

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

*Petitioners Below-
Appellants,*

v.

THE UNIVERSITY OF DELAWARE,

*Respondent Below-
Appellees.*

)
)
)
) No. 32,2021
)

) On Appeal from C.A. No. N20A-
) 07-001 MMJ in the Superior Court
) of the State of Delaware
)

APPELLANTS' OPENING BRIEF

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Dated: March 23, 2021

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NATURE OF PROCEEDINGS

This is the Opening Brief of Plaintiffs Below/Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (the “DCNF”) (together, “Appellants”) in support of their appeal from the Opinion (the “Opinion”), dated January 4, 2021 (attached as Ex. A), issued by the Honorable Mary M. Johnston, Judge, in the Superior Court of the State of Delaware (the “Superior Court”) in Civil Action No. N20A-07001 MMJ (this “Action”). The Opinion affirms Attorney General Opinion 20-IB19, dated June 25, 2020 (the “Judicial Watch Opinion,” attached as Ex. B) and Attorney General Opinion 20-IB20 dated July 1, 2020 (the “DCNF Opinion” attached as Ex. C) (together, the “Attorney General Opinions”). Appellant timely appealed the Opinion on January 29, 2021. *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

This case turns on the Court’s interpretation of contours of the Delaware Freedom of Information Act (“FOIA”), 29 *Del. C.* § 10001-10007. In January 1786, future president Thomas Jefferson wrote from Paris in a letter to his friend Dr. James Currie, “Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”¹ Critical to this freedom is the ability of the press and other citizens to access documents concerning the operation of our government and the

¹ *See* <https://tjrs.monticello.org/letter/2141> (last visited March 2, 2021)

day-to-day handling of affairs by our elected representatives. Stifle access, and liberty is hindered.

Appellants sought various documents donated to Appellee University of Delaware (“Appellee” or the “University”) by then-Senator, now-President Joseph R. Biden, Jr. (“President Biden”), as well as correspondence and other records related to the University’s upkeep of the donated documents. Even though the files of President Biden while sitting as Delaware’s U.S. Senator are of paramount interest for citizens and the free press, to date, the files have been kept under lock and key by the University. Efforts to review those files by Appellants and others have been systematically blocked by the University and denied by the Delaware Attorney General’s Office and the Superior Court. While the Superior Court identified certain concerning issues with respect to the denial of access under Delaware’s FOIA law, the Superior Court gave the benefit of the doubt to the University and refused to allow access to documents which are of national interest.

This appeal challenges the conclusions of the University, the Attorney General’s Office, and ultimately, the Superior Court. Specifically, the Superior Court erred by failing to properly allocate the burden of proof to the University to justify its denial of access to the requested records. The Superior Court further erred by finding that the University had satisfied its burden to prove that no public funds are utilized for the upkeep of the Joseph R. Biden, Jr. Senatorial Papers (the “Biden

Senatorial Papers”), based solely on the representations of counsel. The Superior Court also erred by concluding that none of the requested records are “public records” as defined by FOIA, with the result that the University was permitted to deny Appellants their legal right to access covered documents by failing to review University records for responsive documents. Finally, the Superior Court erred by not awarding Appellants their attorneys’ fees and costs.

Appellants respectfully request that this Court reverse the decision of the Superior Court and grant access to documents which are of national interest.

SUMMARY OF THE ARGUMENT

1. The Superior Court erred by improperly shifting the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c), which provides, in pertinent part, 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.” A-96, A-144.

2. The University failed to prove that no public funds are utilized for the upkeep of the Biden Senatorial Papers. *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.*, 177 A.3d 610 (Table) (Del. 2017) (reversing in part and remanding where findings of fact were not supported by the record). A-97 to A-100, A-149.

3. The Superior Court erroneously concluded that the requested records are not “public records” as defined by 29 *Del. C.* § 10002. A-100, A-149.

