

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. _____

U.S. RIGHT TO KNOW,)
Plaintiff)
)
v.)
)
UNIVERSITY OF VERMONT AND)
STATE AGRICULTURAL COLLEGE,)
Defendant)

IMMEDIATE HEARING
REQUESTED PURSUANT TO
1 V.S.A. § 319(B)

COPY
VERMONT SUPERIOR
COURT

APR - 8 2019

COMPLAINT

Nature of Action

CHITTENDEN UNIT

1. This is an action to obtain public access to records maintained by the University of Vermont and State Agricultural College (“UVM”).

Parties

2. U.S. Right to Know (“USRTK”) is a nonprofit public interest, consumer and public health research group formed pursuant to the laws of the state of California. One of its missions is to provide documents and information to journalists, policy makers, academics and the public on, among other subjects, food safety and policy.

3. UVM is a public land grant university institution of higher learning organized pursuant to the laws of Vermont, with its primary place of business in Burlington, Vermont.

Facts

4. USRTK has been investigating the way in which different corporate funded organizations, including The International Life Sciences Institute (“ILSI”), influence public health policy in the area of obesity, and other chronic diet-related diseases. ILSI receives funding from, among other companies, Coca-Cola, Nestle, McDonald’s, and PepsiCo.

5. Naomi Fukagawa, now professor emerita at UVM, has been a member of the faculty at the UVM School of Medicine for more than twenty years. She was given emerita status in May 2015.

6. During her tenure as a professor of medicine at UVM, from at least 2009 until 2018, and subsequently while still affiliated with UVM as professor emerita, Dr. Fukagawa has served on the editorial board and as the Editor-in Chief of Nutrition Reviews, a publication of ILSI.

7. Dr. Fukugawa has, since May 2015, been listed on the UVM website as a faculty member. On information and belief, she serves at UVM as an instructor and has had use of her UVM.edu e-mail address before and after that date.

8. Upon information and belief, e-mails sent to and from Dr. Fukagawa using her UVM.edu e-mail address, both before and after May 2015, are stored on servers at, or accessible to and under the control of UVM.

9. On March 19, 2018, USRTK made a request of UVM pursuant to the Vermont Public Records Act for e-mails to or from Dr. Fukagawa and ILSI or Coca-Cola, among other documents. The March 19, 2018 request is attached as Exhibit A.

10. On April 6, 2018, UVM responded to USRTK stating that it was seeking reimbursement in the amount of \$296.20 for searching and retrieving the requested documents.

11. USRTK agreed to UVM's request, but UVM did not produce any documents. Instead, nine months after its proposal had been accepted, on January 17, 2019, UVM advised USRTK that the cost of doing the search was \$23,199, 78 times the original estimate.

12. On March 1, 2019, nearly a full year after USRTK had made its request, UVM denied it, asserting that the requested material was privileged under the common law deliberative process privilege at 1 VSA §317(c)(4), that it contains information protected under the academic research exception at 1 VSA §317(c)(23), and that Dr. Fukagawa's work with ILSI was "not part of her job duties or service/committee assignments at UVM." No indication was made of the number of documents that were responsive to USRTK, or which portions of requested documents did not contain protected information.

13. By letter dated March 5, 2019, a copy of which is attached as Exhibit B, USRTK appealed the denial of its request to UVM President E. Thomas Sullivan.

14. On March 12, 2019, UVM denied USRTK's appeal. A copy of the denial is attached as Exhibit C.

15. On March 27, 2019, USRTK made a new document request to UVM, identical to the request it had made a year earlier, on March 19, 2018, except that it expanded the time period of the documents it was seeking from January 1, 2013 to the date of the request to January 1, 2008 to present. A copy of the renewed request is attached as Exhibit D.

16. On March 29, 2019, UVM denied the renewed request, and in light of UVM's action on the substantively identical earlier request, excused USRTK from taking additional procedural steps to exhaust its administrative remedies. A copy of UVM's denial is attached as Exhibit E.

17. UVM's reasons for denying USRTK's requests are incorrect as a matter of law and do not support the withholding of these documents.
18. UVM violated the Public Records Act in failing to act within an appropriate time frame.
19. UVM breached its agreement with USRTK to produce the requested documents.
20. UVM violated the Public Records Act in failing to identify the responsive records it is withholding, or portions of the responsive records which could be produced.

COUNT I
Request for Access

21. USRTK incorporates by reference as though set forth with particularity the allegations contained in paragraphs 1 through 20 of this Complaint.
22. Plaintiff has a First Amendment right, rights under the Vermont Constitution and statutes, and a common law right of access to the documents withheld by UVM.
23. No exemption of the Public Records Act is applicable.
24. UVM is obligated by contract to produce the requested documents.

