

Testimony of John N. Diamond
January 7, 2014

Chairwoman English, Chairman Rice, and honorable members of the committee. My name is John Diamond and I reside in Fayetteville. Thank you for the invitation to join you today.

As you know, until a few months ago I served the University of Arkansas as Associate Vice Chancellor for University Relations. In that role I oversaw the day-to-day operation of the university's communications, marketing, PR and media relations functions.

I also had primary responsibility for receiving and responding to Freedom of Information requests submitted by the news media. It was a job I had personally managed for over 20 years, first in Maine and more recently here in Arkansas. In both states I worked closely—almost daily—with university legal counsel to make sure we fulfilled the university's legal obligations under FOIA.

My prepared remarks today will focus on issues relating to the university's handing of public documents requested under the Freedom of Information Act. I'll provide you with the context in which key actions related to FOIA occurred. I'll share with you documentable examples of the university's willful disregard for the letter and spirit of FOIA. And I will explain to you why I believe citizens of Arkansas deserve further investigation into the possibility of perjury and of efforts to subvert the state's Freedom of Information Act, which as you know is a criminal offense in our state.

Before I address those specific issues, it's important that I explain the process we followed when I handled FOIA requests at the U of A.

Usually a reporter would submit a FOIA request directly to me in the form of an e-mail. When I received the FOIA request, I'd share it in a e-mail with the chancellor and any other university officers whose duties related to the FOIA topic. I'd also share it with the university's legal counsel--primarily attorneys Scott Varady and Bill Kincaid.

Together the lawyers and I would determine which university employees and types of documents were covered by the FOIA request. We'd be looking for what are referred to as "responsive records" specifically requested in the reporter's FOIA. It often will include requests for things like e-mails, letters, memos, budget documents, text messages, videos, meeting schedules, and reports.

We specifically limited our search for responsive records to only those individuals identified in the FOIA by name or by job title. If a reporter's FOIA request was overly broad, we would tell the reporter so in writing. Usually the reporter would then resubmit his or her FOIA with a narrower and more specific scope.

When dealing with university employees on FOIAs, we reminded them that we did not want or expect anyone to create new documents. Arkansas law does not require public entities to create documents if they don't already exist. It would be an onerous task if the law did require that. There would be no reason to create a document in response to a FOIA request.

Sometimes, as part of responding to a FOIA request, I would provide a layperson's explanation of the terminology, coding, or university policy that was referenced in a

particular document. It's done to minimize the possibility that a reporter misunderstands or misrepresents the information he or she receives. This is a standard practice in media relations.

Before I passed along this information to reporters, I would double-check its accuracy with the appropriate university officials. This approach ensured that we demonstrated due diligence in responding to FOIA requests.

This protocol worked well during my first two years as associate vice chancellor. I recall no complaints from university officials. But that began to change shortly after the issues with the Advancement Division's spending became known. Let me address that now.

The first news report about the Advancement situation came on December 3, a few weeks after Chancellor Gearhart had reassigned Brad Choate and Joy Sharp. Following that, the university received numerous FOIA requests over the next several weeks seeking budget information and other documentation regarding the situation. That's what people in the news business do.

It was an intense period for the administration. Chancellor Gearhart had taken over as the acting head of the advancement division. Denise Reynolds, a member of Don Pederson's staff, had taken over administrative responsibility for the Advancement Division's budget. The three associate vice chancellors in the division, Bruce Pontious, Graham Stewart, and I, were desperately in need of regular, accurate budget updates for the current fiscal year. We depended on our weekly meetings with the rest of the Advancement leadership team to gain that information.

With this as the context, it was during this period where the university's adherence to the Freedom of Information Act started to weaken, and the university's senior leadership irritation with the media noticeably started to grow. Allow me to explain.

On January 10 and 11, the university received two detailed FOIA requests seeking records pertaining to the Advancement Division's budget for FY12 and for FY13, as it then stood. Per standard operating procedure, I shared those with the Chancellor, Don Pederson, Denise Reynolds, and the university lawyers to let them know what we'd be working on.

A few days later, Monday, January 14, the Advancement Division's leadership team held its weekly meeting. The meeting consisted of ten people and was chaired by Chancellor Gearhart as our acting division head. His associate vice chancellor for administration, Judy Schwab, also attended.

We worked from a printed agenda, as we always did. The first item on the agenda was the chancellor's update from his executive council meeting held a few hours earlier. Next on the agenda was Denise Reynolds, the budget director. She distributed a monthly budget status report based on the division's budget numbers, broken down by various categories and accounts. It was dated 12/31/2012. It was the most up-to-date FY13 budget breakdown available to us.

