Filing # 68468327 E-Filed 02/26/2018 03:30:28 PM

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ALACHUA COUNTY, FLORIDA
CIVIL ACTION

US RIGHT TO KNOW,

Plaintiff,

v. CASE NO: 01-2017-CA-2426

THE UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendant.

and

DREW KERSHEN,

Intervener.
_____/

PLAINTIFF'S MEMORANDUM OF LAW

Plaintiff, US Right to Know, through undersigned counsel and pursuant to this Court's December 15, 2017, Order Setting Non-Jury Trial, files this Memorandum of Law in support of its Petition for Writ of Mandamus and in advance of the bench trial set for February 28, 2018.

Issues Presented

1. Whether email messages sent and received between Dr. Kevin Folta, University of Florida Professor and Chair, Horticultural Sciences Department, and the email address "AgBioChatter@yahoogroups.com" between January 1, 2011 and June 16, 2017, are public records under Florida law.

2. Whether email messages between Dr. Jack Payne, University of Florida Senior Vice President for Agriculture and Natural Resources, and any staff or employees of the University of Florida Foundation ("UFF") that include certain keywords between January 1, 2013 and October 27, 2015, are "records of [the UFF]" such that they are confidential and exempt from public records pursuant to section 1004.28, Florida Statutes.

1. AgBioChatter Emails

"It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." § 119.01(1), Fla. Stat. (2015).[1] Chapter 119, Florida Statutes, implements the right granted by the Florida Constitution to "[e]very person . . . to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." Art. I, § 24(a), Fla. Const.

Burden of Proof

Plaintiff has the initial burden to prove that the documents it seeks meet the definition of public records. *Times Publishing Co. v. City of Clearwater,* 830 So. 2d 844, 846 n.2 (Fla. 2d DCA 2002), *aff'd*, *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). The determination of what constitutes a public record is a question of law. *State v. City of Clearwater*, 863 So. 2d 149, 151 (Fla. 2003). Florida's public records law "is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose." *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 125 (Fla. 2016) (internal citations omitted); *see also Morris Publishing Group v. Florida Dep't of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2014) ("If there is any doubt as to whether a matter is public record subject to disclosure, the doubt is to be resolved in favor of disclosure.").

Legal Authorities

When enacted in 1909, the Florida Public Records Law did not define the term "public records." Florida courts and the Florida Attorney General thus applied the restrictive definition that had been applied at common law, *i.e.*, defining public records as only those which were

[1] All references to Florida Statutes in this memorandum are to Florida Statutes (2015), the version in effect when Plaintiff made the requests for public records at issue.

"required by law to be kept or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial or evidence of something written, said, or done." Op. Att'y Gen. Fla. 74-215 (1974). In 1967, the Florida Legislature amended the law to provide the definition of public records still in effect today:

> "'Public records' means all documents . . . regardless of the physical form . . . made or received pursuant to law or ordinance *or in connection with the transaction of official business by any agency*."

§ 119.011(12), Fla. Stat. (emphasis added). By inserting the emphasized language in 1967, the legislature "significantly broadened the definition of a public record" such that, subsequent to this amendment, the Attorney General stated "the only relevant concern in deciding whether a document is a public record is whether the document in question is in the legal possession of a public official." Op. Att'y Gen. Fla. 74-215 (1974); *see also* Op. Att'y Gen. Fla. 77-141 (1977) ("Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully, and competently performing their functions as public servants.") (internal citation omitted).

The Florida Supreme Court narrowed its interpretation of this definition slightly in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), in which the Court was asked whether a consultant's handwritten notes of interviews to fill a government position were public records. Citing the dictionary definition of "record," the Court determined that a "record" is material "which is intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* at 640. Thus, rough drafts or notes did not satisfy this definition. *Id.* However, "[i]nter-office memoranda and intra-office memoranda communicating

information from one public employee to another . . . even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business." *Id.*

The Florida Supreme Court again narrowed its interpretation of the scope of the Public Records Act in *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003), in which it held that the definition of public records does not include communications that are "private" or "personal," because such communications are not made or received in connection with official business. *Id.* at 153. The Court held that private documents do not become public records solely by being placed on an agency-owned computer. *Id.* at 154. The *City of Clearwater* case provides little guidance as to what constitutes "private" or "personal" communications, however, because the requester never challenged the public employees' designation of the requested documents as such. *Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002), *aff'd*, *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).[2] Nevertheless, the Court did suggest that the only communications falling outside the scope of the definition of a public record are those "that are *clearly* not official business." *City of Clearwater*, 863 So. 2d at 153 (quoting *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1187 (Fla. 1995)).