4. The Superior Court erroneously permitted the University to deny Appellants their legal right to inspect covered documents by failing to perform an adequate search for responsive records. A-105.

5. The Superior Court erred by not awarding Appellants their attorneys’ fees and costs under 29 *Del. C.* § 10005(d). A-106, A-155.

STATEMENT OF FACTS

In 2012, the University of Delaware Library acquired the Biden Senatorial Papers, comprising more than 1,850 boxes of archival records from President Biden’s tenure in the Senate.² That same year, the University accepted federal funds for the support of the Biden Senatorial Papers, in the form of a grant in the amount of \$30,000 from the National Endowment for the Humanities for storage of electronic files.³ The University has expended funds on other means of non-computer storage to house the Biden Senatorial Papers.⁴

Media organizations (including *The Washington Post* and others) have sought access to the Biden Senatorial Papers, as well as the gift agreement between the University and President Biden to host the Senatorial Records (the “Gift

² See A-90 (citing <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/> (last visited August 21, 2020)).

³ See A-148 (citing *Storage of Electronic Files of the Senatorial Papers of Joseph R. Biden, Jr.*, National Endowment of the Humanities, <https://securegrants.neh.gov/publicquery/main.aspx?f=1&gn=PW-51259-12> (last visited October 5, 2020) (identifying grant for “immediate preservation related to the processing” of the Senatorial Papers)).

⁴ See A-148-49 (citing Andrea Boyle Tippet, *Biden Papers Arrive*, UDaily, June 11, 2012, <http://www1.udel.edu/udaily/2012/jun/library-biden-papers-061112.html> (last visited October 5, 2020) (noting the installation of “[n]ew compact shelving” “to house the immense collection,” *and* the receipt of grant from the National Endowment of the Humanities)).

Agreement”), as they would shed light on some of the most consequential moments of President Biden’s senatorial career.⁵ To date, none have been permitted access.

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.

A-33. The Judicial Watch Request thus solely seeks communications *about* the proposed release of the Biden Senatorial Papers, and any communications between the University on the one hand, and President Biden, or any individual acting on his behalf, on the other.

⁵ See https://www.washingtonpost.com/politics/joe-bidens-senate-records-could-answer-questions-about-his-past-actions--but-hes-keeping-them-secret/2019/07/11/7d0dd222-a347-11e9-bd56-eac6bb02d01d_story.html (last visited Mar. 8, 2021).

On May 20, 2020, the University’s counsel responded by email denying the Judicial Watch 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.” A-32. The email further stated 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.* The University thus categorically denied the Judicial Watch Request, and there is no indication that the University reviewed any records in connection with its denial.

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”). A-27 to A-29.

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.” A-29. 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.” A-17. 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 Biden Senatorial Papers, or include any sources supporting the assertion that public funds are *not* used to support the Biden 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. Ex. B. 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.” Ex. B. at 3.

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.

A-55. The DCNF Request thus seeks the agreement governing President Biden’s donation of the Biden Senatorial Papers to the University, communications between University staff and anyone representing President Biden, records of anyone visiting the still-private senatorial records, and the Biden Senatorial Papers themselves.⁶

On May 20, the University denied the DCNF Request, largely on the basis

⁶ Appellants do not appeal those aspects of the Opinion relating to the DCNF Request’s request for visitors logs and the Biden Senatorial Papers themselves.

that the records “requested do not relate to the expenditure of public funds.” A-57. As with the University’s response to the Judicial Watch Request, there is no indication that the University reviewed any records before issuing its categorical denial of the DCNF Request.

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”). A-55 to A-56. 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.” A-67. 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 Biden 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 Biden Senatorial Papers. A-67.

On June 11, 2020, the University submitted its 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.”

A-75. The University also stated that public funds are not used to support the Biden Senatorial Papers, and concluded that the Biden Senatorial Papers and related documents, including Gift Agreement and correspondence regarding the papers, are not public records under FOIA. A-75 to A-80.