As I testified under oath on September 13, the chancellor got angry when he saw the documents Denise was distributing. He questioned why we were creating documents that could be FOIA'd and went into a loud and angry rant about the Advancement

situation, the news media, and Brad Choate. During this outburst he launched what politely could be called an F-bomb, slamming his hand on the table and saying quote “Brad f***** up!” He then shoved the papers Denise had distributed back across the table to her and said, quote, “Get rid of these and don’t create any more.” He then got up and walked out of the room. Meeting over. We dispersed, with a few of us reconveing down the hall to process what we just experienced.

As the newspapers recently reported, two of the participants in the January 14 meeting, Associate Vice Chancellors Bruce Pontious and Graham Stewart, confirmed this account when each was interviewed by the Washington County prosecutor’s office. Another participant said she didn’t recall what happened, according to the prosecutors’ notes said. Another attendee, Denise Reynolds, denied the Chancellor ever said anything about getting rid of documents. The Chancellor himself categorically denied it under oath here in September and reiterated it in November to the prosecutors. The prosecutors never interviewed the remaining four witnesses.

As I mentioned moments ago, there were outstanding FOIA requests from the news media at the time of the January 14 meeting. One of the requests was for the most current breakdown of Advancement’s FY13 budget showing it by unit and categories. The document Denise Reynolds had started to share on January 14 was the closest thing to what the FOIA request sought. It had many of the specific elements being asked for, but not every single one. The law does not require the contents of a document to be an exact match with the FOIA request if it substantially contains what was requested. This one did.

On Tuesday, January 15—the day after the meeting I just described—university attorney Bill Kincaid and I met with Chancellor Gearhart and Don Pederson to discuss the outstanding FOIA requests and review responsive documents. The budget document was not in the financial documents we received from Don Pederson or Denise Reynolds. Consequently, the FOIA response we provided simply said that the breakdown of the current FY13 budget did not exist in documentary form.

The chancellor’s conduct at the January 14 meeting is relevant to understanding key issues before you. Not just because of his denial and the possibility of perjury, but because it initiated a new environment within the division and in other parts of campus, whereby the Chancellor’s and other leaders’ preoccupation with FOIAs and the news media influenced and interfered with our work.

Let me elaborate on this point.

A few days after the January 14 meeting, we received new FOIA requests from the media about the Advancement situation. Per standard operating procedure, I shared the FOIA request with the Chancellor, Don Pederson, Denise Reynolds, and the university’s lawyers. On January 23, I received the following e-mail about the FOIAs from Don Pederson:

John,

This is really getting to be harassment in my mind. I think we all feel, provost, chancellor, Dr. Bobbitt and me, that we need to end this dialogue. They are obviously trying to find something that damages the UA and the chancellor and

there is nothing there, as you well know.

I have spoken to the chancellor and legal counsel. Below is what we believe should be the response to Lisa Hammersly. I do not plan on responding to any further inquiries. I have spent way too much time on this matter, as have you.

Ans then Don provided the following message for me to send to the reporter:

Lisa:

While I appreciate your continued questions, we believe we have answered your numerous inquiries multiple times, the same questions over and over again, and we have spent hours and hours trying to explain every aspect of this issue. We can continue to explain it to you, but we cannot understand it for you. Your questions as well as continued FOIA requests for the same information, to which we have previously responded, borders on the absurd and frankly, harassment.

We have no further comment.

As the university's chief PR advisor, I hate the phrase "no comment." It's the verbal equivalent of holding a trench coat over your head as you leave a courthouse. Fair or not, it suggests guilt. And for a university whose strategic plan is titled "Transparency and Accountability for the People of Arkansas," Don's response suggested neither.

My response is contained in your materials. To summarize it, I wrote that it would be unwise to issue a blanket refusal to respond, as there will be times—many times—where it's in our own best interest to help reporters understand the nature and context of the materials they seek.

I thought my response was respectful and, I hoped, persuasive. But I found that it was not well received.

The next day, January 24, I was called in to the Chancellor's office. He told me he had been getting a lot of pressure from President Bobbitt and trustees to stop me from answering reporters' questions on the Advancement situation. He told me he thought Don Pederson's e-mail message to me was clear about how we should deal with the media.

I explained that that maintaining a kind of radio silence with the media would result in unintended consequences. I said not helping reporters understand certain types of information would aggravate the situation, and would not stop their queries and FOIAs. I then said to him, "I'm trying to help you."