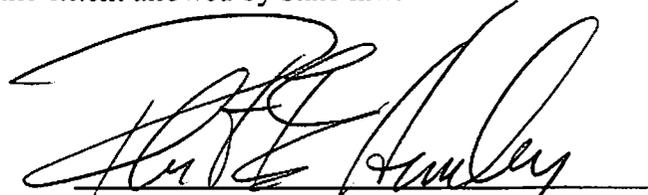
CLAIMS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter the following relief:

- A. A declaratory judgment that Defendants have failed to respond properly to the public records request;
- B. An award of reasonable attorneys' fees;
- C. An Order requiring UVM to produce the requested documents, or to make them available for inspection by USRTK at a reasonable time and place;

D. Such other relief that may be considered appropriate under the circumstances, including other fees and costs of this action to the extent allowed by state law.

Dated: Burlington, Vermont
April 8, 2019



Robert B. Hemley, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P.O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
rhemley@gravelshea.com
For Plaintiff



March 19, 2018

Gary Derr
Vice President for Executive Operations
Public Records Office
University of Vermont
Waterman Building Room 348
Burlington, VT 05405

RE: FOIA Request Re: Naomi Fukagawa, MD, PhD.

Dear Mr. Derr:

This is a request under the Vermont Public Records Act seeking the production of documents. We request a complete and thorough search of all filing systems and locations for all records maintained by the University of Vermont pertaining to Dr. Naomi Fukagawa, Professor Emerita in the College of Medicine.

This request seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa (searching your server for both naomi.fukagawa@uvm.edu and nfukagawa-nutr-rev@ilsi.org) and employees or representatives of the following corporations or organizations and their associated domains:

- International Life Sciences Institute and @ILSI.org and @ILSINA.org
- The Coca-Cola Company and @Coca-Cola.com and @Coca-ColaCompany.com

This request also seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa that contains the following keywords:

- Nutrition Reviews
- ILSI
- Coke and Coca-Cola and TCCC

This request also seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa and the following individuals, and including, but not limited to, the following email addresses:

- Barbara Bowman: bbb8@cdc.gov and n4789c@me.com
- Paul Coates: coatesp@od.nih.gov
- Eric Hentges: ehetges@ilsi.org
- David Allison: dallison@uab.edu and allison@iu.edu
- David Klurfeld david.klurfeld@ars.usda.gov

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USRTK.ORG • 4096 PIEDMONT AVE. #963 • OAKLAND, CA 94611-5221 • (415) 944-7350

EXHIBIT

A

- The time period covered by this request is from January 1, 2013 to the present.

Please narrow the search results to exclude published academic papers, organizational newsletters, and other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled.

If documents are denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blacked out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Vermont Public Records Act. Please send a memo (with a copy or copies to Becky Morrison) to the appropriate unit(s) in your office to assure that no records related to this request are destroyed.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

We are making this request on behalf of U.S. Right to Know, a 501(c)(3) nonprofit food research organization. The records disclosed pursuant to this request will be used in the preparation of articles for dissemination to the public. Accordingly, we request that you waive all fees in the public interest because furnishing of the information sought by this request will primarily benefit the public. Please send the documents to Becky Morrison in PDF format at becky@usrtk.org.

Please call, rather than write, Becky Morrison at (929) 357-4056 if there are any questions, or if you need additional information.

Thank you so much for your help in filling this request.

Sincerely,



Becky Morrison
Researcher



Gary Ruskin
Co-Director

A PROFESSIONAL CORPORATION

76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

Telephone 802.658.0220
Facsimile 802.658.1456
www.gravelshea.com

Robert B. Hemley
Shareholder
rhemley@gravelshea.com

March 5, 2019

E-MAIL AND MAIL

Thomas Sullivan, President
University of Vermont
349 Waterman Building
85 South Prospect Street
Burlington, VT 05405

Re: **Appeal of U.S. Right to Know From Denial of Public Records Request
Submitted by U.S. Right to Know**

Dear President Sullivan:

I am writing as counsel to U.S. Right to Know ("USRTK") to appeal UVM's decision, dated March 1, 2019, denying USRTK's request pursuant to the Public Records Act. USRTK seeks access to correspondence between Dr. Naomi Fukagawa and a number of identified parties, including the International Life Sciences Institute and The Coca-Cola Company. Copies of the original request dated March 19, 2018, and of the denial dated nearly a year later, March 1, 2019, are attached.

The delay in UVM's response is in violation of the Public Records Act, and has not been explained. Nor has any explanation been given for different positions UVM has taken during the year that it has been considering USRTK's request. When it first responded, on April 6, 2018, UVM indicated it was seeking reimbursement in the amount of \$296.20 for searching and retrieving documents, and for 200 minutes it would take to scan and copy the responsive documents. Then, after the passage of nine months, on January 17, 2018, UVM advised that instead of \$296.20, the cost of reviewing 10,140 responsive e-mails would be 78 times that, or \$23,119. UVM did not actually respond to the request until Mr. Derr wrote to USRTK attorney Hall on March 1, 2019, advising that there were a total of three responsive e-mails. Obviously, the way in which UVM has responded raises a number of questions giving rise to this appeal. I trust you will look into the process UVM has followed, and answer the following procedural and substantive questions:

1. What was the reason for excluding 10,137 of the 10,140 e-mails? Did someone actually review them? If so, what was the basis for exclusion? 1 V.S.A. §318(a)(2) requires the custodian to "identify the records withheld and the basis for the denial."

