

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JUDICIAL WATCH, INC., a District of
Columbia corporation, and THE DAILY
CALLER NEWS FOUNDATION,

*Petitioners Below-
Appellants,*

v.

DELAWARE DEPARTMENT OF
JUSTICE and UNIVERSITY OF
DELAWARE,

*Respondents
Below-Appellees.*

C.A. No. _____

NOTICE OF APPEAL

Petitioners Below-Appellants Judicial Watch, Inc. and The Daily Caller News Foundation (together, “Appellants”) hereby appeal the Chief Deputy Attorney General’s June 25, 2020 Opinion No. 20-IB19 (the “Judicial Watch Opinion,” attached hereto as Exhibit A) and the Chief Deputy Attorney General’s July 1, 2020 Opinion No. 20-IB20 (the “DCNF Opinion,” attached hereto as Exhibit B, together with the Judicial Watch Opinion, the “Opinions”), which rejected Appellants’ petitions pursuant to 29 *Del. C.* § 10005(e) appealing the University of Delaware’s denial of Appellants’ April 30, 2020 requests for public documents under Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA,” or the “Act”). In support of this appeal, Appellants allege as follows:

This Court has jurisdiction over this appeal under 29 *Del. C.* § 10005(b), which is being filed within 60 days of the issuance of the Opinions. Appellants respectfully ask this Court to reverse legal and factual errors contained in the Opinion and order the University of Delaware to disclose all public records responsive to the requests. In support, Appellants state the following:

1. Appellant Judicial Watch, Inc. (“Judicial Watch”) is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street, S.W., Suite 800, Washington, DC 20024. Petitioner seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Judicial Watch regularly requests records under federal and state “open records” laws, analyzes the responses and any records it receives, and disseminates its findings and the records to the public to inform them about their government.

2. Petitioner the Daily Caller News Foundation (“DCNF”) has its principal place of business at 1920 L Street, N.W., Suite 200, Washington, DC 20036. Founded in 2011 by Tucker Carlson, a 20-year veteran of print and broadcast media, and Neil Patel, former chief policy adviser to Vice President Dick Cheney, DCNF is a 501(c)(3) non-profit organization providing original investigative reporting from a team of professional reporters that operates for the public benefit. DCNF’s website reaches approximately three million unique

monthly visitors and its content, which is available without charge to any eligible news publisher, is published by The Daily Caller, Yahoo News, Business Insider, and a growing host of other media outlets, reaching a combined audience estimated in excess of 30 million readers.

3. The Board of Trustees of Respondent Below-Appellee University of Delaware (the “University”) is a public body, and the University’s documents relating to the expenditure of public funds are public records. *See 29 Del. C. § 10002(i)*. The University has possession, custody, and control of the records to which Appellants seek access.

4. The Delaware Department of Justice, and the Chief Deputy Attorney General, are vested, in the first instance, with the duty to determine whether a violation of FOIA has occurred or is about to occur. *See 29 Del. C. § 10005*.

5. On April 30, 2020, Judicial Watch submitted a FOIA request (the “Judicial Watch Request”) to the University seeking:

A. Any and all records regarding, concerning, or related to the proposed release of the records pertaining to former Vice President Joe Biden's tenure as a Senator that have been housed at the University of Delaware Library since 2012. This request includes, but is not limited to, any and all related records of communication between any official, employee, or representative of the University of Delaware and any other individual or entity, as well as any notes, agenda, minutes, or similar records created in preparation for, during, and/or pursuant to any meeting of the Board of Trustees during which the proposed release of the records was discussed.

B. Any and all records of communication between any trustee, official, employee or representative of the University of Delaware and former Vice President Biden, any representative of his presidential campaign, or any other individual acting on his behalf between January 1, 2018 and the present.

6. On May 20, 2020, the University denied Judicial Watch's request, stating, without corroboration, that public funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.

7. On May 26, 2020, Judicial Watch filed a petition with the Office of the Attorney General under 29 *Del. C.* § 10005(b) for a determination whether the University violated FOIA by denying the Judicial Watch Request.

8. On June 5, 2020, the University responded to the Petition, and again stated without corroboration that “[p]ublic funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.”

9. On June 25, 2020, the Chief Deputy Attorney General issued the Judicial Watch Opinion, concluding that the University had not violated FOIA when it denied Judicial Watch's request. The Chief Deputy Attorney General's determination is largely based on the University's uncorroborated representation that no public funds were used to support the Joseph R. Biden, Jr. Senatorial Papers.

