

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
NATURE AND STAGE OF THE PROCEEDINGS`	1
QUESTIONS PRESENTED.....	3
STATEMENT OF FACTS	3
A. The Judicial Watch FOIA Request.....	4
B. The DCNF Request	6
LEGAL ARGUMENT	9
I. THE OPINIONS IMPROPERLY SHIFT THE BURDEN OF PROOF TO APPELLANTS IN VIOLATION OF 29 <i>DEL. C.</i> § 10005(C).....	9
II. THE OPINIONS ERRONEOUSLY CONCLUDE THAT THE REQUESTED RECORDS ARE NOT “PUBLIC RECORDS” AS DEFINED BY 29 <i>DEL. C.</i> § 10002(1).	13
III. THE UNIVERSITY FAILED TO CONDUCT SUFFICIENT SEARCHES FOR RECORDS RESPONSIVE TO APPELLANTS’ FOIA REQUESTS, DENYING APPELLANTS’ LEGAL RIGHT TO INSPECT PUBLIC RECORDS UNDER 29 <i>DEL. C.</i> § 10003	18
IV. THE COURT SHOULD AWARD APPELLANTS THEIR ATTORNEYS’ FEES AND COSTS UNDER 29 <i>DEL. C.</i> § 10005(d).....	19
CONCLUSION	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.</i> , 1994 WL 274295 (Del. Ch. May 19, 1994)	12
<i>Emerald Partners v. Berlin</i> , 726 A.2d 1215 (Del. 1999)	17
<i>Gannett Co., Inc. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.</i> , 840 A.2d 1232 (Del. 2003)	19
<i>Guy v. Judicial Nominating Comm’n</i> , 659 A.2d 777 (Del. Super. Ct. 1995)	5
<i>O’Neill v. Town of Middletown</i> , 2007 WL 1114019 (Del. Ch. Mar. 29, 2007)	9
<i>U.S. Dept. of Justice v. Tax Analysts</i> , 492 U.S. 136 (1989)	9
 <u>Attorney General Opinions</u>	
<i>Del. Op. Att’y Gen. 02-IB30</i> , 2002 WL 31867904 (Dec. 2, 2002)	9
<i>Del. Op. Att’y Gen. 17-DB59</i> , 2017 WL 6348853 (Nov. 20, 2017)	11
 <u>Statutes and Rules</u>	
29 <i>Del. C.</i> § 10001	3
29 <i>Del. C.</i> § 10002	<i>passim</i>
29 <i>Del. C.</i> § 10003	3
29 <i>Del. C.</i> § 10005	<i>passim</i>
 <u>Secondary Sources</u>	
37A AM. JUR. 2d Freedom of Information Acts § 514 (1994)	9

PRELIMINARY STATEMENT

This is an appeal by Petitioners Below-Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) (together “Appellants”) of the Attorney General’s June 25, 2020 Opinion No. 20-IB19 (the “Judicial Watch Opinion”) and the Attorney General’s July 1, 2020 Opinion No. 20-IB20 (the “DCNF Opinion,” and together with the Judicial Watch Opinion, the “Opinions”). The Opinions rejected Appellants’ petitions pursuant to 29 *Del. C.* § 10005(e) appealing the 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”) by the University of Delaware (the “University” or “Appellee”).

For the reasons stated herein, Appellants respectfully request that this Court reverse legal and factual errors contained in the Opinions and order the University of Delaware to disclose all public records responsive to the Requests (as defined below).

NATURE AND STAGE OF PROCEEDINGS

On July 2, 2020, Appellants filed the Notice of Appeal in this action, seeking reversal of the Opinions, which rejected Appellants’ petitions pursuant to 29 *Del. C.* § 10005(e) appealing the University’s denial of Appellants’ April 30, 2020 requests for public documents under FOIA.

On July 15, 2020, the Delaware Department of Justice (the “DDOJ”) filed a letter informing the Court that it would not file an answering brief or otherwise participate in this appeal, as the adverse interests in this matter are between the Appellants and the University.

On July 22, 2020, the DDOJ filed the Certification of Record attaching a copy of the original records as maintained in the files of the DDOJ relating to this matter.

On July 30, 2020 the New Castle County Sheriff filed a Writ *Non Est Inventus* setting forth the failed attempts of service on the University, which was closed due to COVID-19 on the occasions service was attempted.

On July 31, 2020, the University’s General Counsel accepted service of the Praecipe, Citation on Appeal, Notice of Appeal, the Summons, and the Civil Case Information Sheet. On August 11, 2020, Appellants filed a letter, countersigned by the University of Delaware’s counsel, acknowledging the University’s acceptance of service.