EXHIBIT

B

Thomas Sullivan, President

March 5, 2019
Page 2

Broad generalized categories do not satisfy the statutory requirement, and suggest that no real review was made.

2. Why did it take UVM nearly a year to respond? 1 V.S.A. §318 contemplates a response within three days unless there are “unusual circumstances.” None was suggested.
3. In his letter of March 1, 2019, Mr. Derr says that Dr. Fukagawa “retired from UVM on May 2, 2015,” and accordingly, he determined that any e-mail dated after that date was not a “public record” because it was subsequent to her retirement. There are several concerns about this position:
 - (a) Dr. Fukagawa is to this day listed by UVM on its website as a member of UVM faculty, with the status of professor emerita. She is said to teach at UVM. Please advise as to her status, her teaching or other responsibilities, and her association in any capacity with UVM since May 2, 2015.
 - (b) Dr. Fukagawa was, according to Mr. Derr’s letter, still apparently using a UVM.edu e-mail address after May 2, 2015, and her e-mails continue to be stored on the UVM server. What other benefits of association with UVM did Dr. Fukagawa continue to receive, including pay, faculty privileges of any sort, or other benefits?
4. Mr. Derr makes a distinction, and excludes, e-mail correspondence related to Dr. Fukagawa’s service “in her personal capacity” on non-UVM affiliated academic journals. I do not agree that is a valid distinction. Dr. Fukagawa no doubt presented herself to the academic journals as a professor and employee of UVM. UVM, credentials were referenced in her role on the journals, both as an editor and contributor.

While we do not wish to review truly personal correspondence, we have no assurance that any of the excluded e-mails legitimately fall into that category. Nor do we agree that Out of Office Replies are appropriately excluded, as Mr. Derr suggests. Whether such replies should be excluded would depend on their content, and whether Dr. Fukagawa used her UVM Out of Office Replies to advise those wishing to contact her that she was on vacation or at a professional meeting.

Mr. Derr’s letter also makes the broad conclusion that “certain information” is protected under the common law deliberative process privilege, or the academic research exception, without identifying the communication or document containing the “certain information,” as required.

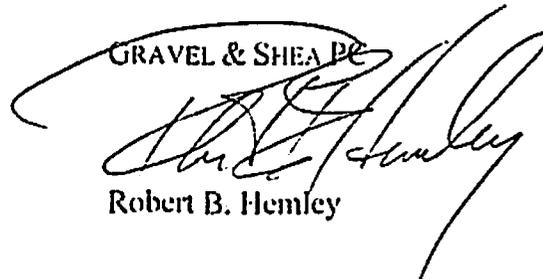
Thomas Sullivan, President

March 5, 2019
Page 3

I look forward to receiving a timely response to this appeal in the interest of avoiding litigation.

Thank you for your consideration.

Very truly yours,

GRAVEL & SHEA PC

Robert B. Hemley

RBH:lbb

cc: Meghan E. Siket, Esq.



March 19, 2018

Gary Derr
Vice President for Executive Operations
Public Records Office
University of Vermont
Waterman Building Room 348
Burlington, VT 05405

RE: FOIA Request Re: Naomi Fukagawa, MD, PhD.

Dear Mr. Derr:

This is a request under the Vermont Public Records Act seeking the production of documents. We request a complete and thorough search of all filing systems and locations for all records maintained by the University of Vermont pertaining to Dr. Naomi Fukagawa, Professor Emerita in the College of Medicine.

This request seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa (searching your server for both naomi.fukagawa@uvm.edu and nfukagawa-nutr-rev@ilsil.org) and employees or representatives of the following corporations or organizations and their associated domains:

- International Life Sciences Institute and @ILSI.org and @ILSINA.org
- The Coca-Cola Company and @Coca-Cola.com and @Coca-ColaCompany.com

This request also seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa that contains the following keywords:

- Nutrition Reviews
- ILSI
- Coke and Coca-Cola and TCCC

This request also seeks all email correspondence – including cc, bcc, and attachments -- to or from Dr. Fukagawa and the following individuals, and including, but not limited to, the following email addresses:

- Barbara Bowman: bbb8@cdc.gov and n4789e@me.com
- Paul Coates: coatesp@od.nih.gov
- Eric Hentges: ehetges@ilsil.org
- David Allison: dallison@uab.edu and allison@iu.edu
- David Klurfeld david.klurfeld@ars.usda.gov

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- The time period covered by this request is from January 1, 2013 to the present.

Please narrow the search results to exclude published academic papers, organizational newsletters, and other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled.

If documents are denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blacked out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Vermont Public Records Act. Please send a memo (with a copy or copies to Becky Morrison) to the appropriate unit(s) in your office to assure that no records related to this request are destroyed.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

We are making this request on behalf of U.S. Right to Know, a 501(c)(3) nonprofit food research organization. The records disclosed pursuant to this request will be used in the preparation of articles for dissemination to the public. Accordingly, we request that you waive all fees in the public interest because furnishing of the information sought by this request will primarily benefit the public. Please send the documents to Becky Morrison in PDF format at becky@usrtk.org.

