IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

JOHN M. BECKER,

Petitioner,

CASE NO.: 2013-CA-5265-0
2013-WR-0000034-A-O

v.

UNIVERSITY OF CENTRAL
FLORIDA BOARD OF TRUSTEES,
("UCF BOT")

Respondent.
_____/

**ORDER ON RESPONDENT'S AMENDED EMERGENCY MOTION TO COMPEL TO COMPEL RETURN OF INADVERTENTLY DISCLOSED DOCUMENTS**

This is a public records case. Now before the Court is the Amended Emergency Motion to Compel Return of Inadvertent Production of the respondent, University of Central Florida Board of Trustees ("UCF" or "respondent"). The Court's disposition of that motion necessarily requires it to decide the ultimate issue of petitioner's entitlement to the documents in issue.

The records sought cover a broad range of documents associated with James Wright ("Wright"), a professor of sociology at the University of Central Florida and editor-in-chief of the Social Science Research Journal ("Journal" or "SSR"). The parties have focused on e-mails sent and received in connection with an article in the June, 2012 edition of the Journal called "How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?" and authored by Mark Regnerus, an associate professor of sociology at the University of Texas at

Austin. The article was based upon something called a "New Family Structure Study." Criticism of the article ensued and soon became an object of nationwide controversy.

While the Regnerus article seems to have become the focus of the parties' attention, the Courts' in camera review of the disputed e-mails demonstrates that the majority relate to other matters including a book Wright was co-authoring about something known as "contract marriage."

The petitioner, John Becker ("Becker" or "petitioner"), is a self-described "investigative journalist" who sent UCF a "Freedom of Information Act request" for the records.

In response to Becker's request, UCF advised that: "The documents were "made by Doctor Wright in his position as editor of SSR and are not university records. As you know, Elsevier publishes SSR. Dr. Wright has contracted directly with and receives remuneration from Elsevier for his work on SSR. Accordingly, any documents relating to SSR, or to Dr. Wright's work on SSR are the property of SSR and not the University of Central Florida." Petitioner, of course, was not satisfied with that response and instituted this action. This reply does not account for e-mails associated with Wright's authorship of a book but UCF has asserted that these communications are "not university business."

Shortly before a scheduled hearing in this matter, UCF produced to Becker's counsel a flash drive containing copies of more than 50,000 e-mails. On June 25, UCF claimed that it had inadvertently produced 357 records and now wants them back.

Of the records UCF wants returned, some are claimed to be "not university business" and thus not public records at all. Others, UCF argues, are public records exempt from inspection because they fall within the purview of the Family Educational Rights and Privacy Act ("FERPA"). *See* § 1002.225(1), Fla. Stat. (2013); 20 U.S.C. section 1232g (2013).

The Court requested that the records in issue be submitted for an in camera review. Generally, "[w]hen statutory exemptions are claimed by the party against whom the public records request has been filed . . . , the proper procedure is to furnish the document to the trial judge for an *in camera* inspection.. . . . At that time, the trial judge can properly determine if the document is, in fact, subject to public records disclosure." *Walton v. Dugger*, 634 So. 2d 1059, 1061-62 (Fla. 1993).

> [I]n-camera inspection of assertedly exempt records is generally the only way for a trial court to determine whether or not a claim of exemption applies. *See Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000) (with respect to "question of entitlement" to assertedly exempt records, commenting, "We fail to see how the trial court can [determine whether records are exempt] without examining the records"); *accord Lopez v. Singletary*, 634 So. 2d 1054, 1058 (Fla. 1993) (remarking that "it is for a judge to determine, in an in camera inspection, whether particular documents must be disclosed").

*Garrison v. Bailey*, 4 So. 3d 683 (Fla. 1st DCA 2009).