On August 17, 2020, counsel for the University entered their appearance, and the parties submitted a proposed briefing schedule to the Court. On August 18, 2020, the Court entered the briefing schedule.

This is Appellants’ Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20.

QUESTIONS PRESENTED

1. Did the Opinions improperly shift the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c)?
2. Did the Opinions err by concluding that the requested records are not “public records” as defined by 29 *Del. C.* § 10002(1)?
3. Has the University failed to conduct sufficient searches for records responsive to Appellants’ FOIA requests, thus denying Appellants their legal right to inspect public records under 29 *Del. C.* § 10003?
4. Should the Court award Appellants their attorneys’ fees and costs under 29 *Del. C.* § 10005(d)?

STATEMENT OF FACTS

In 2012, the University of Delaware Library acquired the Joseph R. Biden, Jr. Senatorial Papers (the “Senatorial Papers”), comprising more than 1,850 boxes of archival records from Vice President Biden’s tenure in the Senate. According to the University’s Library websites, the Senatorial Papers have been “donated ... to the University of Delaware.”¹

¹ See <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/> (last visited August 21, 2020).

A. The Judicial Watch Request.

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.

Certified Record at 000007-08 [Transaction I.D. 65856530]. The Judicial Watch Request thus solely seeks communications *about* the proposed release of the Senatorial Papers, and any communications between the University on the one hand, and former Vice President Biden, or any individual acting on his behalf, on the other hand.

On May 20, 2020, the University responded by email and denied Judicial Watch’s request, stating, without corroboration or reference to a source, that “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.” *Id.* at 000006. The University went on to say that

“[t]he Joseph R. Biden, Jr. senatorial papers were never addressed in a meeting of the full Board of Trustees. Therefore the University has no public records responsive to your request.” *Id.*

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 (the “Judicial Watch Petition”). *Id.* at 000001-03.

The Judicial Watch Petition notes with respect to part one of the Judicial Watch Request that “the Biden senatorial records are housed at the University of Delaware library and overseen by University of Delaware staff,” and that because “both archival storage space and the time of professional staff members are things of value, we disagree with the University’s assertion that there have been no expenditures of public funds related to the records.” *Id.* at 000003. The Judicial Watch Petition goes on to note that the records sought pertain to activity by the University that entails the expenditure of public funds, and because the University did not conduct an adequate search for responsive documents, it has failed to satisfy its obligations under FOIA. *Id.*

On June 5, 2020, the University responded to the Judicial Watch Petition, and admitted that “[t]he State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget.” *Id.* at 000017.

The University noted that the “state appropriation makes up about 11% of the University’s operating budget,” and again asserted without corroboration that “[p]ublic funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.” *Id.* The University did not volunteer any information regarding the actual source of the funds used to support the Senatorial Papers, or include any sources confirming the assertion that public funds are *not* used to support the Senatorial Papers.

On June 25, 2020, the Chief Deputy Attorney General (the “CDAG”) issued the Judicial Watch Opinion, concluding that the University had not violated FOIA when it denied the Judicial Watch Request. *Id.* at 000025-28. The Judicial Watch Opinion is largely based on the University’s uncorroborated representation that “no public funds were used for the senatorial papers and no public funds were paid to Vice President Biden or his campaign.” *Id.* at 000027.

B. The DCNF Request.

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.

Id. at 000029. The DCNF Request thus seeks the agreement governing Vice President Biden's donation of the Senatorial Papers to the University, communications between University staff and anyone representing Vice President Biden, records of anyone visiting the still-private senatorial records, and the Senatorial Papers themselves.

On May 20, the University denied the DCNF Request, largely on the basis that the records "requested do not relate to the expenditure of public funds." *Id.* at 000031.

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 the DCNF Request (the "DCNF Petition"). *Id.* at 000029-30. The DCNF's submission in support of the DCNF Petition notes that the "University of Delaware is a taxpayer-funded entity, having been appropriated \$118.7 million in Delaware state funds in the fiscal year ending June 30, 2019, \$92.4 million of which was allocated into a general unrestricted fund." *Id.* at 000041. The DCNF's submission further notes that "Delaware provided a \$3.6 million

contingency fund to the University in the 2019 fiscal year exclusively for personnel costs,” and notes that these funds could have been used to pay the salaries of L. Rebecca Johnson Melvin, who serves as the Manuscripts Librarian and Curator for the Senatorial Papers, and Andrea Boyle Tippet, the Director of External Relations for the Office of Communications and Marketing, who manages public relations requests related to the Senatorial Papers. *Id.* at 000041.