He didn't like that. He stood up and yelled, "Help me? You think you're helping me? Don Bobbitt and the Board told me to shut John Diamond up!"

He said from that point on he wanted the university's legal counsel, not me or my staff, to handle media calls about Advancement. I don't remember what was said after that, other than there wasn't much else said. He showed me the door.

From there I went directly to see Bill Kincaid, the lawyer with whom I did much of our FOIA work. I told him what happened and said that from now on I was supposed to direct media calls about Advancement to him and his associate, Scott Varady. Bill looked stunned and leaned way back in his chair, as if the weight of this new responsibility overwhelmed him. I went back to my office and told my staff to refer media calls to Bill.

That reassignment didn't last long. Late the following week the Chancellor reached out to me to ask what I thought of the idea of him seeking an audit. Media commentators had been calling for an outside audit and at least two legislators had written to him on the topic. On February 5 he formally asked for the audits. From that point on, our standard response when we received questions about the advancement problems was to say that we couldn't elaborate further in order to protect the integrity of the auditors' investigation.

But of course invoking that statement could not prevent us from responding to FOIA requests. The law doesn't allow that. Over the next several months there were multiple FOIA requests for records and budget updates related to Advancement. In several instances I was told updated budget information had not yet been assembled. And I believed it, because my fellow associate vice chancellors and I were not receiving the budget information ourselves.

It wasn't until July 22, during a tense meeting of our Advancement leadership team, that we discovered that monthly budget documents—public documents—had indeed been prepared. But neither our new vice chancellor nor our budget director had been sharing them with the three associate vice chancellors—the very people who were supposed to run the day-to-day operation of the lion's share of the division.

Furthermore, we were kept in the dark about the additional millions of dollars that were quietly being transferred to Advancement so that the new vice chancellor could publicly claim he successfully balanced the FY13 budget after three months on the job.

The lack of financial information we received from our own vice chancellor and budget director was, I believe, a residual effect of the January 14 meeting. It changed behavior, and not for the better. For example, Denise Reynolds sent me and one other associate vice chancellor, Bruce Pontious, an email on February 6 regarding a budget matter. It opened with the statement, "Please delete after reading." Bruce and I understood why she opened her e-mail that way, though later, when the media asked her about it, she couldn't recall why she wrote that.

The chancellor's antagonism toward the news media was ongoing and at times potentially harmful.

On March 1 I received this e-mail that he wanted me to consider sending. It was addressed to Jennifer Cook, an editor with the Democrat-Gazette who was overseeing some of the newspaper's coverage of the Advancement story. The Chancellor had been telling people that Ms. Cook had recently applied for a job at the university, and had done so in the past as well. He felt this was a conflict of interest and wanted her to step away from involvement in the Advancement coverage. So he sent me this letter, with my name as the signatory. When he asked me a day or so later what I thought about it, I told him I thought it was a bad idea and I didn't want to send it. He asked me to continue to think about.

We soon learned that the Jennifer Cook who applied for the job—a library assistant’s job—was not the same Jennifer Cook from the newspaper. Nonetheless, the Chancellor continued to repeat that tale for months.

Another time Chancellor Gearhart and Chris Wyrick asked me to create a university web page on which we would post FOIA requests from the Democrat-Gazette for the public and other media to see. A week later our staff recommended to him and Wyrick that if we did create such a page, it should feature all FOIA requests if our intent was to be transparent. The chancellor wrote back that, no, he just wanted to single out the Democrat-Gazette.

It was within this environment that we were trying to maintain respectful, professional relations with the news media—and abide by the law. A culture of “delete and destroy” came to exist, and not just in Advancement. At one point last summer I discussed this with Scott Varady, one of the university lawyers I worked with on FOIA matters. He said he didn’t always delete emails and documents because he was fearful of losing track of things. I told him those were my own reasons as well.

During all of this I continued to work with the university attorneys on FOIA matters, specifically Scott and Bill Kincaid. On July 22, we received a lengthy FOIA request from the Democrat-Gazette. The FOIA request asked for print and electronic records pertaining to three areas: Advancement’s FY13 budget; its FY14 budget; and the recently announced Advancement reorganization plan, which Chris Wyrick had presented to about 130 division employees at a meeting on June 20.

Scott, Bill, and I discussed the FOIA request and agreed that it was overly broad. Exercising our normal procedures, we notified the reporter that she needed to be more specific about what records she wanted, and from whom she wanted them. She provided those details in supplemental e-mails on July 24.