Please call, rather than write, Becky Morrison at (929) 357-4056 if there are any questions, or if you need additional information.

Thank you so much for your help in filling this request.

Sincerely,



Becky Morrison
Researcher



Gary Ruskin
Co-Director

From: Gary Derr <Gary.Derr@uvm.edu>
Sent: Friday, March 1, 2019 10:08 AM
To: oliverhall@gmail.com
Cc: Meghan Siket <Meghan.Siket@uvm.edu>
Subject: Response to Records Request

VIA ELECTRONIC MAIL

Oliver B. Hall
Attorney-At-Law
2515 Cliffbourne Pl. NW
Washington, D.C. 20009
oliverhall@gmail.com

RE Public Records Request Submitted by U.S. Right to Know

Dear Attorney Hall:

I am writing on behalf of the University of Vermont (“UVM”) in response to the request for records submitted by your client, U.S. Right To Know (“US RTK”), dated March 19, 2018.

The request sought e-mail correspondence to or from Naomi Fukagawa, Professor Emerita in the UVM College of Medicine and various employees or representatives of third party organizations.

I. Legal Standard

The Vermont Access to Public Records Act (“PRA”), defines “public record” as “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business.” 1 V.S.A. § 317(b).

“The determinative factor in the question of what constitutes a public record is whether the document at issue is produced or acquired in the course of agency business. The PRA does not define “public record” in reference to the location or custodian of the document, but rather to its content and the manner in which it was created.” *Toensing v. AG of Vt.*, 2017 VT 99 (VT 2017) (internal quotations omitted).

II. Factual Background

Dr. Fukagawa retired from UVM on May 2, 2015. While she was at UVM, and after her retirement, Dr. Fukagawa served, in her personal capacity, on the editorial boards of non-UVM affiliated academic journals. Specific to US RTK’s public records request, Dr. Fukagawa served from 2009-2018 as the Editor-in-Chief of Nutrition Reviews, published by the International Life Sciences Institute (“ILSA”), and from 2007 to the present, she has served as the Associate Editor of the American Journal of Clinical Nutrition. Dr. Fukagawa’s editorial responsibilities were not part of her job duties or service/committee assignments at UVM.

III. Response to Request for Public Records

UVM conducted a key word search of Dr. Fukagawa's UVM e-mail correspondence using the organizational names, e-mail addresses, and names of individuals listed in US RTK's request. After review, UVM denies US RTK's request to the extent it seeks e-mail correspondence that does not meet the definition of "public record." E-mail correspondence that was returned based on the search term parameters, but that is not a "public record," falls into the following categories:

1. E-mail correspondence dated after Dr. Fukagawa retired from UVM on May 2, 2015;
2. E-mail correspondence related to Dr. Fukagawa's service, in her personal capacity, on non-UVM affiliated academic journals;
3. E-mail correspondence related to Dr. Fukagawa's service, in her personal capacity, on non-UVM affiliated advisory committees;
4. Advertisements/Newsletters from non-UVM entities;
5. Automatic/Out-of-office replies; and
6. Dr. Fukagawa's personal correspondence.

UVM further denies US RTK's request to the extent it seeks e-mail correspondence that is exempt from disclosure because:

1. It contains information protected under the common law deliberative process privilege under 1 V.S.A. § 317(c)(4); and
2. It contains information protected under the academic research exception under 1 V.S.A. § 317(c)(23).

Enclosed is e-mail correspondence that was responsive to US RTK's request, met the definition of a "public record," and was not excludable under 1 V.S.A. § 317(c)(4) and/or 1 V.S.A. § 317(c)(23).

IV. Appeal

As provided in section 318(a) of the Act, you may appeal to the University's President my determinations with respect to your records request. The President is Thomas Sullivan, 349 Waterman Building, Burlington, VT 05405; his e-mail address is president@uvm.edu.

Sincerely,

Gary L. Derr, Ed.D.
Vice President for Executive Operations

cc: Meghan E. Siket, Esq., Associate General Counsel

--



The University of Vermont

Gary L. Derr
Vice President for Executive Operations

University of Vermont
347 Waterman Building
Burlington, Vermont 05405

(802) 656-8937 (Office)
(802) 656-9220 (Fax)

UVM is subject to the Vermont Public Records Act and communications to and from this email address, including attachments, are subject to disclosure unless exempted under the Act or otherwise applicable law.

From: David Johnson <djohnson@strategicvision.biz>
Sent: Wednesday, August 14, 2013 10:23 AM
To: Naomi Fukagawa
Subject: Possible Story - Are Diet Sodas Really Safe

Coca-Cola is running ads defending the safety of artificial sweeteners the soft drink industry looks to stop declining diet soda sales. The ad is says that diet drinks can help people manage their weight and stresses the scientific evidence showing the safety of aspartame, which is more commonly known under the NutraSweet brand name. So is aspartame safe? Why are there so many concerns? Why are Americans turning away from diet sodas?