On June 11, 2020, the University made its submission in response to the DCNF Petition, again admitting that “[t]he State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget.” *Id.* at 000049. The University also stated that public funds are not used to support the Senatorial Papers, and concluded that the Senatorial Papers and related documents, including the gift agreement and correspondence regarding the papers, are not public records under FOIA. *Id.* at 000049-50.

On July 1, 2020, the CDAG issued the DCNF Opinion, concluding that the University had not violated FOIA when it denied the DCNF Request. *Id.* at 000055-58. As with the Judicial Watch Opinion, the DCNF Opinion is largely premised on the University’s uncorroborated representation that no public funds were or are used to support the Senatorial Papers. *Id.*

ARGUMENT

I. THE OPINIONS IMPROPERLY SHIFT THE BURDEN OF PROOF TO APPELLANTS IN VIOLATION OF 29 DEL. C. § 10005(C).

FOIA expressly provides that “[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records.” 29 Del. C. § 10005(c). Neither Opinion references the University’s burden of proof, nor expressly analyzes whether the University has met its burden, thereby implicitly and improperly shifting the burden of proof to Appellants. *See* Certified Record at 000025-28; *see also id.* at 000055-58.

The allocation of the burden of proof under FOIA underscores the basic public policy that disclosure, not secrecy, is the purpose behind the Act. 37A AM. JUR. 2d Freedom of Information Acts § 514 (1994). *See also U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (“The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records or have not been improperly withheld.”) (internal quotations omitted); *Del. Op. Att’y Gen.* 02-IB30, 2002 WL 31867904, at *3 (Dec. 2, 2002) (“We determine that the County violated FOIA by not providing you with access to the remaining documents you requested because the County has *failed to meet its burden of proof* that those documents are within the potential litigation or other exemption under FOIA.” (emphasis added)); *O’Neill v. Town of Middletown*, 2007 WL 1114019, at *8 (Del. Ch. Mar. 29, 2007) (“because of its failure to satisfy its burden under

§ 10005(c), the Court concludes that the Council engaged in an illegal executive session.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (“I conclude that the Board has failed to carry its burden of proof to justify its use of executive sessions in adopting the challenged Regulations. On that ground as well, FOIA was violated.”).

Rather than properly address the burden of proof, the Opinions instead reject the Requests based on the University’s uncorroborated representation that no public funds are used to support the Senatorial Papers. DCNF had countered the University’s uncorroborated assertion by listing University personnel who maintain the Senatorial Papers whose salaries, it can be inferred, are paid with State funds. Certified Record at 000032. Judicial Watch noted that archival storage space and professional staff members’ time are things of value that it can be inferred are paid for with public funds. *Id.* at 000003. Although Appellants do not bear the burden of proof under FOIA,² the Judicial Watch Opinion expressly, and improperly, relies on counsel’s statement as a “factual record,” despite the fact that the University’s counsel did not reference any authority or sources to support the perfunctory blanket statement that no public funds are used to support the Senatorial Papers. *Id.* at 000027. The DCNF Opinion similarly, and improperly, relies on the University’s

² 29 *Del. C.* § 10005(c).

counsel's statement that "no public funds were used for the senatorial papers." *Id.* at 000057.

The Opinions justify their acceptance of counsel's assertion by relying on a prior Attorney General Opinion concerning challenged redactions made to the publicly-released minutes of a Sussex County Council meeting. *Id.* at 000027 n.11 & *id.* at 000057 n.10 (citing *Del. Op. Att'y Gen.* 17-DB59, 2017 WL 6348853, n.12 (Nov. 20, 2017)). In *Del. Op. Att'y Gen.* 17-DB59, the CDAG relied on the representations of the Sussex County Council's counsel for the propriety of the redactions, noting that the Delaware Lawyers' Rules of Professional Conduct impose on attorneys a duty of candor to a decision-making body. *Del. Op. Att'y Gen.* 17-DB59, 2017 WL 6348853, n.12 (Nov. 20, 2017). At most, *Del. Op. Att'y Gen.* 17-DB59 stands for the proposition that a decision-making body may rely on representations of counsel to determine the propriety of redactions from public documents that are otherwise subject to FOIA. By analogy, courts routinely rely on counsels' representations for the propriety of privilege logs and redactions to discovery materials, as the alternative would mean *in camera* review as the default method for resolving privilege log disputes. This practice should not be applied to justify improperly shifting the burden of proof to a FOIA petitioner concerning an inherently factual issue, as the Opinions have done. "[T]he plaintiff asserting a freedom of information claim is at a disadvantage because on the public body

holding the information can speak confidently regarding the nature of the material and the circumstances of its preparation[.]” *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 781 (Del. Super. 1995).