On July 1, 2020, the CDAG issued the DCNF Opinion, concluding that the University had not violated FOIA when it denied the DCNF Request. Ex. C. 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 Biden Senatorial Papers. *Id.*

On July 2, 2020, Appellants timely appealed the Attorney General Opinions to the Superior Court, and thereafter the matter was fully briefed. A-7.

On January 4, 2021, the Superior Court issued the Opinion and affirmed the Attorney General Opinions, holding that “[t]he Attorney General, and this Court may rely on the statement of University Counsel that no public funds are used to maintain the Papers.” Ex. A. at 15. However, despite this finding, the Superior Court ordered the University’s counsel to review the Gift Agreement and inform the Court within thirty days whether the Gift Agreement relates to the University’s expenditure of public funds, so that the Court may amend the Opinion, if necessary. *Id.* at 11 n.38.

On January 2, 2021, the University's counsel represented to the Superior Court that the Gift Agreement was reviewed, and "it does not discuss the use of public funds to support the Joseph R. Biden, Jr. Senatorial Papers." A-157. Notably, this is the only instance in the Action wherein the University's counsel specifically reviewed a requested document and made a particularized determination that the subject document does not relate to the expenditure of public funds.

ARGUMENT

I. THE SUPERIOR COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO APPELLANTS TO PROVE THAT THE REQUESTED DOCUMENTS RELATE TO THE EXPENDITURE OF PUBLIC FUNDS OR ARE OTHERWISE SUBJECT TO FOIA.

Questions Presented

Whether the Superior Court improperly shifted the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c), which provides, in relevant part, 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). A-96, A-144.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087, 1090 (Del. 2011) (“Questions of law are reviewed *de novo*. Statutory interpretation is a question of law. Accordingly, this Court does not defer to either the agency’s or the Superior Court’s interpretation of the statutes in question.”). “The proper allocation of the burden of proof is a question of law that [this Court] review[s] *de novo*.” *State Farm Mutual Automobile Insurance Company v. Spine Care Delaware, LLC*, 238 A.3d 850, 857 (Del. 2020) (reversing and remanding).

Merits of the Argument

The Superior Court erroneously shifted the burden of proof to Appellants and found, based solely on the representations of the University’s counsel, that none of the requested documents are responsive or constitute “public records” under FOIA. Ex. A at 12. In making this factual determination, the Superior Court noted that Delaware lawyers are bound by a duty of candor under both the Delaware Lawyers’ Rules of Professional Conduct and the Principles of Professionalism for Delaware Lawyers, and that “[i]n light of this duty, statements made by the University’s General Counsel may be given proper weight.” *Id.*

Although courts routinely rely on the representations of counsel for the propriety of privilege logs and redactions to discovery materials—because 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 Superior Court has done here. Unsworn representations by counsel are generally *not* sufficient to establish substantive facts in Delaware courts. *See, e.g.*, Superior Court Rule 33(b) (requiring parties to answer interrogatory responses under oath despite signature by Delaware counsel); Superior Court Rule 56(e)-(g) (pertaining to affidavits in support of motions for summary judgment); Court of Chancery Rule 3(aa) (requiring sworn verification by each plaintiff to a complaint);

Superior Court Rule 30(b)(4)(D) (requiring administration of oath or affirmation to deposition witnesses).

FOIA plainly provides that “the burden of proof shall be on the custodian of records to justify the denial of access to records.”⁷ Here, however, the Superior Court held that “FOIA only requires a public body to provide its reasons for denying a request; there is no requirement to provide supporting proof.” Ex. A at 12. The General Assembly was unambiguous when it assigned the burden of proof, without qualification or caveat, to the custodian of records to justify any denial of access to records under FOIA.⁸ The plain and unambiguous language of a statute controls. *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008).

The “burden of proof” is:

the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.... Burden of proof is a term which describes two different concepts; first, the ‘burden of persuasion’, which under the traditional view never shifts from one party to the other at any stage of the proceeding, and second, the ‘burden of going forward with the evidence’, [the burden of production] which may shift back and forth between the parties as the trial progresses.