Able to discuss this and more is Dr. Keith Kantor, a leading nutritionist and author of the book, What Matters. Dr. Kantor can discuss in detail the safety of aspartame and why so many Americans are concerned about it and leaving diet sodas. He has appeared on numerous shows for his expertise. Would you be interested in interviewing him on this?

Thanks for any consideration:

David E. Johnson

Strategic Vision, LLC

Ph: (404) 380-1079

www.strategicvision.biz

If you would rather not receive future communications from Strategic Vision, let us know by clicking [here](#).
Strategic Vision, 677 Main Street, Suwanee, GA 30024 United States

From: Alex Sharp <asharp@rippmedia.com>
Sent: Monday, April 21, 2014 10:54 AM
To: Naomi Fukagawa
Subject: Supreme Court hears arguments 4/21 in Pom Wonderful labeling dispute with Coca-Cola

Naomi -

Today, April 21, the U.S. Supreme Court hears arguments in the **Pom Wonderful** consumer labeling case against **Coca-Cola**, bringing a long-standing case to the fore with broad implications for food labeling and false advertising.

Morrison & Foerster consumer litigation and product liability attorney **Claudia Vetesi** has been watching the case, and is available to discuss its implications for the food and beverage industry. She has experience with food mislabeling and class action litigation, and has written on the *POM Wonderful LLC v. The Coca Cola Co.* case specifically.

The contentious dispute between the two companies has been ongoing since 2008, when Pom first argued that the pomegranate-blueberry juice blend sold by Coca-Cola-owned Minute Maid -- which contains less than 1% pomegranate juice -- was labeled to mislead customers. The full name of the Minute Maid product is "Pomegranate Blueberry Flavored Blend of 5 Juices."

At issue is whether a private party can bring a Lanham Act false advertising claim against a product label regulated federally by the Food, Drug and Cosmetic Act. Pom Wonderful is now challenging a 2012 Ninth Circuit ruling that FDA regulations supersede Pom's right to bring claims.

District court decisions have been mixed on the matter, with some ruling that the Pom decision means federal FDA regulations preempt state claims, and others allowing state claims to proceed. Monday's hearing will offer insight into each side's arguments. When the case is decided -- sometime by the end of June -- it will provide clarity to food companies unsure whether the FDA has final say in all labeling matters or if the door remains open for future false advertising litigation.

Let us know if you'd like to speak with Ms. Vetesi on *POM Wonderful LLC v. The Coca-Cola Co.* and its implications for the food and beverage industry and FDA regulation.

Alex Sharp 212.262.7481 asharp@rippmedia.com

From: Ivan Alexander <ivan.k.alexander@gmail.com>
Sent: Thursday, June 12, 2014 11:43 AM
To: Naomi Fukagawa
Subject: Supreme Court ruling today in Pom Wonderful labeling dispute with Coca-Cola

Naomi-

Today, June 12, the U.S. Supreme Court handed down its ruling in **Pom Wonderful's** closely watched consumer labeling case against **Coca-Cola**.

Morrison & Foerster consumer litigation and product liability attorney [Claudia Vetesi](#), who has been watching the case, is available to discuss its implications for the food and beverage industry. She has experience with food mislabeling and class action litigation, and has written on the *POM Wonderful LLC v. The Coca Cola Co.* case specifically.

The dispute between the two companies has been ongoing since 2008, when Pom first argued that the pomegranate-blueberry juice blend sold by Coca-Cola-owned Minute Maid -- which contains less than 1% pomegranate juice -- was labeled to mislead customers. The full name of the Minute Maid product is "Pomegranate Blueberry Flavored Blend of 5 Juices."

At issue was whether a private party can bring a Lanham Act false advertising claim against a product label regulated federally by the Food, Drug and Cosmetic Act. Pom Wonderful challenged a 2012 Ninth Circuit ruling that FDA regulations supersede Pom's right to bring claims. The Court reversed the Ninth Circuit, holding that competitors may bring Lanham Act claims like POM's challenging food and beverage labels regulated by the FDCA.

Let us know if you'd like to speak with Ms. Vetesi on *POM Wonderful LLC v. The Coca-Cola Co.* and its implications for the food and beverage industry and FDA regulation.

Ivan Alexander 212-262-7482 ivan.k.alexander@gmail.com
James Bourne 212-262-7470 jimbournenyc@aol.com

March 12, 2019

VIA ELECTRONIC MAIL:

Robert B. Hemley, Esq.
Gravel & Shea Attorneys at Law
rhemley@gravelshea.com

RE: Public Records Request Appeal

Dear Attorney Hemley:

This letter is in response to your email message of March 5, 2019 appealing the decision of Vice President Gary Derr, in which the request of U.S. Right to Know (“USRTK”) pursuant to the Vermont Public Records Act was partially denied.