As the Court understands it, Becker does not simply argue that the documents are public records-simply by virtue of being stored on a UCF computer or computers. Instead Becker has "asserted that there is a substantial relationship between the official business of UCF and publication of the [J]ournal." (Pet. Resp. to UCF Mot. for Protective Order 2.) This case, then, is unlike *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844 (Fla. 2d DCA 2002) *approved sub nom. State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003) where a newspaper sought a bright-line ruling that all e-mail on a City's computer system was "public record." *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002) *approved sub nom. State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). As *City of Clearwater* involved a "bright line" legal issue no in camera inspection was required. Such is not the case here. Even though the

Court did not *have* to conduct such an examination sua sponte on records claimed to be not public, it is permissible to do so and a proper method to attempt to resolve this dispute.[1]

The Court rejects any contention that e-mails become public by the mere fact of their presence on a computer of a public entity (here UCF) and for this reason also conducted an in camera review of those documents which UCF argues are not public records (as opposed to being exempt).

With respect to those documents which UCF claims are not public records at all (as opposed to being public records statutorily exempt from production), "the burden rests initially with [Becker] to prove that what [he] seeks meets the definition of a public record. *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002), *approved sub nom. State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).[2]

Wright points to his contract with the publisher of SSR, Elsevier, which he has provided to the court and adverse counsel in exceedingly redacted form. He asserts that SSR-related e-mails are Elsevier property, not that of UCF and that "the SSR Journal's records are not purposely compiled and maintained in the course of UCF's official business operations." (Wright Aff. 4/29/13, ¶ 26.) Wright goes on to assert that Elsevier's "publication of its SSR Journal is not an integral part of UCF's decision making process in administering the University." (Wright Aff. 4/29/13, ¶ 22.) He also claims that "Elsevier LTD and its SSR Journal are not organized exclusively for the benefit of UCF or the State of Florida and their

[1] UCF did not object to producing the disputed documents for in camera review.

[2] Becker contends that the burden *always* rests with UCF to show why documents should not be produced because *all* records in UCF's possession are public records by virtue of UCF policy number 4-002. The Court disagrees. In the Court's view, Becker would have UCF's internal policy trump the Florida Supreme Court's decision in *City of Clearwater* which explicitly rejected a bright line rule of possession.

operations are not subject to substantial oversight and ultimate control by UCF." (Wright Aff. 4/29/13, ¶ 23.)

Wright is paid by UCF, his work on the article used UCF facilities and resources, employed students who were paid by UCF but work solely on the Journal. Further, although he utilizes a non-UCF, SSR computer to do SSR work, that computer was purchased with UCF funds. Not only is Wright the editor of the SSR journal but another UCF professor is the managing editor. SSR funds were used to purchase the printer at the UCF sociology department. As Wright testified at his deposition:

> Q. As I understand it, the university, UCF houses your particular journal; is that right?
> A. Yes.

(Wright dep. T16:1-3).

All of the e-mails sent by Wright among those claimed to be "non-public" because they are "not university business" were sent from a "ucf" e-mail address. All of these e-mails sent by Wright are over an electronic signature "Jim Wright, Department of Sociology, University of Central Florida" or something similar which identifies Wright's connection with UCF. The booklet on contract marriage co-authored by Wright was brought to the UCF printer but Wright thought this was too expensive. When Wright sought the assistance of an outside source for preparation of the book's index, Wright again went to UCF for financial help. As with his SSR project, Wright, at times relevant, had at least one UCF student working with him on research for his contract marriage book.

**PUBLIC RECORDS**

The Fifth District Court of Appeal recently provided this explanation of Florida's historically liberal policy of access to public records :

> The Florida Constitution requires that the public have full access to public records, which includes any "public record made or received in connection with the official business of any public body, officer, or employee of the state." Art. I, § 24, Fla. Const. This constitutional right of public access to government records is "virtually unfettered" save for certain constitutional and statutory exemptions. *Rameses, Inc. v. Demings,* 29 So. 3d 418, 421 (Fla. 5th DCA 2010). As repeatedly recognized by this court and others, courts must construe the public records law "liberally in favor of openness and any exemptions from disclosure are construed narrowly and limited to their designated purpose." *Id.; Nat'l Collegiate Athletic Ass'n v. Associated Press,* 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009) ("The right to inspect a public record in Florida is not one that is merely established by legislation, it is a right demanded by the people.... Florida courts construe the public records law liberally in favor of the state's policy of open government."); *see also Lightbourne v. McCollum,* 969 So. 2d 326 (Fla.2007); *WFTV, Inc. v. Sch. Bd. of Seminole,* 874 So. 2d 48, 53 (Fla. 5th DCA 2004); *City of Riviera Beach v. Barfield,* 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994).