Per standard practice, I shared the FOIA request with Chancellor Gearhart, Vice Chancellor Wyrick, and Vice Chancellor Pederson. A few days later, on July 29, Scott, Bill, and I were called to the Chancellor’s conference room to meet with him, Wyrick, and Pederson. The Chancellor immediately made it clear that he was angry with the breadth and nature of the latest FOIA request. He repeated something he had said in my presence several times previously—that the media, particularly the Democrat-Gazette, was trying to bring him down. He said he had sources who had told him that editors within the newspaper boasted that they already “got” two university leaders and that he, Gearhart, was next.

The three of us said very little. Scott, as the senior member of our group, tried to delicately explain that under FOIA we had obligations to respond, and that we would handle it with our usual protocol. The chancellor wasn’t convinced and remained agitated. After nearly an hour, he ended the meeting with something to the effect, Go ahead and do what you want but I don’t like it.

Scott, Bill, and I left the chancellor’s office and immediately went down the hall to their office. Scott suggested we contact Fred Harrison, the university system’s senior legal counsel, based in Little Rock. With Fred on speakerphone, Scott related what had just occurred in the Chancellor’s conference room. Fred asked a couple of questions and

then said, "I'll talk to him [meaning the Chancellor]. This won't be the first time I've had to set him straight." That call occurred sometime between 4:30 and 5 p.m. on July 29.

Based on that assurance, Scott, Bill, and I developed the written instructions we agreed should be sent to the university employees cited by name or title in the FOIA. The FOIA request covered print and electronic records, including videos, e-mails, memos, budget reports, and more involving eight individuals currently employed by the university and covering a time period of seven months. We finalized it and sent it to the Chancellor, Wyrick, and Pederson on August 7.

Later that same day, Scott, Bill, Chris Wyrick, and I received an e-mail from the Chancellor. In it he professed his support for Arkansas' FOIA law and his desire to comply fully with it. But he then said he was assigning the July 22 FOIA request to Chris Wyrick; that Chris would be the one to ask for and gather the potentially responsive documents, sort them out, and then give the final product to me to transmit to the reporter who filed the FOIA.

As vice chancellor for Advancement, Chris was my immediate supervisor. I went to him in person and asked if he needed me to provide him with the FOIA message that Scott, Bill, and I had prepared. That's when he told me that he wasn't going to put the request in writing; he was going to ask employees orally and individually whether or not they had responsive documents. I told him that that approach was fraught with problems. This particular FOIA request had multiple parts and covered eight individuals and seven months of records. Without a common, written explanation of what the FOIA request covered, the potential for misunderstanding and incomplete responses was great. He disagreed. Conversation over.

I went next door to see Scott Varady and explained what Chris had just told me. Scott seemed surprised. And while the law doesn't REQUIRE that employees be told in writing exactly what they need to provide, he agreed that the chances of misunderstanding the request is lessened considerably when employees are asked in writing—just as we had been doing with every FOIA that I had been involved with during my three years at the U of A.

On Monday, August 19, I asked Chris Wyrick about the status of the FOIA response. It was nearly a month since we received it and we were being asked about it daily. He said he had finished it but he hadn't had a chance to go over it with the Chancellor because, and I quote, "He's preoccupied with the audit."

The following day, August 20, I spoke with Judy Schwab, the chancellor's associate vice chancellor for administration—his *de facto* chief of staff. I asked her if she knew whether or not Chris and the Chancellor had talked about the FOIA. I was referring to the July 22 FOIA. Judy thought I was talking about something else—an announcement she said Chris had made the previous day at a meeting of the Chancellor and vice chancellors at which he told them all I would no longer be handling FOIAs. I sent Chris a text message asking him about this and he did not respond.

The next day, August 21, four weeks after the FOIA request was received, Chris sent me the totality of documents he had gathered in response to the July 22 FOIA. It was a single, one page document from March regarding scheduling. One page, even though the FOIA request we received sought seven months of e-mails, budget documents,

recordings, and reports from eight senior university employees. As a response to the FOIA it completely lacked credibility. Chris's instruction to me was to forward it to the reporter, which I did reluctantly.

I knew this was far from a complete record. For example, there was a large budget notebook for FY14 that was kept in Denise Reynolds' office. Chris had told the Advancement leadership staff to go in and look at our section of the book but not to copy it or take it out of the office. Furthermore, he wanted us to sign something or send him and Denise an e-mail to confirm that we reviewed the notebook. That notebook was clearly responsive to the FOIA but he did not provide it.