With respect to Gary Derr’s denial of the above described records on March 1, 2019, I have reviewed the definition of “public records” set forth in 1 V.S.A. § 317(b), and I concur with his decision that e-mail correspondence related to Dr. Fukagawa’s service in her personal capacity on non-UVM affiliated academic journals and advisory committees are not “public records” as that term is defined by law. This distinction goes to the heart of USRTK’s request, which is essentially seeking records of entities unaffiliated with UVM.

USRTK cannot obtain records of a non-UVM affiliated entity via a request under the Vermont Public Records Act. Your disagreement is based on 1) the fact that Dr. Fukagawa used her uvm.edu e-mail address in conducting non-UVM related business and 2) your assertion that “Dr. Fukagawa no doubt presented herself to the academic journals as a professor and employee of UVM.” Neither of these arguments has merit.

First, Vermont case law interpreting the Public Records Act is clear that the Public Records Act does not define “public record” in reference to the location or custodian of the document, but rather to its content and the manner in which it was created. *Toensing v. AG of Vt.*, 2017 VT 99, ¶ 14, 178 A.3d 1000, 1005 (2017). The “determinative factor” in the question of what constitutes a public record is “whether the document at issue is ‘produced or acquired in the course of agency business.’” *Herald Ass’n v. Dean*, 174 Vt. 350, 354, 816 A.2d 469, 473 (2002) (quoting 1 V.S.A. § 317(b)). Therefore, the fact that Dr. Fukagawa used her uvm.edu e-mail address (i.e., that UVM is the custodian of the document) is not determinative of the record’s status as a “public record.”

Second, there are doubtless numerous credentials on Dr. Fukagawa’s resume that make her an exemplary candidate for an editorial position on an academic journal, including her former role as an employee of UVM. That fact is, however, irrelevant to the question of whether the records sought by USRTK are “public records.” Correspondence generated in the course of the business of a third party entity is not “produced or acquired in the course of UVM business” regardless of the credentials of Dr. Fukagawa. By analogy, Dr. Fukagawa’s former role as an employee of UVM likely was relevant to her selection to serve on a number of regional, national

and international non-UVM related non-profit committees and boards, but that does not make the records of such non-profit organizations “public records.”

With respect to Gary Derr’s denial of USRTK’s request as to records dated after Dr. Fukagawa’s retirement from UVM, I have reviewed the definition of “public records” set forth in 1 V.S.A. § 317(b), and I concur that such documents are not public records. The status of “professor emerita” is an honorary title with no associated duties or compensation.

I further agree with Gary Derr’s denial of USRTK’s request as to automatic/out-of-office replies because these are non-public records. To clarify, the denial is based on automatic/out-of-office replies of individuals listed in USRTK’s request other than Dr. Fukagawa.

I understand that USRTK is not appealing Gary Derr’s denial of USRTK’s request as to advertisements/newsletters from non-UVM entities or Dr. Fukagawa’s personal correspondence.

Finally, I agree with Gary Derr’s denial of USRTK’s request to the extent it seeks e-mail correspondence that is exempt from disclosure because (i) it contains information protected under the common law deliberative process privilege under 1 V.S.A. § 317(c)(4); and (ii) contains information protected under the academic research exception under 1 V.S.A. § 317(c)(23). E-mails that are scientific and scholarly in nature, such as those discussing drafts of published articles, research proposals, and collaborative communications, are exempt from the definition of public records. These exemptions are necessary to prevent harm to research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. *See e.g. Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, 287 Va. 330 (Va. 2014).

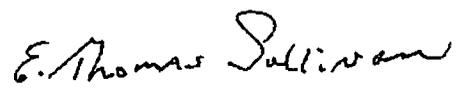
We disagree with your assertions that UVM is required to identify specifically why USRTK’s request was denied for each of the many thousands of responsive e-mails individually. USRTK made a generalized request for e-mails based on name and entity search terms. USRTK did not identify any specific document it was seeking. UVM responded by explaining the specific categories of exemptions that apply to USRTK’s very general request. This satisfies UVM’s requirement to “include the asserted statutory basis for denial and a brief statement of the reasons and supporting facts for denial.” 1 V.S.A. § 318(a)(2).

Therefore, I respectfully decline to release the requested records, other than the records previously released by Gary Derr, at this time.

You may seek judicial review of my determination that the decision issued by Gary Derr on March 1, 2019 was in accordance with the University’s obligations under the Vermont Public Records Act to the Vermont Superior Court under 1 V.S.A. § 319.

Please feel free to contact me if you have any questions.

Sincerely yours,

A handwritten signature in black ink that reads "E. Thomas Sullivan". The signature is written in a cursive style with a large, prominent initial "E".