10. On April 30, 2020, DCNF submitted a FOIA request (the “DCNF Request”) to the University seeking:

A. All agreements, including modifications, revisions, or updates, concerning the storage of more than 1,850 boxes of archival records

and 415 gigabytes of electronic records from Joe Biden's senate career from 1973 through 2009.

- B. Correspondence including but not limited to email, phone and written communications between staff of the University of Delaware Library and Joe Biden or members of Joe Biden's senatorial staff, Joe Biden's vice-presidential staff or Joe Biden's political campaign staff, or for anyone representing any of those entities between 2010 to the date of this request about Joe Biden's senate records.
- C. Any logs or sign-in sheets recording any individuals who have visited the special-collections department where records from Joe Biden's senate career are stored between 2010 to the date of this request.
- D. All records from Joe Biden's Senate career that have been submitted to the University of Delaware Library.

11. On May 20, the University denied the DCNF request, on the basis that the documents “requested do not relate to the expenditure of public funds.”

12. On May 29, 2020, DCNF filed a petition with the Office of the Attorney General under 29 *Del. C.* § 10005(b) for a determination whether the University violated FOIA by denying DCNF's request (the “DCNF Petition”).

13. On July 1, 2020, the Chief Deputy Attorney General issued the DCNF Opinion, concluding that the University had not violated FOIA when it denied the DCNF request. As with the Judicial Watch Opinion, the DCNF Opinion is based in part on the University's uncorroborated representation that no public funds were or are used to support the Joseph R. Biden, Jr. Senatorial Papers.

14. Respectfully, the Opinions contain the following errors of law from which Appellants seek this Court's review:

a. Both Opinions improperly shift the burden of proof to Appellants, in violation of 29 *Del. C.* § 10005(c). The Chief Deputy Attorney General accepted the University's representations that no public funds are used to support the Joseph R. Biden, Jr. Senatorial Papers at face value without factual support. The Judicial Watch Opinion even refers to the University's uncorroborated statements as a "factual record" and concludes that the requested records are therefore not "public records" subject to FOIA.

b. Both Opinions err by concluding that the Joseph R. Biden, Jr. Senatorial Papers are not "public records" as defined by 29 *Del. C.* § 10002(1).

c. Both Opinions fail to analyze whether a violation of FOIA occurred, in violation of 29 *Del. C.* § 10005(b), based on the Opinions' erroneous burden-shifting, and the erroneous conclusion that the Joseph R. Biden, Jr. Senatorial Papers are not "public records."

d. In addition to the above errors, the DCNF Opinion is based in part on an erroneous conclusion concerning the University's library's public vs. private status.

15. As a result of the Opinions, the University has failed to conduct sufficient searches for records responsive to Appellants' FOIA requests, and

Appellants have been denied their legal right to inspect public records under 29 *Del. C.* § 10003.

WHEREFORE, Appellants respectfully request that the Court:

(1) Issue a citation to the custodian of records for the Attorney General's office directing such custodian to send the Superior Court a certified copy of the record of the proceedings below, including a typewritten copy of the evidence;

(2) Set a schedule pursuant to which the parties may submit written briefs in support of their arguments on appeal;

(3) Declare that the Opinions contain the errors of law referenced above;

(4) Order that the University produce all public records responsive to the Judicial Watch Request and the DCNF Request;

(5) Award Appellants their attorneys' fees and costs pursuant to 29 *Del. C.* § 10005; and

(6) Grant such other relief as the Court deems just and proper.

Dated: July 2, 2020

HALLORAN FARKAS + KITTLA LLP

/s/ William E. Green, Jr.

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*Counsel for Petitioners Below-
Appellants Judicial Watch, Inc. and The
Daily Caller News Foundation*

EXHIBIT A



KATHLEEN JENNINGS
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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB19

June 25, 2020

VIA EMAIL

Sean Dunagan
Judicial Watch, Inc.
SDunagan@JUDICIALWATCH.ORG

RE: FOIA Petition Regarding the University of Delaware

Dear Mr. Dunagan:

We write in response to your correspondence alleging that the University of Delaware (“University”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. As set forth below, we conclude that the University has not violated FOIA with respect to your records request.

