STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 330-4-19 Cncv

U.S. Right to Know,
Plaintiff

v.

University of Vermont,
Defendant

JUDGMENT

The court having granted Defendant's motion for summary judgment, judgment is hereby entered in favor of the University of Vermont.

Dated at Burlington this 26th day of February, 2020.

Helen M. Toor
Superior Court Judge

STATE OF VERMONT

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CIVIL DIVISION
Docket No. 330-4-19 Cncv

U.S. Right to Know vs. University of Vermont

ENTRY REGARDING MOTIONS

Count 1, Access to Records (330-4-19 Cncv)

Title: Motions for Summary Judgment (Motions 4 and)
Filer: University of Vermont(4)/U.S. Right to Know (5)
Attorney: Meghan E. Siket/Robert Hemley
Filed Date: November 25, 2019

Response to Motion 4 filed on 01/08/2020
Response to Motion 5 filed on 01/08/2020
Reply in support of Motion 5 filed 01/22/2020

This is a Public Records Act case. Plaintiff U.S. Right to Know (RTK) sought records from the University of Vermont (UVM) regarding a professor's work on outside journals. UVM denied the request on the ground that the records were not "public records." Both sides have moved for summary judgment. They have each filed a statement of material facts, as well as a joint statement.

Relevant Facts

None of the facts are in dispute. In sum, RTK seeks emails of an emeritus professor of medicine, Naomi Fukagawa, that relate to two entities—the Coca-Cola Company and the International Life Sciences Institute (ILSI)—as well as any emails referencing those entities. In addition, the request seeks emails with a list of five individuals. Although it is not entirely clear who they are, the email addresses suggest that three are employees of federal agencies: the CDC, NIH, and USDA. One appears to be associated with ILSI. The

period requested was from January 1, 2013 forward. That period was later expanded to begin in 2008.

UVM produced some emails, but denied the balance of the request. The denial letter stated that the disputed materials were generated in the course of Dr. Fukagawa's work as the editor-in-chief of Nutrition Reviews, published by ILSI, and as associate editor of the American Journal of Clinical Nutrition.[1] UVM stated that her "editorial responsibilities were not part of her job duties or service/committee assignments at UVM." Denial Letter at 1. The letter also noted that Dr. Fukigawa retired from her tenured position in 2015 and is now an emeritus professor. It also stated that the deliberative process and academic research exceptions would apply, although the only issue raised in UVM's motion is the issue of whether the documents meet the definition of a public record.

The work done by Dr. Fukigawa for the two journals was not directly supervised or directed by UVM. However, having faculty work on such journals is advantageous to UVM's reputation and is encouraged. It can help with recruiting, endowments and fundraising. Work on journals is one element used to evaluate faculty for re-appointment, promotion and tenure. Dr. Fukigawa was given tenure in 2004, prior to the time period at issue here. Thus, she was no longer subject to any reappointment process. However, tenured professors are still expected to participate in scholarship, including such things as editorial boards. Dr. Fukigawa retired in 2015. She was awarded emeritus status and continues to use a UVM email address.

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[1] The letter also listed other materials, such as personal correspondence, that were being withheld. The parties are not fighting over all of the categories withheld, only those related to the professor's duties in connection with the two journals. Joint Statement of Facts ¶ 14.

UVM had no contract with or financial interest in the outside entities at issue here, does not control or have any role in their work, derived no income from them, did not pay Dr. Fukigawa for the work she did for them, and had no role in creating them. The entities are not agents of UVM, do not conduct business on UVM property, and UVM has no authority to terminate or dissolve them. The journals in questions are not products of UVM and UVM had no authority over Dr. Fukigama's work for the journals. Dr. Fukigawa had a contract with ISLI that required her to keep information she received in the course of that work confidential. Disclosure of the requested records could include the names of peer reviewers, which are normally kept confidential in academic publishing. It could also disclose confidential information about investigations of scientific misconduct.

Discussion

The parties first argue over who has the burden of proof here. The court does not find that significant, as the facts are not disputed. The sole issue before the court in these motions is a legal question: are the emails at issue "produced or acquired in the course of public agency business." 1 V.S.A. § 317(b).

There is no dispute that UVM is a semi-public entity and within the scope of the Public Records Act (the Act). The question is whether the specific emails here related to the two journals were created in the course of "public agency business." Unfortunately, that term is not defined in the statute. The mere fact that the records were generated in UVM's email system does not answer the question. The determination is based not on "the location or custodian of the document, but rather its content and the manner in which it was created." Toensing v. Attorney General, 2017 VT 99, ¶ 14, 206 Vt. 1.

RTK argues that because publishing and serving as an editor are encouraged by UVM and bring benefits to UVM, work on such journals is a public record. The court

disagrees. Not every document that is "related in any way to the individual's employment" or "created as a result of the employee's employment" is a public record. Toensing, 2017 VT 99, ¶ 22. While having professors serve as journal editors may be good for the prestige of the university, the content of those journals is not what matters. The specific work done on the journals is not done for the benefit of the employer, and is not directed or owned by the employer. The emails in question "played no role in [University] business as records themselves." Nissen v. Pierce Cty., 357 P.3d 45, 55 (Wash. 2015). The fact that working as a journal editor may look good on the professor's resume and add to the university's credentials does not make the content of the journals and all communications about them pubic records. This is not comparable to the cases RTK cites, where, for example, the Governor's daily calendar played an "essential role . . . in the day-to-day functioning of the Governor's office." Herald Ass'n, Inc. v. Dean, 174 Vt. 350, 354 (2002); *see also* Animal Legal Def. Fund, Inc. v. Institutional Animal Care & Use Comm. of Univ. of Vermont, 159 Vt. 133, 138 (1992) (committee records were public because, inter alia, its members were "appointed by the University's chief executive officer," it filed semiannual reports with the Office of the Provost, it received staff support from the university, and its members could be replaced by the university).

Under RTK's analysis, if the university encouraged outside consulting work, any time a professor was hired as a consultant on a lawsuit, or served as an expert witness, all of the contacts between the professor and the lawyer would be public records. Likewise, if a state agency encouraged its employees to join a gym to stay healthy, because healthier employees saved it money, that would make all the employees' conversations at the gym—or emails scheduling workouts—public records.

Opening up such communications for public inspection is surely not the purpose of the Public Records Act. The Act should be construed broadly in favor of disclosure, but it must be construed in light of its purpose. That is "to ensure that citizens can 'review and criticize' government actions." Toensing, 2017 VT 99, ¶ 20; quoting 1 V.S.A. § 315(a). It "aims to uphold the accountability of the public servants to whom Vermonters have entrusted our government." Toensing, 2017 VT 99, ¶ 28. The fact that the university is a state entity does not mean that professors give up their right to have pursuits that go beyond their direct role as faculty. "All people have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer. " 1 V.S.A. § 315(a). There is no government role here that requires public inspection.

Order

The University's motion for summary judgment is granted. The Plaintiff's motion is denied.

Dated at Burlington this 26th day of February, 2020.

Helen M. Toor
Superior Court Judge

Notifications:
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