E. Thomas Sullivan
President

A PROFESSIONAL CORPORATION

76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369

Telephone 802.658.0220
Facsimile 802.658.1456
www.gravelshea.com

Robert B. Hemley
Shareholder
rhemley@gravelshea.com

March 27, 2019

E-MAIL AND MAIL

Gary Derr
Vice President for Executive Operations
Public Records Office
University of Vermont
Waterman Building Room 348
Burlington, VT 05405

Re: **Revised Request re: Naomi Fukagawa, MD, Ph.D.
Pursuant to Vermont Public Records Act**

Dear Mr. Derr:

I am writing on behalf of U.S. Right to Know to submit a Public Records Act request that is nearly identical to the request dated March 19, 2018, which you denied on March 1, 2019, and the appeal of which was denied by University President Thomas Sullivan on March 12, 2019. The only change is that the date range of requested documents is now January 1, 2008 to present. Previously, the date range of requested documents was January 1, 2013 through the date of the earlier request, March 19, 2018. The original request and the updated request are both attached for your convenience. I assume you have the denial, appeal, and decision on appeal, so have not attached them.

We expect that the University will again deny the request and any appeal, applying the same reasons on which it rested its earlier actions. We wish to proceed without delay, and are agreeable to accepting a statement from the University as follows:

"We are in receipt of U.S. Right to Know's request for documents dated March 27, 2019, which, except for an expanded date range, is identical to an earlier request dated March 19, 2018. The University of Vermont denies the request (except for the production of three e-mails earlier produced) for the same reasons as set forth in my letter to attorney Oliver B. Hall dated March 1, 2019. Further, we agree that U.S. Right to Know would appeal from this denial, and that the University of Vermont would deny any such appeal for the reasons set forth in the letter from Thomas Sullivan to Robert B. Hemley, dated March 12, 2019. We agree that the procedural requirements set forth at 1 V.S.A. §318 are satisfied, and that U.S. Right to Know may apply for relief to the Civil Division of the Superior Court as set forth at 1 V.S.A. §319. In the event an

EXHIBIT

D

Gary Derr

March 27, 2019

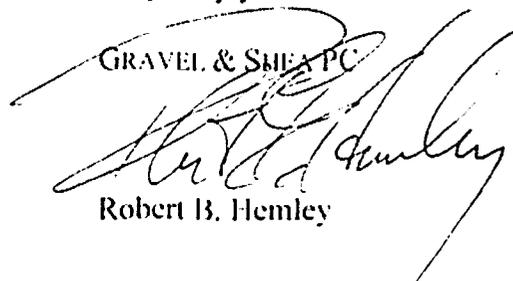
Page 2

action is filed, the University of Vermont will not raise any defense based on a failure to comply with the procedural requirements of 1 V.S.A. §318.”

Absent such a statement, we ask that you respond to this letter within the strict time limits allowed pursuant to the Public Records Act, and that the University act in a similarly timely fashion in response to any appeal.

If you have any questions, please contact me. I am sending a copy of this letter by e-mail to President Sullivan, who is also invited to call me with any questions. Our interest is in expediting a resolution of U.S. Right to Know's document request following an inexplicably lengthy delay since its original request was made over a year ago.
Thank you in advance.

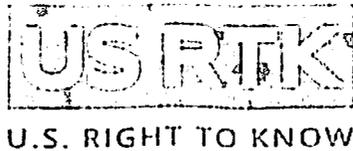
Very truly yours,

GRAVEL & SHEA PC

Robert B. Hemley

RBH:bb

Enclosures

cc: E. Thomas Sullivan, President (w/enclosures) (e-mail)



March 19, 2018

Gary Derr
Vice President for Executive Operations
Public Records Office
University of Vermont
Waterman Building Room 343
Burlington, VT 05405

RE: FOIA Request Re: Naomi Fukagawa, MD, PhD.

Dear Mr. Derr:

This is a request under the Vermont Public Records Act seeking the production of documents. We request a complete and thorough search of all filing systems and locations for all records maintained by the University of Vermont pertaining to Dr. Naomi Fukagawa, Professor Emerita in the College of Medicine.

This request seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa (searching your server for both naomi.fukagawa@uvm.edu and nfukagawa-nutr-rev@ilsil.org) and employees or representatives of the following corporations or organizations and their associated domains:

- International Life Sciences Institute and @ILSI.org and @ILSINA.org
- The Coca-Cola Company and @Coca-Cola.com and @Coca-ColaCompany.com

This request also seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa that contains the following keywords:

- Nutrition Reviews
- ILSI
- Coke and Coca-Cola and TCCC

This request also seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa and the following individuals, and including, but not limited to, the following email addresses:

- Barbara Bowman: bhb8@cdc.gov and n4789e@me.com
- Paul Coates: coatesp@od.nih.gov
- Eric Hentges: ehentges@ilsil.org
- David Allison: dallison@uab.edu and allison@iu.edu
- David Klurfeld david.klurfeld@ars.usda.gov

Exposing what the food industry *doesn't* want us to know

- The time period covered by this request is from January 1, 2013 to the present.

Please narrow the search results to exclude published academic papers, organizational newsletters, and other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled.

