

**IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**CASE NUMBER: 01-2017-CA-002426
Circuit Civil Division W**

**US RIGHT TO KNOW,
Plaintiff,**

-vs-

**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
Defendant,**

and

**DREW KERSHEN,
Intervener/Defendant**

FINAL JUDGMENT

AND ORDER SEALING COURT RECORDS

This cause came before the Court for nonjury trial on February 28, 2018. Plaintiff, US Right to Know (USRTK) initially filed this chapter 119 mandamus case against the University of Florida Board of Trustees (UF) seeking emails between UF professor Kevin Folta and the list-serve AgBioChatter@yahoogroups.com (AgBioChatter). Plaintiff also sought emails between UF Senior Vice President Jack Payne and the University of Florida Foundation (UFF), a university fundraising direct support organization for UF under section 1004.28, Florida Statutes. Drew Kershen, a participant in the AgBioChatter list-serve, moved to and was granted permission to intervene as a defendant with respect to the Folta emails issue.

At trial the following witnesses testified:

1. Gary Ruskin, executive director of USRTK.

2. Kevin Folta, professor and chair of UF Horticultural Sciences Department.
3. Drew Kershen, Intervener.
4. Amy Quillen, UF assistant university counsel.
5. Susan Goffman, UFF general counsel.

The following exhibits were received in evidence:

1. Plaintiff's exhibits 1-33 (exhibits 18-21 under seal per stipulated confidentiality order).
2. Defendant's exhibits 3, 4 and 5.
3. Intervener's exhibits 1, 2 and 7.

Additionally, 164 pages of records (the disputed Payne emails) were submitted to the Court for *in camera* review, and the parties submitted memoranda which the Court has reviewed.

There are two primary issues to be decided: 1) Whether the emails between professor Folta and AgBioChatter are public records as defined by section 119.11(12); and 2) Whether emails between VP Payne and UFF are confidential direct support organization (DSO) materials pursuant to section 1004.28(5)(b). The parties agree that Plaintiff carries the burden of showing that the Folta emails are public records, and that UF carries the burden to show that the Payne emails are confidential DSO records.

With respect to the Folta emails, the evidence shows that professor Folta's employment with UF consists of 80% grant-funded research and 20% teaching, although teaching pervades all his activities. His areas of academic focus at UF include genetic engineering and science communication. His department is within the Institute of Food and Agricultural Sciences (IFAS) at UF, and he agrees with and is dedicated to its mission of developing scientific knowledge and making it accessible to the public. He was invited to join the AgBioChatter group by another participant. However, his participation in AgBioChatter was not required by and did not contribute in any way to the performance of his duties as a UF professor. His participation, which was sporadic, was not a part of his official activities and was not done in connection with the transaction of any UF official business. It was a purely personal activity born out of his own self interest and inquisitiveness with respect to matters of interest to him personally although those matters certainly overlap with those included in his UF academic pursuits as well. He did not accomplish any UF business through his participation in this list-serve.

Plaintiff's position with regard to the Folta emails with AgBioChatter conflates professor Folta's personal interests with his UF academic activities. Oftentimes, someone's personal interests lead to a career which is focused on those same interests. This seems to be the case for professor Folta.

But that doesn't mean there can never be separation between the performance of job activities and the pursuit of those same interests outside of work duties. This is the case here where, although involving issues similar to those involved in his academic duties, Folta decided to join the AgBioChatter list-serve as a purely personal endeavor. To effectuate Plaintiff's position in the context of this case would be akin to holding that a university baseball coach who took the job because he loves baseball is doing public university business if he decides to coach his child's little league team, and that all emails regarding his little league activities are public records. Such is clearly not the case. Therefore the Court finds that the Folta emails "to, from, CC or BCC to the email address AgBioChatter@yahoogroups.com " were not made or received in connection with the transaction of official UF business, are not public records, and that Plaintiff's request for mandamus relief should be denied.

In regard to the Payne emails, the Plaintiff's request for records (Plaintiff's exhibit #11) was in two parts . One part dealt with emails between VP Payne and certain specified entities, and those are not at issue. The second part of this request asked for emails between VP Payne and UFF with certain keywords. Some of these were produced but some have been withheld on the basis of DSO confidentiality. With respect to the withheld items, the evidence shows that UFF personnel are all UF employees as authorized by section 1004.28(2)(a), and that VP Payne is a member of the board of UFF. Therefore, Payne is not only a UF employee but is part of UFF's personnel. UFF coordinates with all UF departments, and VP Payne is an integral part of UFF's fundraising mission. The Court's *in camera* review of the withheld records, which consist of three emails with voluminous attachments, shows clearly that they are DSO records confidential under 1004.28(5)(b). Therefore, Plaintiff's request for mandamus relief regarding these records should be denied.

Wherefore, it is hereby ordered and adjudged that the alternative writ is discharged, that Plaintiff's request for mandamus relief is denied, and that this case is dismissed. The Court reserves jurisdiction to tax costs as appropriate upon timely motion.

It is additionally ordered that the UFF documents submitted for *in camera* review and Plaintiff's exhibits 18-21 shall be held under seal by the Clerk and shall not be open to the public except upon order of the Court.

DONE AND ORDERED on Friday, March 2, 2018.

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Toby Monaco, Circuit Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Friday, March 2, 2018 to the following:

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