

IN THE CIRCUIT COURT OF THE 8th JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

Case No.: 01 2017 CA 002426

US RIGHT TO KNOW,

Plaintiff,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendant.

**DREW KERSHEN, INDIVIDUALLY AND AS A PARTICIPANT
IN AGBIOCHATTER, RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

Drew Kershen ("Kershen") individually and as a member of the list-serve AgBioChatter Yahoo Group, ("AgBioChatter"), (the **Intervener**) pursuant to this Court's Order to Show Cause and Order Allowing Motion to Intervene hereby files this his Response to Plaintiff's Complaint for Writ of Mandamus as follows:

I. Introduction and Factual Background.

Plaintiff filed a Complaint for Writ of Mandamus for the production of certain records, alleging that the records fall under the Public Records Act, Chapter 119, Florida Statutes. Drew Kershen requests that the Court enter an order denying the complaint as it pertains to any AgBioChatter e-mails on the basis that all emails generated or received by AgBioChatter are private and do not fall under the provisions of the Public Records Act.

Drew Kershen is a private individual and participant in AgBioChatter's list-serve.¹ Kershen's personal emails are being sought by Plaintiff through its public records request to the University of Florida "for any and all emails to or from Professor Folta that is to, from, CC or BCC to the email address AgBioChatter...from July 1, 2012 to the present". Kershen has been a member of AgBioChatter list-serve during the entirety of that period of time.

Kevin Folta is a Professor at University of Florida ("UF") and a member of the AgBioChatter list-serve. There is no membership fee to join AgBioChatter's list-serve, but membership must be approved. Thus, no public funds were used to join the list-serve. *See, F.S. 119.01(3).*

(a) AgBioChatter.

AgBioChatter is a private email forum which may only be accessed by members. An individual must be invited to join the Group. Individuals who share similar interests in the field of agricultural biotechnology are members of AgBioChatter's list-serve. Topics in the Group discussions include FDA testing, advocacy against labeling and responding to negative press about GMO's.

AgBioChatter's participation rules are as:

Welcome to the AgBioChatter group at Yahoo! Groups. Please take a moment to review this message, and then to send a message to the group introducing yourself.

AgBioChatter is a private forum for invited members. Its purpose is to provide a private forum for brainstorming and information exchange, and provide an arena whereby members can have candid and open debates without fear their conversations will become public. Only members can see who else is a member and what has been posted.

¹ Drew Kershen is a now-retired professor at the University of Oklahoma (the "University"), and is a participant in AgBioChatter. The records being sought are Kershen's personal and private records; even if his previous status as a professor at the University were sufficient to trigger a records obligation (which it decidedly is not), his retirement in 2012, ended that argument and his emails are private.

Never use public email addresses (e.g., .edu [except private universities], .gov). Best use an e-mail never used for work purposes.

To maintain this integrity, the rules of conduct are as follows:

- No comments appearing on AgBioChatter will be released to the press or public
- NEVER forward any Chatter email under any circumstance
- Non-sensitive information may be extracted and shared, but only with the author's permission, and after removing all references to Chatter.
- Chatter sanctity is important enough that any violators of these policies will be removed from the group immediately.
- In addition, in order to maintain the usefulness and integrity of AgBioChatter members agree that:
 - All personal conversations are to be off the group
 - Short answers like 'thanks,' 'got it,' etc. are to be avoided or limited to the sender, not the entire group.

We thank all participants in advance. The information and insights from AgBioChatter have empowered us to be far more pro-active and effective than we all would have been acting as individuals.

Regards,

C. S. Prakash and Wayne Parrott, Moderators

Kershen has abided by, and relied upon, the above rules in deciding to participate in AgBioChatter. As provided in the rules members agree too, E-mails submitted to AgBioChatter are private e-mails. It is these emails, submitted by persons outside the jurisdiction of Florida, which are intended for members of this private group, which Plaintiff seeks.

AgBioChatter was at one time an association with multiple hundreds of participants, throughout the world. Previous actions by Plaintiff in obtaining what had originally been intended to be private and free exchanges of scientific ideas, have resulted in prison sentences

and express threats of bodily harm from those countries, persons, and entities to whom free speech is not respected (including, apparently, Plaintiff).

For example:

- a. Dr. Ernesto Bustamante from Peru, a scientist of great repute and once a student of Dr. Jim Watson (of Watson & Crick DNA fame), faced serious prison time, which he avoided only with the help of others, for simply contesting alleged facts relating to GMO issues (<http://www.scidev.net/global/policy/news/scientists-rally-round-convicted-peruvianresearcher.>);
- b. Dr. Tony Trewavas, a highly reputed scientist from the University of Edinburgh in Scotland, was taken to court by Greenpeace and GM Watch in UK for alleged claims of defamation arising from comments he made in an AgBioChatter discussion group called AgBioView. Dr. Trewavas lost his case, was forced to publicly apologize for his writings, and ultimately completely retreated into seclusion, not participating in any open discussion on science anymore;
- c. Mike Adams of Natural News called for murder of GM scientists after Prof. Kevin Folta episode. (<https://geneticliteracyproject.org/2014/07/24/naturalnews-huckster-mike-adams-asks-antigmoers-to-kill-scientists-supporters-of-crop-biotech>); and
- d. Ernesto Bustamante Donayre, a molecular biologist and vice-president of the Peruvian College of Biologists, was convicted of defamation after criticizing research by Antonietta Ornella Gutierrez Rosati which purported to find evidence of such crops.

Such instances of criminal prosecution for scientific beliefs demonstrates the need to keep Kershen's and others privacy rights sacrosanct.

As a result of the actions against members, AgBioChatter revised its process to protect the lives of those participating in its online group, and now operates in what is clearly a private chat group.

