

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
\_\_\_\_\_ DIVISION

TRACIE DUNGAN; and  
LITTLE ROCK NEWSPAPERS, INC.  
d/b/a ARKANSAS DEMOCRAT-GAZETTE

PLAINTIFFS

v. Case No. \_\_\_\_\_

JOHN DIAMOND, in his official capacity  
as VICE CHANCELLOR for UNIVERSITY  
RELATIONS FOR THE UNIVERSITY OF  
ARKANSAS; DAVID GEARHART in his  
official capacity as CHANCELLOR for THE  
UNIVERSITY OF ARKANSAS; and  
THE UNIVERSITY OF ARKANSAS

DEFENDANTS

**COMPLAINT**

Plaintiffs Tracie Dungan and Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette (collectively “Little Rock Newspapers”), for their complaint, state:

**NATURE OF THE ACTION**

1. This is an action brought pursuant to the Arkansas Freedom of Information Act of 1967, as amended, Ark. Code Ann. § 25-19-101 *et seq.* (“FOIA”).

**PARTIES**

2. Tracie Dungan is a citizen of the State of Arkansas.

3. Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette is an Arkansas corporation that operates a statewide newspaper with its main office in Pulaski County, Arkansas.

4. The University of Arkansas is a land grant university with its main campus in Fayetteville, Arkansas. The University of Arkansas has offices and campuses in Pulaski County,

Arkansas. The University of Arkansas receives funding from the State of Arkansas through state appropriations borne by the citizens of Arkansas.

5. John Diamond is the Vice Chancellor for University Relations at the University of Arkansas. At times relevant to this lawsuit, he has been custodian of the records at issue in this FOIA action.

6. David Gearhart is Chancellor of the University of Arkansas. At times relevant to this lawsuit, Dr. Gearhart has maintained control of the records at issue in this FOIA action and has therefore been the custodian of these records.

### **JURISDICTION AND VENUE**

7. Jurisdiction and venue are appropriate in this Court pursuant to Ark. Code Ann. § 25-19-107(a).

### **FACTS**

8. In July 2012, a budget shortfall of \$3.37 million was discovered in the Advancement Division of the University of Arkansas. This budget shortfall had built up prior to June 2012.

9. The Advancement Division of the University of Arkansas employs approximately 150 employees. At the time of the budget shortfall discovery, the Advancement Division was headed by Vice Chancellor Brad Choate (“Mr. Choate”), and the budget officer was Joy Sharp (“Ms. Sharp”).

10. Subsequent to the budget shortfall, Chancellor David Gearhart undertook an investigation of the shortfall. The investigation included, without limitation, explanations for the shortfall by Mr. Choate and Ms. Sharp, an internal audit by University of Arkansas Vice Chancellor Don Pederson, an internal review by Jean Schook, the University of Arkansas’s

treasurer and Associate Vice Chancellor for finance and administration, and other documents and findings. These represent the core information and documents that Chancellor Gearhart, Mr. Diamond, and the University of Arkansas refuse to release to the public under the Arkansas FOIA despite Chancellor Gearhart's assertion that the University of Arkansas has been transparent and accountable about the budget shortfall situation.

11. Subsequent to the internal audit and findings of the treasurer's office, Mr. Choate was stripped of his day-to-day management responsibilities and was notified that his employment with the University of Arkansas will cease as of June 30, 2013. Likewise, subsequent to the internal audit and findings of the treasurer's office, Ms. Sharp was reassigned out of budget management to the University of Arkansas's human resources department and notified that her employment with the University of Arkansas will cease on June 30, 2013. Additionally, Ms. Sharp's pay was cut from \$91,086 to \$68,314 as a result of these findings.

12. On December 5, 2012, Tracie Dungan, a reporter with the Arkansas Democrat-Gazette, emailed a FOIA request to Mr. Diamond requesting certain documents relating to the University of Arkansas Development office that related to the budget shortfall in the Advancement Division. Ms. Dungan requested, specifically, access to the "Internal audit done by Don Pederson" and "Correspondence, letters, e-mails, texts, etc. of Joy Sharp," among other items. A copy of Ms. Dungan's email of December 5, 2012, is attached hereto and incorporated herein as Exhibit 1.

13. Mr. Diamond responded to Ms. Dungan's FOIA request by email on December 5, 2012, and, in that email, Mr. Diamond stated that "Per state FOIA law, certain records which fall under the FOIA exemption for 'employee evaluation or job performance records' (Ark. Code

Ann. § 25-19-105(c)(1)) have been redacted or withheld.” A copy of Mr. Diamond’s email of December 5, 2012, is attached hereto and incorporated herein as Exhibit 2.

14. Ms. Dungan supplemented her original FOIA request on January 10, 2013, in an email to Mr. Diamond. In this supplemental FOIA request, Ms. Dungan reiterated her request for the written responses of Joy Sharp, the “treasurer’s office findings,” the “internal audit done by [Don Pederson],” and other items. A copy of Ms. Dungan’s email of January 10, 2013, is attached hereto and incorporated herein as Exhibit 3.