If documents are denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blacked out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Vermont Public Records Act. Please send a memo (with a copy or copies to Becky Morrison) to the appropriate unit(s) in your office to assure that no records related to this request are destroyed.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

We are making this request on behalf of U.S. Right to Know, a 501(c)(3) nonprofit food research organization. The records disclosed pursuant to this request will be used in the preparation of articles for dissemination to the public. Accordingly, we request that you waive all fees in the public interest because furnishing of the information sought by this request will primarily benefit the public. Please send the documents to Becky Morrison in PDF format at becky@usrtk.org.

Please call, rather than write, Becky Morrison at (929) 357-4056 if there are any questions, or if you need additional information.

Thank you so much for your help in filling this request.

Sincerely,



Becky Morrison
Researcher



Gary Ruskin
Co-Director



U.S. RIGHT TO KNOW

March 27, 2019

Gary Derr
Vice President for Executive Operations
Public Records Office
University of Vermont
Waterman Building Room 348
Burlington, VT 05405

RE: FOIA Request Re: Naomi Fukagawa, MD, PhD.

Dear Mr. Derr:

This is a request under the Vermont Public Records Act seeking the production of documents. We request a complete and thorough search of all filing systems and locations for all records maintained by the University of Vermont pertaining to Dr. Naomi Fukagawa, Professor Emerita in the College of Medicine.

This request seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa (searching your server for both naomi.fukagawa@uvm.edu and nfukagawa-nutri-rev@ilsi.org) and employees or representatives of the following corporations or organizations and their associated domains:

- International Life Sciences Institute and @ILSI.org and @ILSINA.org
- The Coca-Cola Company and @Coca-Cola.com and @Coca-ColaCompany.com

This request also seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa that contains the following keywords:

- Nutrition Reviews
- ILSI
- Coke and Coca-Cola and TCCC

This request also seeks all email correspondence - including cc, bcc, and attachments -- to or from Dr. Fukagawa and the following individuals, and including, but not limited to, the following email addresses:

- Barbara Bowman: bbb8@cdc.gov and n4789e@me.com
- Paul Coates: coatesp@od.nih.gov
- Eric Hentges: ehentges@ilsi.org
- David Allison: dallison@uab.edu and allison@iu.edu
- David Klurfeld david.klurfeld@ars.usda.gov

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The time period covered by this request is from January 1, 2008 to the present.

Please narrow the search results to exclude published academic papers, organizational newsletters, and other widely available published materials.

We request that you disclose these documents and materials as they become available to you, without waiting until all the documents have been assembled.

If documents are denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. We request that excised material be "blacked out" rather than "whited out" or cut out and that the remaining non-exempt portions of documents be released as provided under the Vermont Public Records Act. Please send a memo (with a copy or copies to Becky Morrison) to the appropriate unit(s) in your office to assure that no records related to this request are destroyed.

Please advise of any destruction of records and include the date of and authority for such destruction. As we expect to appeal any denials, please specify the office and address to which an appeal should be directed.

We are making this request on behalf of U.S. Right to Know, a 501(c)(3) nonprofit food research organization. The records disclosed pursuant to this request will be used in the preparation of articles for dissemination to the public. Accordingly, we request that you waive all fees in the public interest because furnishing of the information sought by this request will primarily benefit the public. Please send the documents to Becky Morrison in PDF format at becky@usrtk.org.

Please call, rather than write, Becky Morrison at (929) 357-4056 if there are any questions, or if you need additional information.

Thank you so much for your help in filling this request.

Sincerely,



Becky Morrison
Researcher



Gary Ruskin
Co-Director



The University of Vermont

Gary L. Derr
Vice President for Executive Operations

March 29, 2019

VIA ELECTRONIC MAIL

Robert B. Hemley, Esq.
Gravel & Shea
76 St. Paul Street
P.O. Box 369
Burlington, Vermont 05402-0369
rhemley@gravelshca.com

RE: Public Records Request Submitted by U.S. Right to Know

Dear Attorney Hemley:

I am writing on behalf of the University of Vermont (“UVM”) in response to the second request for records submitted by your client, U.S. Right to Know (“US RTK”), dated March 27, 2019. The request sought e-mail correspondence to or from Naomi Fukagawa, Professor Emerita in the UVM College of Medicine and various employees or representatives of third party organizations, and was identical to US RTK’s previous request for records other than the expanded date range.

The University of Vermont denies this second request (except for the production of three e-mails earlier produced) for the same reasons as set forth in my letter to attorney Oliver B. Hall dated March 1, 2019. Further, we agree that U.S. Right to Know would appeal from this denial, and that the University of Vermont would deny any such appeal for the reasons set forth in the letter from Thomas Sullivan to Robert B. Hemley, dated March 12, 2019. We agree that the procedural requirements set forth at 1 V.S.A. §318 are satisfied. In the event that U.S. Right to Know applies for relief to the Civil Division of the Superior Court as set forth in V.S.A. §319, the University of Vermont will not raise any defense based on a failure to comply with the procedural requirements of V.S.A §318.

Sincerely,

Gary L. Derr, Ed.D.
Vice President for Executive Operations

cc: Meghan E. Siket, Esq., Associate General Counsel