Thus, the test following the *City of Clearwater* case is whether the records requested are "clearly not official business," or alternatively, whether they are "purely personal." *See id.*; *see also Bent v. State*, 46 So. 3d 1047, 1048 (Fla. 4th DCA 2010) ("purely personal" calls by minors from jail were "clearly not public records"), *Miami-Dade County v. Professional Law*

[2] Likewise, in *Media Gen. Operations, Inc. v. Feeney*, 849 So. 2d 3, 6 n.2 (Fla. 1st DCA 2003), another case relied upon by the University (UF Bench Brief 10), the agency's designation of certain call records as "personal" was not challenged. Thus, that case provides no guidance on the question presented here.

Enforcement Ass'n, 997 So. 2d 1289, 1290-91 (Fla. 3d DCA 2009) (pilots' flight log information was "readily distinguishable from the purely personal e-mails at issue in [*City of Clearwater*]" because the agency's operating procedures required each pilot to maintain this information).

In this case, it cannot be said that the requested records are "clearly not official business," nor that they are "purely personal." The evidence will show that Dr. Folta engages in research, teaching, and outreach on the topics of agricultural biotechnology and science communication, the very topics discussed on the AgBioChatter group discussion. Although the University contends there is a "line" between Dr. Folta's association with AgBioChatter discussion group and his official position at UF (UF Trial Brief 17), Plaintiff submits that this contention is irreconcilable with the objective evidence adduced in this case.[3]

The only case cited by either party involving the activities of a university professor is the unpublished decision of the Ninth Judicial Circuit of Florida in *Becker v. University of Central Fla. Bd. of Trustees*, No. 2013-CA-5265-O, 2014 WL 1499515 (Fla. Cir. Ct. Apr. 17, 2014), *aff'd per curiam*, 181 So. 3d 504 (Fla. 5th DCA 2015) (unpublished table disposition). The facts of that case are dramatically different than those here. A university professor entered into a personal service contract to provide editorial services to a private journal in exchange for direct personal compensation from the journal's owner. *Id.* at *1. The professor was required to, and did, obtain prior approval to use university resources for outside endeavors such as his work on the journal. *Id.* at *4. The professor's agreement with the journal provided that his work product

[3] The University's references to Plaintiff's opposition to Dr. Folta's position on GMOs and its references to other public requests by Plaintiff to the University (UF Bench Brief 1 n.1, 9, 12), have no place in this litigation. The University cannot withhold records based upon its animosity toward Plaintiff or its positions. *E.g.*, *Promenade D'Iberville LLC v. Sundy*, 145 So. 3d 980, 983 (Fla. 1st DCA 2014) ("Florida law doesn't allow public records custodians to play favorites on the basis of who is requesting records" and "[t]he motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act.") (internal citations omitted).

on the journal was the property of the journal's owner, not his own or the university's. *Id.* at *7. All of these facts supported the university's contention that communications were not made or received in the course of the university's business. In contrast, Dr. Folta's participation in the AgBioChatter discussion group pertains directly to his work for the university, not some separately contracted or compensated engagement.

The remaining case cited by the University is also distinguishable. In *Butler v. City of Hallandale Beach,* 68 So. 2d 278, 279 (Fla. 4th DCA 2011), the mayor distributed to her friends and political supporters copies of newspaper articles she had written for a local newspaper. Because the mayor's purpose in distributing them was to inform her friends and supporters of their publication (presumably so that they would continue to support her) rather than for any purpose related to her work for the city, the communications were not deemed public records. *Id.* at 281. Additionally, the court noted that the articles had been previously published where anyone could inspect or copy them. *Id.* In contrast here, Dr. Folta's communications with the AgBioChatter discussion group were not simply one-sided messages forwarded to friends for political or social purposes; the participants exchanged information on the precise topics in which Dr. Folta engages on behalf of the University.