It is impossible to independently verify that no public funds are used to support the University’s hosting of the Senatorial Papers when the only basis for this fact is counsel’s “say-so.” This is especially true because the first category of records sought by the DCNF Request (and denied by the University and the CDAG) is the Gift Agreement (defined below in Section II.B.1.) between the University and Vice President Biden to host the Senatorial Records, which presumably outlines the arrangements by which costs will be split between the publicly-funded University and private donors in support of the Senatorial Records. A quick review of the University’s publicly available financial statements show that in 2019, the University received more than \$95 million of State appropriations for “general unrestricted operations.”³ This is consistent with the University’s admission that “[t]he State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget.” Certified Record at 000017. Cash is fungible. It is fair to infer that the University and its library would not be

³ See: https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/0/3249/files/2019/12/2019-F_036755C-1A_UnivDelaware_StatementFunds.pdf. (last visited Aug. 22, 2020).

able to accept the Senatorial Papers without the expenditure of public funds. It is therefore impossible to conclude on this record that no public funds support the Senatorial Papers.

The Opinions should therefore be reversed because they fail to address the burden of proof, and thereby implicitly and improperly place it on Appellants. It was incumbent upon the University to show that no public finances are used for the Senatorial Papers.

II. THE OPINIONS ERRONEOUSLY CONCLUDE THAT THE REQUESTED RECORDS ARE NOT “PUBLIC RECORDS” AS DEFINED BY 29 DEL. C. § 10002(I).

By erroneously assigning the burden of proof to Appellants to demonstrate that public funds are used to finance the storage, management, curation, and hosting of the Senatorial Papers, the Opinions erroneously conclude that all records sought in the Requests are exempt from FOIA. *See 29 Del. C. § 10002(i)* (providing in relevant part that “university documents relating to the expenditure of public funds shall be ‘public records,’” and defining the Board of Trustees of the University of Delaware as a “public body” under FOIA).

A. Records Sought by the Judicial Watch Request.

If public funds are used to finance the University’s storage, management, and curation of the Senatorial Papers, then the records sought by the Judicial Watch Request relate to the expenditure of public funds and are therefore “public records”

under FOIA. *See 29 Del. C. §§ 10002(i) & (l)*. The first category of documents sought by the Judicial Watch Request are records regarding the proposed release of the Senatorial Papers (which, as discussed later in this section, are themselves public records). The second category of documents sought by the Judicial Watch Request are records of communications between any representative of the University and any representative of Vice President Biden. If public funds support the Senatorial Papers, both of these categories of documents relate to the University's expenditure of public funds to support the Senatorial Papers.

Even if the University's uncorroborated assertion that the Senatorial Papers are entirely supported by private funds were to be verified, Vice President Biden's communications with the University regarding the release of the Senatorial Papers necessarily involve communicating with individuals whose salaries are paid with public funds. Notably, the University states that "the Biden Papers were not discussed during meetings of our *full* Board of Trustees[.]" Certified Record at 000017-18 (emphasis added); *see also id.* at 000049-50. The University should not be permitted to circumvent FOIA by hiding its decision-making with respect to matters of public interest behind executive sessions or delegation to a subset of the Board of Trustees. *See 29 Del. C. §§ 10002(i)* ("each meeting of the full Board of Trustees of either institution shall be a 'meeting'" subject to FOIA).

B. Records Sought by the DCNF Request.

The records sought by the DCNF Request are public documents. If public funds support the Senatorial Papers, three of the four categories of documents sought by the DCNF Request relate to the expenditure of public funds and are therefore public records under FOIA. *See 29 Del. C. §§ 10002(i) & (l)*. The fourth category, the Senatorial Papers themselves, are also public records.

1. The Gift Agreement.

The DCNF Request first seeks “[a]ll 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” (the “Gift Agreement”). The University is admittedly publicly-funded, and the Gift Agreement pertains to the expenditure of public funds to curate and maintain the Senatorial Papers. The Gift Agreement is a therefore a public record and should be ordered to be produced.

2. Communications and correspondence between Vice President Biden’s representatives and the University.

The second category of documents sought by the DCNF Request is communications and correspondence “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.” Again, because the University is admittedly publicly-funded, correspondence with Vice President Biden’s representatives about the Senatorial Papers pertains to the University’s expenditure of public funds. Records of such correspondence and communications are thus public records and should be ordered to be produced.

