lives in California and operates a business that collects tax data from states for use by mortgage companies and other commercial operations.

Tennessee and Arkansas have similar laws. No other states currently make residency distinctions among those filing records requests.

The arguments go far beyond typical FOI concerns of transparency and accountability in government, touching on long-standing legal assumptions about interstate commerce and the rights of states to treat their citizens differently than those of other states. Oral argument Feb. 20 at the Supreme Court touched on the so-called dormant Commerce Clause – an assumption that Congress’ authority to regulate commerce that happens between states also means no state can, on its own, pass a law that negatively impacts such commerce – and the Constitution’s “privileges and immunities” clause, intended to guarantee equal treatment for citizens across the various states, in part to remedy abuses that grew up under the Articles of Confederation.

Heady and history-laden constitutional stuff, indeed, for freedom of information laws that only found their legal footing in the U.S. beginning in the 1960s.

In sum, the two arguments shape up as:

- McBurney-Hurlbert: Access to public records has become a bedrock element of civic life, nationwide, in terms of holding government accountable; and that in a modern world, public information such as tax records has value as a commercial product



*Gene Policinski*

– and Virginia cannot reserve the use of such value just to its own citizens..

- Virginia: The commercial aspect of the state records business is incidental to the purpose of such “freedom of information” laws, and that holding Virginia government “accountable” is a matter of interest for the citizens of Virginia, not other states – and therefore, just as with voting, for example, the state has a right to exclude outsiders from the process.

Another interesting angle to the dispute, according to a variety of legal analyses, is that the “out-of-state” restriction also applies to news organizations that don’t have “circulation” or that don’t broadcast from or into Virginia.

In an amicus brief filed by the Reporters Committee for Freedom of the Press and 53 other media organizations in support of the challenge, the group argued that if it allows “states to enact open records laws that discriminate against non-residents, the Court will be sanctioning a practice that directly harms the media’s ability to gather and disseminate news that provides a full and accurate account of regional and national events.”

The brief notes that while “states comprising our union are in many ways diverse, they at the same time make up a unified and interdependent body where events in one state impact and are newsworthy to citizens in other states.” The news group also claims the law fails to recognize that online news operations are accessible to Virginia residents, and makes no provision to measure such “circulation” or “broadcast” requirements in the state for web-based operations. In the oral argument, several justices noted a readily available subterfuge around the law’s provisions: simply asking or paying a Virginia resident to request the records involved. But the challengers maintain that such a cost – even if incidental – poses an unconstitutional burden in that it would apply only to a non-citizen.

Forecasting a Supreme Court decision is risky business – particularly in this case, where the justices’ questions during argument showed both skepticism about linking the commercial use of information with the “good government” thrust of FOI laws, but also about Virginia’s seeming acceptance of the ease with which the law can be circumvented by simply hiring – cheaply – a local person to file the request.

*Gene Policinski is the senior vice president and executive director of the First Amendment Center.*