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

US RIGHT TO KNOW,

Plaintiff,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Defendant.
_____/

Case No. 01 2017 CA 002426

DEFENDANT-INTERVENER DREW KERSHEN'S
MOTION FOR SUMMARY JUDGMENT UNDER FLA.R.CIV.P.1.510

Drew Kershen, ("Kershen" or the "Defendant-Intervener"), individually and as a member of the list-serve AgBioChatter Yahoo Group, ("AgBioChatter"), files this Motion for Summary Judgment under Rule 1.510, Fla. R.Civ.P., and states that the undisputed facts when applied to the applicable law demonstrate that judgment should be entered against the Plaintiff as a matter of law against the Plaintiff's Complaint and 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 Florida's 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 responses to the Complaint for Writ of Mandamus and the Supplemental Complaint for Writ of Mandamus, 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.

Summary Judgment Standard

This Court may grant this Motion for Summary Judgment as the pleadings, discovery, and affidavits establish that there is no genuine issue as to any material fact and that Kershen is entitled to judgment as a matter of law. Fla. R.Civ.P. 1.510(c). The party moving for summary judgment [Kershen] has the initial burden of demonstrating the non-existence of material issues of fact, but after Kershen has carried that burden, by competent evidence, the burden shifts to the Plaintiff to come forward with contrary material evidence to show a question of material fact exists. *Hicks v. Hoagland*, 953 So.2d 695, 697 (Fla. 5th DCA 2007) (citations omitted). Thus, the material facts must be crystallized such that nothing remains but questions of law. *Snow v. Byron*, 580 So.2d 238 (Fla. 5th DCA 1991).

Undisputed Facts

After filing its 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. Kevin M. Folta and AgBioChatter. Kershen has today filed two verifications: one verifying the facts in the Response to the Complaint for a Writ of Mandamus and one verifying the facts in this Motion.

As argued in the Intervener's Amended Response to Petition for Writ of Mandamus filed on September 1, 2017 and its response to the Supplemental Complaint for Writ of Mandamus filed on November 13, 2017 (collectively, the "Response"), emails between Dr. Folta and AgBioChatter are private and are not public records. Plaintiff is a California nonprofit corporation. Plaintiff filed successive requests for what it contends are public records to UF. Kershen understands that UF produced over 15,000 pages of documents responsive to Plaintiff's requests, which documents are largely emails and related documents of Dr. Folta. To the best of Kershen's knowledge, Dr. Folta was briefly a member of the private chat group; from November 13, 2013 through July 31, 2015. Thus any email sought by Plaintiff before or after those dates could not possibly be related to Dr. Folta's AgBioChatter participation. The terms of the chat group require that it and all communications within it remain private. When such private discussions have been made public in the past, foreign authorities have taken actions against what would be considered in the United States as free speech as is set forth in the Response.

The verification filed by Kershen, along with the undisputed terms of the AgBioChatter chat room, demonstrate that the AgBioChatter group and Kershen are not government actors, have no intent to formalize knowledge for the public, and that their personal chat room communications are not public records. Emails between AgBioChatter and Dr. Folta were not "received in connection with the transaction of official business." Dr. Folta had no official business with AgBioChatter by definition. *See* the Response, pages 2-3, detailing the terms of participation in the AgBioChatter group. Plaintiff has merely recited the above phrase from case law, without presenting any facts to support the conclusion that there was any official business being conducted to which a member of AgBioChatter was a party. UF had no agreement with AgBioChatter, and no right or obligation to participate in any AgBioChatter discussions.

AgBioChatter is not a recognized UF chat room, and UF has made no payments, or took any action with respect to this private chat room.

Indeed, there is no evidence that Dr. Folta even read any of the emails – which were not addressed to Dr. Folta, but to the AgBioChatter chat room itself, and which were accessible only to the participants in the chat room. There is no email address posted on AgBioChatter to give notice to its members; one only responds to the chat room, and the addresses reflect only AgBioChatter@yahoo.com. A copy of the terms for AgBioChatter use are attached to this motion as Exhibit A.

Legal Argument and Authorities

These issues have been briefed in Kershen's Response. Plaintiff must carry the burden of proving that what it seeks are in fact public records. *Times Publishing Co. V. City of Clearwater,* 830 So.2d 844, 846 (Fla. 2d DCA 2002). It has long been held that the mere act of placing emails on government computers does not convert a private email into a public email. *State v. City of Clearwater,* 863 So. 2d 149, 152 (Fla. 2003). In order for the email to become a public document, they must have "been prepared in connection with official agency business and be intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* 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 id.*

As stated in the Response, the Complaint seeks documents from UF, received or sent by Dr. Folta to the AgBioChatter list-serve, of 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. § 119.011(12), Florida Statutes. (emphasis supplied). Based on the evidence before this Court, the answer is clearly "no."

UF played no role in the receipt of emails from a chat room. There was no committee, intern, or teaching assistant whose job it was to receive and respond to AgBioChatter emails or communications. This chat room was just that – a private exchange of ideas, not meant to be captured or formalized, and specifically intended to remain private. *Butler v. City of Hallandale Beach*, 68 So.3d 278 (Fla. 4th DCA 2011)(noting Mayor's email was not a public record as she sent it to select personal friends and supporters at their discretion, and the City played no role in that action). The emails here were clearly not prepared in connection with official agency business, and, not being part of that business, cannot possibly be public. *Id*. at 280-81. Plaintiff has been unable to demonstrate that any official role of UF existed such that private chat group conversations, captured in an email by Dr. Folta, would transform into public records.

Independent of the lack of government agency intent, these messages are not public records because they are transitory private messages. Transitory messages – those not meant to be formalized, permanent, transmissions of information – cannot be public records. Chat rooms, by their very nature, are not meant to permanently capture information or formalize knowledge. The public would have no right to sit in the room and listen to a conversation between a UF professor, and another university's professor or individual from outside the university system. The two individuals would be free to set up a conference call and talk freely without the Plaintiff listening in – and vice versa. Thus, this Court must consider whether the transitory nature of the communication, the complete lack of government resources involved (none), and the clear disclaimer on something clearly marked as a chat room should all be ignored merely because the chat room's messages were being received by someone with a government email address.

Clearly, based on the undisputed facts, the AgBioChatter chat room messages were not used to formalize or perpetuate knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc*., 379 So.2d 633, 640 (Fla. 1980).

However, even if the emails could be considered public records, which contention the Defendant-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).

For all the above-stated reasons and those previously set forth in the Defendant-Intervener's Amended Response to the Complaint and Response to the Supplemental Complaint for a Writ of Mandamus, along and UF's responses, the Defendant-Intervener respectfully requests that this Court enter judgment for Defendant-Intervener, and against Plaintiff, denying

the Plaintiff's requested writ and request for the production of the emails between Dr. Folta and AgBioChatter.

December 12, 2017

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 December 12, 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.

By: */s/ Cindy Laquidara*

EXHIBIT "A"

Welcome to the AgBioChatter group at Yahoo! Groups. Please take a moment to review this message, & 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 that their conversations will become public. Only members can see who else is a member and what has been posted.

Never use public email addresses (eg, .edu [except priviate universities], .gov).
Best use an email never used for work purposes.

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

- No comments appearing on AgBioChatter will be released to the press or public fora
- 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 '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