Chris himself maintained a large notebook of materials related to his reorganization plan. He didn't allow any of us to look at it but would bring it to our weekly leadership meetings and hold it up and fan the pages, making a point to show us all the yellow highlights he had added. That information was responsive to the FOIA but was not provided.

There were four copies of a video of the June 20 staff meeting Chris had had us make when he announced the reorganization plans. Under the law, videos are considered electronic documents—the kind sought in the July 22 FOIA. Those videos were not provided in response to the FOIA. Nor was the non-searchable link to the YouTube video of the June 20 meeting that Chris had an employee create so that he could share the video that evening with the Chancellor.

And there were countless e-mail exchanges dealing with these topics between and among individuals, including the Chancellor, Chris, and Don Pederson, that were specifically asked for by name or title. But none of these was provided as responsive to the July 22 FOIA. I know they existed because I was cc'd or blind copied on many of them. I gave the Washington County prosecutor's office over one hundred pages of potentially responsive documents related just to the July 22 FOIA alone. In Arkansas, knowingly and negligently violating a FOIA request is a criminal offense.

I planned to raise my concerns about all of this with Chris at our 4 o'clock meeting the next day, August 22. But on the 22nd I was called to come to Chris's office earlier, at 9 a.m. At the meeting, at which Denise Reynolds was present, Chris told me I was being reassigned. I would no longer be responsible for FOIAs, nor would I have administrative responsibility for University Relations. Instead I was being named associate vice chancellor for campaign communications, an appointment that would last through the end of the calendar year.

I asked him why this action. He said he didn't have to tell me, but said I should already know why. I said I thought it was because of one or possibly two reasons, both of which were retaliatory: my objections to what I believed were intentional efforts to block the university's compliance with FOIA laws; and because of a complaint I had voiced a few weeks earlier to the Chancellor's chief of staff, Judy Schwab, about things Chris had said and done to me and to other members of Advancement that we found offensive and threatening. That made him angry, and the meeting went downhill from there.

The next day at 11:28 a.m. I received a text message from Chris. He told me I had one hour to resign from the university or else he would issue a news release that afternoon saying I had been removed from my position. He e-mailed a letter to me in which he

described my reaction to my reassignment the day before an act of insubordination. I was given 30-days notice and later given a work-from-home assignment for that period.

And then there was the September 13 Legislative Audit hearing. You are all well aware of that. As you know, the Washington County prosecutor issued a report last month in which he said he would not pursue criminal charges in the matters referred to his office. I'm not going to criticize the prosecutors' work. However, I do want to point out some important points as they pertain to my testimony under oath on September 13.

I testified that the Chancellor said on January 14 to "get rid of" documents. He swore he did not say that. Two others besides me independently told the prosecutor that the Chancellor did say that. That's three of the six people the prosecutor interviewed. When half the witnesses agree on what happened, that's enough to at least show probable cause.

The prosecutor said the January 14 budget document that we were told to get rid of eventually was transmitted to the newspaper and therefore the university complied with the FOIA. But what the report did not say was that it was turned over 10 months after it was FOIA'd, well after it could have shed light on the true financial condition of Advancement. The timeliness of that budget document and its relevance to the public interest was important in January, not in November, when it was finally given.

I testified that documents referred to in the audit as unavailable to auditors were shredded before and immediately after the audit request was submitted. The prosecutor's notes show that some payment authorizations that were NOT available to auditors were indeed among the documents that Advancement staff said Denise Reynolds told them to shred.

I testified that despite the university's claims, neither Jean Schook nor the Chancellor interviewed me or the rest of the Advancement leadership team as part of the investigation that led to the October 19, 2012 Schook report. Ironically, the only time the Advancement leadership team's input was sought came nearly a year later, on September 24, 2013. That's when at least five of the individuals present for the January 14 meeting were called in, one by one, to be de-briefed by university lawyers and the Chancellor's personal lawyer, all just a few weeks prior to their interviews with the Washington County prosecutors.

A credibility gap exists and it's damaging to the university and the state. Just 20 months ago the U of A was receiving widespread national praise for the integrity with which it handled the Petrino situation. The only way to restore that kind of public trust and the university's accountability is for some entity—a district or special prosecutor, with or without the help of a grand jury—to put all relevant witnesses under oath to get to the truth. That includes the university's lawyers—all of them good people who know a great deal about what has happened. I respectfully ask that this committee use whatever authority it has to make sure the tuition payers, taxpayers, students, employees, alumni, and donors all learn the truth.

Thank you.