The University emphasizes that the AgBioChatter is a "private" discussion group intended to be accessed by members who gain admission by invitation only. (UF Bench Brief 5, 8 n.3). This is irrelevant to this Court's analysis, as a private entity's designation of records as private cannot alter the terms of Florida's public record laws. *National Collegiate Athletic Ass'n v. Associated Press,* 18 So. 3d 1201, 1208-09 (Fla. 1st DCA 2009). "A private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential. The right to examine these records is a right belonging to the

public; it cannot be bargained away by a representative of the government." *Id.* Therefore, it is irrelevant whether the discussion group considers itself private; the only relevant inquiry before the court is whether the emails Dr. Folta exchanged with the AgBioChatter Group were made or received in the course of Dr. Folta's official business for the University.

Both the University and Intervener Kershen suggest that the AgBioChatter discussion group is designed to create a safe environment to facilitate the exchange of the participants' views on potentially controversial scientific issues without the discussions becoming public. (UF Bench Brief 5, 7, 8, 8 n.3; Kershen Amended Response to Petition for Writ of Mandamus at 2, 3; Kershen Response to Supplemental Complaint at 2). As a policy matter, this is a valid concern upon which reasonable people may differ. Indeed, some states have created exemptions for institutions of higher learning that exclude certain categories of documents from their public records laws. *See* Utah Code Ann. § 63G-2-305(40)(a) (protecting "creative works in process" and "scholarly correspondence"); Ohio Rev. Code Ann. 149.43(A)(5) (excluding from the definition of public record "intellectual property record[s]"). But whether or not an exemption protecting the free exchange of scholarly ideas engaged in by the AgBioChatter discussion group would be meritorious, it can only be created by the legislature. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999) (refusing to imply public record exemption because "an exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution"). As the Florida Supreme Court held in holding the open meeting law applicable to a university search committee:

> This Court recognizes the necessity for the free exchange of ideas in academic forums, without fear of government reprisal, to foster deep thought and intellectual growth. Nonetheless, this freedom is not to be used as a shield which could, in some other case on other facts, be used to mask abuses of the rights of others. . . . Were the chilling effect respondents apprehend balanced against any less compelling a consideration than Florida's commitment to open government at all levels, we might agree that the burdens herein imposed were unduly onerous.

Wood v. Marston, 442 So. 2d 934, 941 (Fla. 1983).

In light of the foregoing, Plaintiff submits that the University had a ministerial duty to produce the records requested by Plaintiff, and failed to do so. When an agency fails to produce public records as required in Chapter 119, a writ of mandamus is proper. *City of Gainesville v. State ex rel. Int'l Ass'n of Fire Fighters*, 298 So. 2d 478 (Fla. 1st DCA 1974).

2. <u>The Payne Emails</u>

Plaintiff requested copies of email messages between Dr. Jack Payne, University of Florida Senior Vice President for Agriculture and Natural Resources, and any staff or employees of the University of Florida Foundation ("Foundation") that include certain keywords between January 1, 2013 and October 27, 2015. "Records of" the Foundation are confidential and exempt from Chapter 119. § 1004.28(5)(b), Florida Statutes. Professor Payne is not an employee of the Foundation.

<u>Burden of Proof</u>

The burden is on the University to demonstrate its entitlement to an exemption. *Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000). "Exemptions from disclosure are to be construed narrowly and limited in their designated purpose." *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 125 (Fla. 2016) (internal citations omitted).

Legal Authorities

Dr. Payne is the Senior Vice President for Agriculture and Natural Resources for the University of Florida. As an employee of the University of Florida, Dr. Payne, just like Dr. Folta, must produce email communications sent or received by him in the course of *the university's* official business.

The DSO exemption in Section 1004.28(5)(b) was first adopted in 1975, long before the requirement that a public record exemption be supported by a two-thirds vote of each house of the legislature and a specific statement of the public necessity justifying the exemption. *See* Art. I, § 24(c), Fla. Const. (adopted 1992). Furthermore, the purpose for the exemption does not appear on the face of the statute. Therefore, it is difficult to evaluate its "designated purpose" as required by *Board of Trustees, Jacksonville Police & Fire Pension Fund*, 189 So. 3d at 125.

