

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

US RIGHT TO KNOW,

Case No. 01 2017 CA 002426

Plaintiff,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendant.

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

Pursuant to this Court's Order Granting Unopposed Motion for Leave to File Supplemental Complaint, Drew Kershen ("Kershen" or the "Intervener"), individually and as a member of the list-serve AgBioChatter Yahoo Group, ("AgBioChatter"), files this Response to Plaintiff's Supplemental Complaint for Writ of Mandamus:

Introduction and Factual Background

Plaintiff seeks a writ of mandamus directing the Defendant, The University of Florida Board of Trustees ("UF"), to produce to Plaintiff certain personal emails between Dr. Folta and AgBioChatter, alleging that the records fall under the Public Records Act. The extraordinary relief the Plaintiff seeks is an attempt to deprive the Intervener, a private individual and participant in AgBioChatter, of his personal privacy rights.

As explained in the Intervener's September Response (defined below), AgBioChatter is a private email forum only accessible by members, who must be invited to join. AgBioChatter was formed to afford its members a private forum to freely share scientific ideas and thoughts in the field of agricultural biotechnology without fear of harassment or government reprisal. The

sought-after documents consist solely of private group communications posted to AgBioChatter, including the Intervener's personal emails. The requested emails are not public records subject to disclosure under Florida's Public Records Act.

Supplemental Legal Argument

After filing the Plaintiff's Complaint for Writ of Mandamus, the Plaintiff filed a Supplemental Complaint for Writ of Mandamus (collectively, the "Complaint"), which adds allegations based on UF's response to the Plaintiff's revised and expanded request for personal emails between Dr. Folta and AgBioChatter.

As argued in the Intervener's September Response (defined below), emails between Dr. Folta and AgBioChatter are private and are not public records. The emails were not prepared in connection with official university business, and are not intended to perpetuate, communicate or formalize knowledge of some type. *See State v. City of Clearwater*, 863 So. 2d 149, 152 (Fla. 2003).

However, even if the emails could be considered public records, which contention the Intervener vehemently disputes and Florida law does not support, the importance of academic freedom and privacy substantially outweigh the production of the emails: "Scholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be able to produce new knowledge or make life-enhancing discoveries." "Having every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created." *See Rachel Levinson-Waldman, Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, American Constitution Society for Law and Policy (2011) (citing an April 1, 2011 letter from University of Wisconsin

Chancellor Biddy Martin to the campus community in response to FOIA request for all of a University of Wisconsin professor's emails with certain key terms).

This response supplements the Intervener's Amended Response to Petition for Writ of Mandamus filed on September 1, 2017 (the "Intervener's September Response"), which response the Intervener incorporates herein. In addition, to the extent they pertain to the AgBioChatter Yahoo Group, the Intervener adopts and incorporates herein UF's Response to Plaintiff's Complaint for Writ of Mandamus and Order to Show Cause filed on August 2, 2017, and any other response UF files in response to Plaintiff's Supplemental Complaint for Writ of Mandamus.

For all the above-stated reasons and those previously set forth in the Intervener's September Response and UF's responses to the Complaint, the Intervener respectfully requests that this Court enter an order denying the Plaintiff's requested writ and request for the production of the emails between Dr. Folta and AgBioChatter. Alternatively, the Intervener respectfully requests that this Court order an in-camera inspection of the requested emails.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed and served by e-mail on November 13, 2017, on the following counsel or parties of record: Lynn C. Hearn, Esq., lhearn@meyerbrookslaw.com; Ronald G. Meyer, Esq., rmyer@meyerbrookslaw.com; Amy M. Hass, Esq., amhass@ufl.edu; John A. Devault, III, Esq., JAD@bedellfirm.com; and Courtney Williams, Esq., CAW@bedellfirm.com.

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