*Chandler v. City of Sanford*, 5D12-3735, 2013 WL 4859246 (Fla. 5th DCA Sept. 13, 2013).

The Florida Supreme Court has broadly construed the definition of a "public record" to encompass all materials made or received by an agency in connection with official business, which are used to "perpetuate, communicate, or formalize knowledge." *Shevin v. Byron, Harless Schaffer, Reid & Associates,* 379 So. 2d 633, 640 (Fla. 1980).

## PARTIES' POSITIONS

### UCF

UCF is claiming that many documents inadvertently produced are "not university business" and thus not public records. It argues that Becker is trying to force UCF to turn over private records that are not in its custody or control, but are in the possession of an employee – Wright - who sent and received those records in his private capacity. Many of the requested records, UCF contends, were created pursuant to a private contract between Elsevier LTD, a private, for-profit corporation based in Amsterdam, and Dr. James Wright, an individual. This claim requires the Court to determine what, in this context, is "university business."

The respondent relies heavily upon the case of *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). That case explained that "private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003). The *Clearwater* Court rejected a "mere possession" argument that the simple existence of e-mails on a government computer transforms them into public records. It has divided the documents inadvertently produced as those which are not public records and those which are but are exempt from production by virtue of being "education records."

### BECKER

Becker emphasizes the liberal interpretation given the term "public record" by the Florida Supreme Court and applied by the district courts in various factual contexts. That interpretation has led to holdings where documents were deemed "public records" when they were in the hands of and/or created by third parties. For example, in *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201(Fla. 2d DCA 2009), documents which were maintained on a remote

computer of a private party (the NCAA) were examined by public agents (state lawyers) for a public purpose. These were held to be public records. This result obtained even though the lawyers had signed confidentiality agreements. The district court held that "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d at1208.

Becker has contended that Wright's "research and editorial activities directly support the instructional, service and research missions of UCF" and therefore constitute "official business" of the school. (Becker Reply to Resp. to Pet. for Writ of Mandamus at ¶ 12).

Petitioner also points to *Booksmart Enterprises, Inc. v. Barnes & Noble Coll. Bookstores, Inc*. 718 So. 2d 227 (Fla. 3d DCA 1998). In that case, public college professors gave student reading lists to an off-campus bookstore (Barnes & Noble) so it could stock those books. A competitor, Booksmart, successfully used the Public Records Act to obtain the reading lists.

**DISCUSSION**

This Court recognizes the teaching of the Florida Supreme Court in *City of Clearwater* that not everything on a UCF computer necessarily constitutes a "public record" which must be produced upon request (in the absence of a statutory exemption). For "it cannot merely be the placement of the e-mails on the [UCF] computer system that makes the e-mails public records. Rather, the e-mails must have been prepared 'in connection with official agency business' and be "intended to perpetuate, communicate, or formalize knowledge of some type.'" *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) (*quoting Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633 (Fla.1980)). "The determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d at 154. The simple fact that

documents can be found on UCF computers is not determinative. The converse is also true. "[T]he mere fact that [an] email was sent from [a] private email on [a] personal computer is not the determining factor as to whether the email was a public record." *Butler v. City of Hallandale Beach*, 68 So.3d 278, 281 (Fla. 4th DCA 2011).

The issue here devolves to whether or not documents in question were created or received in connection with the transaction of official business of UCF. In order to decide this issue, the Court must determine what constitutes the school's "official business." The parties cite no case on point and the Court finds none. *City of Clearwater* mandates a "commonsense approach" to resolving this question. *Id*. at 280.

The analysis begins with a reiteration of the Court's rejection of the position that the burden of proof rests at all times upon UCF. *See supra* footnote 2, The college is not claiming a statutory exemption for *all* of the e-mails but rather that many of them are not public records to begin with.

Where a court must decide whether documents are "public records" it is confronted with the difficult truth that:

> It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis.

*Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

There is no case directly controlling the threshold public records issue here.

For guidance in determining the "business" of a university and specifically UCF, the Court notes the legislature's pronouncement on the mission of the state universities in this state:

> (2) The mission of the state system of postsecondary education is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and to develop in students heightened intellectual, cultural, and humane sensitivities; scientific, professional, and technological expertise; and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training, and public service designed to educate people and improve the human condition.

§ 1004.01(2), Fla. Stat. Ann. (2013).

The mission is a broad one and is clearly not restricted to the classrooms and campus at UCF. Doctor Wright, himself, noted the interplay between his work at SSR and his professorship at UCF. He recognized the need for professors to write to succeed. As the Florida Supreme Court noted in *Shevin*, a public record is that which is "intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 640 (Fla.1980).

The Court must now place the documents in question somewhere on the continuum between purely public and purely private. It rejects UCF's assertion that these are records created by a purely private person in the employ of a purely private enterprise. Likewise, the Court does not accept a suggestion that e-mails acquire public status by virtue of being housed in a UCF e-mail system. Given the broad nature of a university's "business" and the broad meaning accorded the term "public record" under the Florida Constitution and section 119, the Court finds that the symbiotic relationship between Wright-as-SSR editor and Wright-as-UCF professor compel the conclusion that the e-mails in question are public records and must be produced if no statutory exemption has been asserted. This is especially true given the mandate that any doubts under the Public Records Act should be resolved in favor of disclosure. *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 304 (Fla. 3d DCA 2001).

The Court is not moved by UCF's protestations that any documents relating to the Journal or to Wright's work on the Journal are property of Elsevier, not the University of Central Florida. The question of what constitutes a public record is one of law for courts to decide based- as *City of Clearwater* teaches and UCF, itself, asserts - upon the nature of the record. It is not for UCF or Elsevier to determine whether a particular document is a public record. "A public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009)

In *Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009), police pilots' personal flight logs were held to be public records. The court observed that these documents were distinguishable from the "purely personal" e-mails at issue in City of Clearwater. *Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289, 1291 (Fla. 3d DCA 2009). Here, Wright's e-mails are not "purely" personal given the interconnection between them and UCF. As one example, in many e-mails, Wright ridicules his graduate assistant who is paid with UCF funds. The "purely" personal standard has been applied in *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 2010) ("monitoring of inmate calls for security purposes is related to official business of the jail, maintaining recordings of purely personal calls is not").

As previously stated, the issue here devolves to whether or not the e-mails in question were created or received in connection with the official business of UCF. The Court has reviewed the e-mails in question and concludes that, with but few exceptions, those which UCF wants returned because they are "not university business" are indeed public records. Wright, of course, is paid by UCF. his work on the Journal utilizes UCF resources and facilities; he utilizes

a UCF graduate student, who is paid with UCF funds and given office space at UCF. Many, if not all, of the e-mails are signed "Jim Wright, Department of Sociology, University of Central Florida." The Court saw none which identified Wright as Editor-in-Chief of the Journal. If there were any, the number is negligible.

The overlap between the Journal and UCF is wide; the connections between the two are many. Wright, himself, has acknowledged the necessity of professorial publication in the academic world, the use of the Journal to formalize, perpetuate and communicate knowledge and the not insignificant use of UCF resources in creating and promoting the Journal all of which redounds to Wright's financial and professional benefit and the concomitant advancement of his department at UCF. While UCF never defined what it meant by its "business," the Court concludes that term to be broad and flexible enough to include Wright's work on the Journal and extends well beyond its classrooms, buildings and campus gates. Therefore, all of the documents UCF wants returned because they are "not university business" and therefore "not public records" may be retained by petitioner WITH THE FOLLOWING EXCEPTIONS:

Tab 128- Credit card info shall not be re-disclosed.

Tab 129- Credit card info shall not be re-disclosed.

Tab 130- Credit card info shall not be re-disclosed.

Tab 131- Credit card info shall not be re-disclosed.

Tab 138- Credit card info shall not be re-disclosed.

Tab 141- Purely personal; not a public record; shall not be re-disclosed and shall be returned.