Dr. Folta was invited to join the AgBioChatter list-serve. From a review of Dr. Folta's credentials it is obvious that he has some interest in the AgBioChatter list-serve. It is Kershen's, AgBioChatter's, Folta's and UF's contention that the list-serve emails, both receipt and submittal

were private in nature and not intended to be used as a public record. No action by AgBioChatter or its members has resulted in the creation of any public records. Dr. Folta's use of his university email address (if any), or reference to his title at the university does not make the records of AgBioChatter public. Further, a person's title and address is typically added as a function of an email server.

The mere act of receiving an email from the group or individual members of the list-serve, through list-serve, does not create a public record. In fact, Dr. Folta did not open the vast majority of the emails requested by Plaintiff (reportedly a total of 5,343). *see* UF Response to Plaintiff's Complaint, P. 2, 11. ("UF, p.—"). Like spam, the emails remain on the computer until destroyed.²

II. Legal Argument

Plaintiff's Complaint seeks documents from UF, received or sent by Dr. Folta to the AgBioChatter list-serve, which Kershen is a member. Kershen responds to those legal issues directly related to AgBioChatter and Kershen's membership therein. That is: Were the emails Dr. Folta "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. *F.S. 119.011(12)*.

- A. The emails Dr. Folta made or received were private in nature, and not made in connection with the transaction of official business of UF.

² Plaintiff's description of the duties of Dr. Folta, vis a vis the exchanges with accepted members of AgBioChatter are incorrect. Dr. Folta was not hired by UF to perform any of the duties which would be found as the purpose of AgBioChatter, such as responding to negative press about GMO's. Dr. Folta was hired to conduct research on fruit crop genetics, teach and run the department. Based on Plaintiff's espoused theories is Dr. Folta required to copy the pages of research materials for his teaching duties and preserve them under the Public Records Act? If reads a page from a research book, and moves on to information directly related to the topic he is teaching, must he still copy that page and maintain it for production under the Public Records Act?

Florida's Sunshine Amendment, article I, section 24(a), of the Florida Constitution

provides:

Every person has the right 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, except with respect to records exempted pursuant to this section or specifically made confidential by the constitution.

Under Florida statutory law codifying the constitutional requirement, "public records" is defined broadly to include, among other things, "all documents, papers ... or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(1), *Fla. Stat. (2015)*. Email messages are considered public records for, among other things, retention purposes. *See, Op. Att'y Gen. Fla. 96-34* (e-mail messages are subject to statutory limitations on destruction of public records) and, *Op. Att'y Gen. 01-20*, and *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851 (Fla. 1st DCA 2013).

However, records which are not made or received in connection with the transaction of official business do not constitute public records for purposes of disclosure requirements under the Public Records Act. *See, Butler v. City of Hallandale Beach*, 68 So.3d 278 (Fla. 4th DCA 2011), where the District Court held that the Mayor's personal email to friends and supporters attaching news articles she wrote, was not a public record.

The Supreme Court has held that in evaluating whether a record is made or received in connection with the official business of an agency, "the determining factor is the nature of the record, not its physical location." *See, State v. City of Clearwater*, 863 So.2d 149, 154 (Fla. 2003). In *Clearwater*, the Court held that personal emails between public employees on publicly-owned computers which were not made or received in the course of official business did not constitute public records. The Court held that the emails must have been (a) prepared in

connection with official agency business, and (b) be intended to perpetuate, communicate or formalize knowledge of some type. *See also, Media General Operations v. Feeney*, 849 So.2d 3 (Fla. 1st DCA 2003), *and, Bent v. State*, 46 So.3d 1047, 1050 (Fla. 4th DCA 2010).

In this case, Dr. Folta was invited to personally join AgBioChatter, and upon acceptance received access to the list-serve site. He was not required to join the site by the University of Florida, was not hired to join the site, did not access information from the site to research, teach or serve as Chair of the Horticultural Sciences Department, Plant Molecular and Cellular Biology Program and Plant Innovation Program. Dr. Folta's research is in the areas of Functional genomics of small fruit crops, plant transformation and genetic basis of flavors. He does not address FDA testing or labeling for UF and was not hired by UF to respond to negative press about GMO's.

AgBioChatter is a private forum for members to debate and discuss various issues including agricultural biotechnology. None of the emails sent to the group or received by AgBioChatter are (a) prepared in connection with official agency business, and (b) intended to perpetuate, communicate or formalize knowledge of some type. Acceptance by AgBioChatter results in the new member being added to the Group and receiving all list-serve emails, whether or not they are a party to the email. The email sent by the member is sent to the Group, whether they wish to receive the email or not. AgBioChatter restricts and does not allow the sharing of the information or emails with individuals who are not members and a violation will subject a member to removal from the group. The emails are purely private-and should not be disclosed or released. *See, AgBioChatter Rules*.

To avoid duplication of previously briefed positions, Intervener further adopts the Response filed by UF as they pertain to the AgBioChatter Yahoo Group, as though fully set forth herein.

III. Conclusion

The emails Dr. Folta sent or received from the AgBioChatter list-serve are not public records: AgBioChatter is a private entity not subject to any business or other relationship with UF. Dr. Folta did accept membership and was not asked to join in AgBioChatter in his official capacity, but rather in his personal capacity. The emails that Dr. Folta received were group emails from the list-serve and not from any official transaction of a public agency. The emails Dr. Folta sent were personal, of a topic of mutual interest and not related to his official duties at UF. Much like spam, Dr. Folta did not open the majority of the emails sent from the list-serve.

As such, the Intervener respectfully requests that the request for all AgBioChatter emails be denied. Alternatively, AgBioChatter would agree to an in-camera inspection of the requested emails in Dr. Folta's computer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished in the manner indicated below this 28th day of August, 2017, to:

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