BACKGROUND

On April 30, 2020, you filed a FOIA request with the University seeking the following records:

1. Any and all records regarding, concerning, or related to the proposed release of the records pertaining to former Vice President Joe Biden’s tenure as a Senator that have been housed at the University of Delaware Library since 2012. This request includes, but is not limited to, any and all related records of communication between any official, employee, or representative of the University of Delaware and any other individual or entity, as well as any notes, agendas, minutes, or similar records created in preparation for, during, and/or pursuant to any meeting of the Board of Trustees during which the proposed release of records was discussed.
2. Any and all records of communication between any trustee, official, employee, or representative of the University of Delaware and former Vice President

Biden, any representative of his presidential campaign, or any other individual acting on his behalf between January 1, 2018 and the present.¹

By email dated May 20, 2020, the University responded to your request, stating that it had no responsive public records. The University clarified “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.”² In addition, the University stated that the full Board of Trustees holds public meetings, but the senatorial papers were not addressed at a full Board meeting. The University also referred you to its website regarding access to the Biden Senatorial Papers. This Petition followed.

The Petition challenges the University’s denial of access to the requested records on two grounds. First, you argue that because the senatorial papers are housed at the University’s library, the archival storage space and staff members’ time both constitute “things of value,” and therefore, are expenditures of public funds.³ Second, you argue that the University failed to meet its obligation to search for the communications between the University and Vice President Biden and his representatives, contending that the Board of Trustees’ lack of discussion is not relevant, as “[t]he Board of Trustees is not the only component of the University that is subject to the Freedom of Information Act.”⁴

On June 5, 2020, the University’s counsel responded to the Petition (“Response”). The University argues that not all of its activities are subject to FOIA. Rather, its full Board of Trustees is considered a “public body” and must comply with the requirements for a “meeting” as defined by FOIA. Further, the University states its records are not considered “public records” unless those records relate to the expenditure of State dollars. Noting that the State provides approximately 11% of the University’s yearly operating budget, the University contends there are many areas of the University not supported with public funds. Accordingly, the University argues that it appropriately denied your request, stating “[p]ublic funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.”⁵ The University states the full Board of Trustees did not address this matter at a meeting; thus, no agendas or minutes are available to provide. Finally, the University states that the communications sought between the University and Vice President Biden or his presidential campaign are not considered public records, “as the University has not provided public funds to Vice President Biden or his presidential campaign.”⁶

¹ Petition.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Response.

⁶ *Id.*

DISCUSSION

FOIA does not apply to the University of Delaware with two specific exceptions. First, the Board of Trustees is a public body “and each meeting of the full Board of Trustees . . . [is] a ‘meeting.’”⁷ Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”⁸ Public funds are defined as “those funds derived from the State or any political subdivision of the State.”⁹ To aid in identifying such records, FOIA also requires that “any university request for proposal, request for quotation, or other such document soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure proposed to involve any amount or percentage of public funds by or on behalf of the university shall indicate on the request for proposal or other such document that it relates to the expenditure of public funds.”¹⁰

Neither category of records requested here falls into these exceptions. Your request seeks the records and communications related to the proposed release of the senatorial papers and communications on any topic between the University and Vice President Biden or his campaign. FOIA deems those records relating to public expenditures subject to the public records requirements, not records on any topic. The University’s counsel specifically states that no public funds were used for the senatorial papers and no public funds were paid to Vice President Biden or his campaign.¹¹ As such, we find nothing in this factual record indicating the records you requested relate to the expenditure of public funds, and thus, these records are not considered public records subject to FOIA.¹²

CONCLUSION

For the above reasons, this Office concludes that the University has not violated FOIA as alleged.

⁷ 29 *Del. C.* § 10002(i).

⁸ *Id.*

⁹ 29 *Del. C.* § 10002(k).

¹⁰ 29 *Del. C.* § 10002(i).

¹¹ *See Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations made by the public body’s attorney).

¹² *See Del. Op. Att’y Gen.* 10-IB06, 2010 WL 3195780, at *4 (July 15, 2010) (finding that certain bid documents, contracts, payment records, and funding documents of Delaware State University were “public records” as defined by FOIA); *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000) (finding that “[a]ny documents relating to the spending of state funds for those infrastructure improvements are ‘public records’”).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Jennifer M. Becnel-Guzzo, Associate Vice President and Deputy General Counsel

EXHIBIT B



KATHLEEN JENNINGS
ATTORNEY GENERAL

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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB20

July 1, 2020

VIA EMAIL

Andrew Kerr
Daily Caller News Foundation
akerr@dailycallernewsfoundation.org

RE: FOIA Petition Regarding the University of Delaware

Dear Mr. Kerr:

We write in response to your correspondence alleging that the University of Delaware violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. As set forth below, we conclude that the University has not violated FOIA with respect to your records request.