Tab 143- Purely personal; not a public record; shall not be re-disclosed and shall be returned.

Tab 145- Purely personal; not a public record; shall not be re-disclosed and shall be returned.

Tab 148- Purely personal medical. Not a public record. Shall be returned.

Tab 149- Purely personal medical. Not a public record. Shall be returned.

**EXEMPT - EDUCATION RECORDS**

UCF also seeks the return of some two hundred twenty-three documents which it claims as exempt from production as "education records."

As noted, unlike the question of whether a document is a public record, on the issue of whether a public record is exempt from production, the respondent bears the burden of proof. The government has the burden to demonstrate the applicability of a statutory exemption it claims . *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010). All exemptions must be narrowly construed in favor of access. *Lightbourne v. McCollum*, 969 So. 2d 326, 333-34 (Fla. 2007).

An exemption to Florida's Public Records Law exists for a student's "education records." This exemption provides that "[a] public postsecondary educational institution may not release a student's education records without the written consent of the student to any individual ..., except in accordance with and as permitted by" the Federal Educational Rights and Privacy Act, otherwise known as FERPA. See § 1006.52(2), Fla. Stat. (2009). The Legislature has adopted FERPA's definition of "education records." § 1002.225(1), Fla. Stat. (2009). This Court, therefore, must look to FERPA, 20 U.S.C. section 1232g, to determine whether UCF must produce the e-mails it now claims are exempt from production.

FERPA protects "education records" (and personally identifiable information contained therein) from improper disclosure.[2] Such records generally include "those records, files, documents, and other materials which ... (i) contain information *directly related to a student* and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (emphasis added).

Federal authorities are helpful in applying the Florida education records exemption and they have concluded that:

> FERPA does not prohibit the release of records so long as the student's identifying information is redacted. *See United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002); *Ragusa v. Malvern Union Free Sch. Dist.*, 549 F. Supp.2d 288 (E.D.N.Y. 2008). Likewise, several state courts have recognized that once a record is redacted, it no longer contains "information directly related to a student" and is therefore not an "education record" under FERPA. *See, e.g. Osborn v. Board of Regents of University of Wisconsin System*, 254 Wis. 2d 266, 647 N.W.2d 158, 168 n. 11 (2002) ("once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student"); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. App.2003) (materials are not "education records" if student identifying information has been redacted); *see also Bd. of Tr., Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 337 Mont. 229, 160 P. 3d 482 (2007) (FERPA does not prohibit disclosure of records that do not reveal personally identifying information). Because the names of all students were redacted from the transcript and response, we conclude that these documents do not disclose education records as defined in FERPA, and that the documents do not therefore fall within the exemption created by section 1006.52(1), Florida Statutes.

*Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1211 (Fla. 2009).

The United States Department of Education has adopted a definition of "personally identifiable information" which includes the student's name, a family member's name, the address of the student or family member, personal identifiers such as the student's social security number or student number, and personal characteristics or other information that would make the student's identity easily traceable. *See* 34 C.F.R. § 99.3. Utilizing that definition, personally identifiable information shall be redacted from the documents which UCF claims are education

records and they shall be produced to petitioner. Becker is directed that he shall not disclose any such information of which he may have inadvertently gained knowledge.

WHEREFORE, it is ORDERED that:

1) With the exceptions set forth herein, respondent's emergency motion to compel return of inadvertently disclosed documents is DENIED.

DONE and ORDERED on this _____ day of November, 2013 at Orlando, Orange County, Florida.

_____

DONALD E. GRINCEWICZ
Circuit Judge

**CERTIFICATE OF SERVICE**

I CERTIFY that on November _____, 2013, I served a true copy of this Order upon: Richard E. Mitchell, Esquire**,** GrayRobinson, P.A., 301 East Pine Street, Suite 1400**,** Orlando, FL 32801; and Andrea Flynn Mogensen, Esquire, THE LAW OFFICE OF ANDREA FLYNN MOGENSEN, P.A., 200 South Washington Boulevard, Suite 7, Sarasota FL 34236.

_____

Darlene Mahaleris
Judicial Assistant