Alternatively, even if the Senatorial Papers are not supported with public funds, communications with the University regarding the Senatorial Papers necessarily involve the expenditure of public funds to pay the salaries of University staff. And to the extent the University delegated its decision-making with respect to the Senatorial Papers to a subset of its full Board of Trustees to evade its obligations under FOIA, such circumvention of the law should not be validated. *See* Section II.A., above.

3. Visitor logs.

The third category sought by the DCNF Request comprises “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.” Again, because the University is publicly-funded, and because the Senatorial Papers are themselves public records, visitor logs for the Senatorial Papers are public records that should be produced. In denying access to this category of records, the University analogizes to public library records “which contain the identity of a user and the books,

documents, films, recordings or other property of the library which a patron has used,” which are exempt from FOIA. Certified Record at 000049-50; 29 *Del. C.* § 10002(1)(12).

This analogy is inapt. The University Library purports *not* to be a public library, and the request for visitor log does not seek the specific documents within the Senatorial Papers a visitor has accessed. But most importantly, the visitor logs to the Senatorial Papers are akin to an elected official’s schedule or visitor logs, and their disclosure is essential to maintain government transparency and accountability.

4. The Senatorial Papers.

The Biden Senatorial Papers are public records. Neither the DCNF Opinion nor the University’s submission to the CDAG expressly address whether the Senatorial Papers are “public records” under FOIA. *See* Certified Record at 000055-58 (DCNF Opinion); *see also id.* at 000049-50. Because the University has not argued that the Senatorial Papers are *not* public records under FOIA, it has waived the issue on appeal. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (“Issues not briefed are deemed waived.”). This is especially so where the University bears the burden of proof to justify denial of access to these records. 29 *Del. C.* § 10005(c).

“Public record” is defined under FOIA as:

[I]nformation of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by

any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

29 *Del. C.* § 10002(1). The Senatorial Papers are self-evidently “public records” under FOIA and any understanding of the phrase, as they were created by then-Senator Biden and his staff during his tenure representing the people of the State of Delaware in the U.S. Senate. Then-Senator Biden was a public official, and the Senatorial Papers relate to public business. Finally, there is no doubt they are of public interest.⁴

The Opinions err by permitting the University to shield these important public records from view based on the unestablished factual premise that the Senatorial Papers are housed and maintained in a facility that is not supported by public funds. The Opinions should be reversed and access to the requested records should be granted.

III. THE UNIVERSITY FAILED TO CONDUCT SUFFICIENT SEARCHES FOR RECORDS RESPONSIVE TO APPELLANTS’ FOIA REQUESTS, DENYING APPELLANTS’ LEGAL RIGHT TO INSPECT PUBLIC RECORDS UNDER 29 *DEL. C.* § 10003.

There is no indication that the University undertook any search for records responsive to the Requests. *Id.* at 000017-18; *Id.* at 000049-50. Rather, the

⁴ Alternatively, if the Senatorial Papers are deemed to have been Vice President Biden’s personal property, they became public documents subject to FOIA when he donated them to the publicly-funded University.

University determined categorically that no responsive public records exist based on the unsupported assertion that public funds are not expended to support the Senatorial Papers. *E.g., id.* at 000050 (“[t]he Biden papers and documents related to those papers, including the gift agreement and correspondence regarding the papers, are not public records under FOIA. That is the end of the inquiry.”). The University’s response to the Requests, and the Opinions’ erroneous validation of the University’s response, have denied Appellants their legal right to inspect public records under FOIA. 29 *Del. C.* § 10003.

IV. THE COURT SHOULD AWARD APPELLANTS THEIR ATTORNEYS’ FEES AND COSTS UNDER 29 *Del. C.* § 10005(d).

FOIA expressly provides that “[t]he court may award attorney fees and costs to a successful plaintiff of any action brought under this section.” 29 *Del. C.* § 10005(d). After correcting the errors above, Appellants’ petitions should have been approved by the CDAG, and are successful plaintiffs in this action. *See, e.g., Gannett Co., Inc. v. Board of Managers of the Del. Criminal Justice Information System*, 840 A.2d 1232, 1234 (Del. 2003) (affirming award of attorneys’ fees to successful FOIA plaintiff). The Court should award Appellants their attorneys’ fees and costs.

CONCLUSION

For the reasons stated above, Petitioners Below-Appellants Judicial Watch, Inc. and the Daily Caller News Foundation respectfully request that the Court enter an order (1) reversing the Opinions, (2) requiring that the University of Delaware promptly search for all records requested, (3) requiring that the University of Delaware promptly produce all records requested, and (4) awarding Appellants their attorneys' fees and costs.

Dated: August 28, 2020

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