15. On January 16, 2013, Mr. Diamond responded to the FOIA requests and asserted that the requested written response of University of Arkansas employee Joy Sharp was exempt because it “is part of the employee’s job performance record.” Mr. Diamond added: “Ms. Sharp was specifically requested by the Chancellor to respond to a memorandum which addressed her performance or lack of performance of her job responsibilities as budget director for the Division of Advancement. The record in question is maintained by the Chancellor as a part of the employee’s personnel file.” A copy of Mr. Diamond’s correspondence of January 16, 2013, is attached hereto and incorporated herein as Exhibit 4.

16. Mr. Diamond and the University also refused in this letter of January 16, 2013, to release the treasurer’s findings that had been requested by Ms. Dungan, stating “this record is also a job performance record and therefore is exempt, in its entirety, from release under the Act. The memorandum reflects a review undertaken at the request of the senior university officials and directly addresses the performance or lack of performance of Mr. Choate and Ms. Sharp, and is maintained by the Chancellor as a part of employee personnel records.” (Exhibit 4)

17. Ms. Dungan made another supplemental FOIA request on January 22, 2013, in an email to Mr. Diamond. Once again, under the Arkansas FOIA, Ms. Dungan requested the

written response from Joy Sharp, the treasurer's office findings, and the written response of Brad Choate related to the University changing his job responsibilities and ending Mr. Choate's appointment on June 30, 2013, among other items. A copy of Ms. Dungan's email of January 22, 2013, is attached hereto and incorporated herein as Exhibit 5.

18. The University of Arkansas again denied Ms. Dungan's FOIA requests in correspondence dated January 25, 2013, from associate general counsel Bill Kincaid. A copy of Mr. Kincaid's correspondence of January 25, 2013, is attached hereto and incorporated herein as Exhibit 6.

19. Despite the numerous requests for the findings of the University of Arkansas's treasurer concerning the budget and shortfall of the Advancement Division, the written responses by Mr. Choate and Ms. Sharp, and the internal audit, the University of Arkansas, Mr. Diamond, and Dr. Gearhart have refused to produce the requested documents.

20. Defendants' conduct violates the clear dictates of the Arkansas Freedom of Information Act.

### **GROUND FOR RELIEF**

21. Paragraphs 1 through 20 of the Complaint are incorporated herein as if fully set forth word for word.

22. Defendants violated the Arkansas FOIA by not producing the requested documents within three working days. Indeed, it has been over two months since the initial requests were made by Tracie Dungan and Little Rock Newspapers.

23. The University of Arkansas, Mr. Diamond, and Dr. Gearhart assert that the requested documents are exempt from disclosure because they constitute employee's job performance records under Ark. Code Ann. § 25-19-105(c)(1). The University of Arkansas also

seemingly places importance on the fact that the records in question have been placed in the personnel files of Mr. Choate and Ms. Sharp.

24. Release of the requested documents plainly would not constitute a clearly unwarranted invasion of personal privacy in that the documents were explanations by University of Arkansas employees of a multi-million dollar shortfall at the University of Arkansas Advancement Division. The documents were requested for the purpose of explaining how the budget shortfall was created and why it was not detected earlier. The documents were not requested to evaluate the employees. The documents would not constitute an invasion of personal privacy, and, thus, the fact that the documents have been placed in the employees' personnel files does not exempt the documents.

25. Likewise, the claimed exemption as an employee-evaluation or job-performance record fails. The treasurer's report, the internal audit, and the documents prepared by Mr. Choate and Ms. Sharp were created to explain the budget shortfall, not specific conduct by the two employees. The University of Arkansas cannot hide embarrassing documents by claiming they were later used to evaluate and discipline employees.

26. Even if the records in question were exempt as employee evaluations – which Plaintiffs do not concede – they must be disclosed regardless because both Mr. Choate and Ms. Sharp have already been suspended from their jobs. The University of Arkansas has effectively terminated them by moving them to another position or terminating their responsibilities until their terms expire. The determination by a University of Arkansas official to allow them to finish out a term does not mask the fact they have been suspended from their positions and terminated as of June 2013.

27. There is a compelling public interest in knowing the explanation for the budget shortfall of \$3.37 million in the Advancement Division of the University of Arkansas.

28. Pursuant to the FOIA, the court should order Defendants to produce the requested documents and award to Plaintiffs their attorneys' fees and costs pursuant to Ark. Code Ann. § 25-19-107(d)(1).

WHEREFORE, Plaintiffs Tracie Dungan and Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette pray that the Court order Defendants John Diamond, in his official capacity as Vice Chancellor for University Relations for the University of Arkansas, David Gearhart, in his official capacity as Chancellor for the University of Arkansas, and the University of Arkansas to provide the requested information and documents; award to Plaintiffs Tracie Dungan and Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette their reasonable attorneys' fees and costs in bringing this action; and for all other just and proper relief.

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