Defendant appears to contend that all email exchanges in which one party is a member of the DSO fall within the exemption of Section 1004.28(5)(b). But this is an overbroad reading of the statute. And the First District's brief decision in *Environmental Turf, Inc. v. University of Fla. Bd. of Trustees*, 83 So. 3d 1012 (Fla. 1st DCA 2012), is unhelpful on this point because it is impossible to tell from the face of the opinion what kind of documents were at issue. *Id.* at 1013 ("We affirm the trial court's ruling that the documents prepared by [a DSO] are exempt from disclosure because these documents were prepared and disseminated by a DSO."). Further, as set forth in Plaintiff's Reply in Support of Complaint for Writ of Mandamus, in *Environmental Turf* the University actually produced documents that were communicated outside the DSO to UF/IFAS. (Reply dated Aug. 14, 2017 at 8-9 and Ex. 8, 9). Plaintiff does not suggest that UF's failure to invoke the exemption in that case is dispositive of the issue presented in this case, but

rather that the First District's ruling cannot be read as addressing the issue because it was not disputed by the parties.

It remains the University's obligation to prove that the documents it withheld from Plaintiff fall within the scope of Section 1004.28(5)(b), Florida Statutes and that withholding them is consistent with the purpose of the exemption. This Court should reject the University's contention that it can withhold all emails in which one party of the conversation is a member of the DSO.

IN CAMERA REVIEW

If, following a hearing, the Court believes that some of the documents requested from Dr. Folta may not be public records, or that some of the documents requested from Dr. Payne may fall within the exemption provided in Paragraph 1004.28(5)(b), Florida Statutes, then Plaintiff respectfully requests that the Court require Defendant to submit such documents to the Court for an *in camera* inspection. *Walton v. Dugger*, 634 So. 2d 1059, 1061-62 (Fla. 1993).

ATTORNEYS' FEES

If this Court finds that the University violated a provision of the public records laws, Plaintiff is entitled to statutory attorney's fees. § 119.12, Fla. Stat.; *Bd. of Trustees, Jacksonville Police & Fire Pension Fund*, 189 So. 3d at 128. There is no need for further briefing on this issue.

RELIEF REQUESTED

Plaintiff requests the Court enter a Writ of Mandamus:

A. Directing the Defendant to produce the records requested by Plaintiff USRTK;

B. Awarding Plaintiff its reasonable attorney's fees and costs; and

C. Granting such other and further relief as the Court deems appropriate.

/s/Lynn C. Hearn
LYNN C. HEARN
Florida Bar No.: 0123633
Email: lhearn@meyerbrookslaw.com
THOMAS W. BROOKS
Florida Bar No.: 0191034
Email: tbrooks@meyerbrookslaw.com
RONALD G. MEYER
Florida Bar No.: 0148248
Email: rmeyer@meyerbrookslaw.com
MEYER, BROOKS, DEMMA AND BLOHM, P.A.
131 North Gadsden Street (32301)
Post Office Box 1547
Tallahassee, Florida 32302-1547
(850) 878-5212
(850) 656-6750 – Facsimile

and

JOSEPH E. SANDLER
Email: sandler@sandlerreiff.com
District of Columbia Bar No. 255919
Pro Hac Vice No. 1001306
SANDLER, REIFF, LAMB, ROSENSTEIN & BIRKENSTOCK PC
1025 Vermont Ave., N.W. Suite 300
Washington, D.C. 20005
(202) 479 -1111
(202) 479-1115 – Facsimile

Attorneys for Plaintiff US Right to Know

CERTIFICATE OF SERVICE

Pursuant to Rules 2.516(b)(1) and (f) of the Florida Rules of Judicial Administration, I certify that the foregoing document has been furnished to the following individuals by email via the Florida Courts e-filing Portal this 26th day of February, 2018, to:

John A. DeVault, III
Primary E-mail: jad@bedellfirm.com
Secondary E-mail: mam@bedellfirm.com
Courtney A. Williams
Primary E-mail: caw@bedellfirm.com
Secondary E-mail: mam@bedellfirm.com
Bedell, Dittmar, Devault, Pillans & Coxe
Professional Association
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202

Attorneys for Defendant The University of Florida Board of Trustees

Cindy A. Laquidara
Primary email: cindy.laquidara@akerman.com
Secondary email: kim.crenier@akerman.com
Allison M. Stocker
Primary email: allison.stocker@akerman.com
Secondary email: maggie.hearon@akerman.com
Akerman LLP
50 North Laura Street, Suite 3100
Jacksonville, Florida 32202

and

Elizabeth M. Hernandez
Three Brickell City Centre
98 Southeast Seventh Street, Suite 1100
Miami, FL 33131
Email: elizabeth.hernandez@akerman.com
Secondary Email: merari.motola@akerman.com

Attorneys for Intervener Drew Kershen

/s/Lynn C. Hearn
Lynn C. Hearn