BACKGROUND

On April 30, 2020, you filed a FOIA request with the University seeking the following records:

1. All agreements, including modifications, revisions, or updates, concerning the storage of more than 1,850 boxes of archival records and 415 gigabytes of electronic records from Joe Biden's senate career from 1973 through 2009.
2. Correspondence including but not limited to email, phone and written communications between staff of the University of Delaware Library and Joe Biden or members of Joe Biden's senatorial staff, Joe Biden's vice presidential staff or Joe Biden's political campaign staff, or for anyone representing any of those entities between 2010 to the date of this request about Joe Biden's senate records.
3. Any logs or sign-in sheets recording any individuals who have visited the special-collections department where records from Joe Biden's senate career are stored between 2010 to the date of this request.

4. All records from Joe Biden's Senate career that have been submitted to the University of Delaware Library.¹

By email dated May 20, 2020, the University responded to your request, stating that it had no responsive public records. The University stated that the “documents you have requested do not relate to the expenditure of public funds.”² The University also referred you to its website regarding access to the senatorial papers. This Petition followed.

This Petition challenges the University’s denial of access to the requested records, arguing that these records relate to the expenditure of public funds. The Petition states the University received over \$118 million in State funds in fiscal year 2019, most of which was allocated to a general unrestricted fund, in addition to a \$3.6 million contingency funds for personnel costs “which could have been used to pay the salaries of University of Delaware library employees” who are responsible for curating and managing the marketing for the senatorial papers.³ Finally, you note that the purpose of the donation of these records was to make them available for public access.

On June 11, 2020, the University’s counsel responded to the Petition (“Response”). Noting that the State provides approximately 11% of the University’s yearly operating budget, the University contends there are “many areas of the University . . . not supported with public funds.”⁴ The University states that it appropriately denied your request, stating “[p]ublic funds are not used to support the Joseph R. Biden Jr. Senatorial Papers.”⁵ The University also explicitly denies your speculation that the two identified employees are paid with public funds; the University’s counsel states they are not. The University further contends even if such salaries were publicly funded, that would not render every document that employee reviews, creates, or receives a public record. The University notes that its full Board of Trustees has not discussed the senatorial papers, meaning that there no public meeting records to provide. Finally, the University states that your request for the log of library patrons does not relate to public expenditures, and even if they did, FOIA’s exemption regarding library patrons’ records would apply.

¹ Petition.

² *Id.*

³ *Id.*

⁴ Response.

⁵ *Id.*

DISCUSSION

FOIA does not apply to the University of Delaware with the exception of two specific areas. First, the Board of Trustees is a public body, “and each meeting of the full Board of Trustees . . . [is] a ‘meeting.’”⁶ Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”⁷ Public funds are defined as “those funds derived from the State or any political subdivision of the State.”⁸ To aid in identifying such records, FOIA also requires that “any university request for proposal, request for quotation, or other such document soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure proposed to involve any amount or percentage of public funds by or on behalf of the university shall indicate on the request for proposal or other such document that it relates to the expenditure of public funds.”⁹

The University’s counsel specifically states that no public funds were used for the senatorial papers,¹⁰ and thus, your first and second requests do not seek public records related to the expenditure of public funds.¹¹ The third request also does not seek public records, as a library patron log does not relate to the expenditure of public funds and as the University points out, such records are also exempt from FOIA as “records of a public library which contain the identity of a user and the books, documents, films, recordings or other property of the library which a patron has used.”¹² Finally, the request seeks to obtain the senatorial papers from the University’s library using the FOIA process. Attempting to access library records through the FOIA process is an inappropriate use of FOIA that does not advance FOIA’s objective of furthering the accountability of government to its citizens.¹³ Moreover, the FOIA statute does not designate the University library as a public body nor as discussed above, are the senatorial papers public records.

⁶ 29 *Del. C.* § 10002(i).

⁷ *Id.*

⁸ 29 *Del. C.* § 10002(k).

⁹ 29 *Del. C.* § 10002(i).

¹⁰ *See Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations made by the public body’s attorney).

¹¹ *See Del. Op. Att’y Gen.* 10-IB06, 2010 WL 3195780, at *4 (July 15, 2010) (finding that certain bid documents, contracts, payment records, and funding documents of Delaware State University were “public records” as defined by FOIA); *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000) (finding that “[a]ny documents relating to the spending of state funds for those infrastructure improvements are ‘public records.’”).

¹² 29 *Del. C.* § 10002(l)(12).

¹³ 29 *Del. C.* § 10001.

CONCLUSION

For the above reasons, this Office concludes that the University has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Jennifer M. Becnel-Guzzo, Associate Vice President and Deputy General Counsel