Black’s Law Dictionary 196 (6th ed. 1990); *see also Black’s Law Dictionary* 80 (2d Pocket ed. 2001) (describing secondary burden as “burden of production”). FOIA’s

⁷ 29 Del. C. § 10005(c).

⁸ 29 Del. C. § 10005(c).

allocation of the burden of proof—as mandated by the plain language of the statute—to the custodian of records underscores the basic public policy that disclosure, not secrecy, is the purpose behind FOIA. 37A AM. JUR. 2d Freedom of Information Acts § 514 (1994).

It is reversible error for a court to place the burden of proof on the wrong party. *See, e.g., State Farm Mutual Automobile Insurance Company v. Spine Care Delaware, LLC*, 238 A.3d 850, 861 (Del. 2020) (reversing and remanding where Superior Court erroneously shifted the burden of proof). Here, the Superior Court erred in failing to properly ascribe the burden of proof to the University, and thereby improperly placed it on Appellants.

While Delaware rightfully can take pride in the relationship of trust between bench and bar, that relationship and representations cannot displace a litigant’s right to challenge a key factual issue. Mandating that counsel’s representations alone can shift a burden of proof not only deprives a challenger of his or her right to question the denial of access, but also places members of the bar in the precarious position of serving not as the representative of the party, but as the actual party denying access. The Superior Court’s holding blurs the distinction between advocate and client.

Delaware jurisprudence is clear that lawyers are agents rather than principals: at trial, Delaware lawyers are not permitted to assert personal knowledge of facts in issue except when testifying as a witness. *See Delaware Lawyers Rules of*

Professional Conduct 3.4(e). Similarly, it is reversible error for trial counsel to make factual statements that are not supported by submitted evidence. *Henne v. Balick*, 146 A.2d 394, 398 (Del. 1958) (reversing and remanding where counsel's quantification of pain and suffering was not based upon evidence submitted); *see also DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993) (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 532-33 (Del. 1987), to hold that Delaware lawyers are forbidden from commenting on witness credibility based on personal knowledge or evidence not in the record).

Along these lines, improper vouching for a client or witness is grounds for reversal. *See Trump v. State*, 753 A.2d 963, 964 (Del. 2000) (citing DLRPC 3.4 for the proposition that lawyers must refrain at trial from expressing personal opinion on the credibility of witnesses). Commentators have noted that lawyers are prohibited from vouching for clients because of the danger that it may corrupt decision-making in findings of fact. *See, e.g., Thomas Shaffer, The Legal Profession's Rule against Vouching for Clients: Advocacy and the Manner That Is the Man Himself*, 7 NOTRE DAME J.L. ETHICS & PUBL POL'Y 145, 150 (2012).

Never has this Court permitted an attorney's *ipse dixit* assertion to serve as the ultimate determination of key facts at issue. The Court must reverse.

II. THE UNIVERSITY FAILED TO CARRY ITS BURDEN TO PROVE THAT THE REQUESTED RECORDS ARE NOT SUBJECT TO FOIA.

Question Presented

Whether the Opinion should be reversed because the University did not carry its burden to prove that the requested records are not subject to FOIA. A-97 to A-100, A-149.

Standard and Scope of Review

The Delaware Supreme Court reviews “mixed question of fact and law *de novo*, ‘to the extent that we examine the trial judge’s legal conclusions,’ and for clear error, ‘[t]o the extent the trial judge’s decision is based on factual findings.’” *Miller v. State*, 4 A.3d 371, 373 (Del. 2010) (citations omitted).

The Delaware Supreme Court has “authority to review the record below, examine the sufficiency of the evidence and test the propriety of the findings.” *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.*, 177 A.3d 610 (Table) (Del. 2017). This Court “affirm[s] [the lower court’s] findings so long as they are sufficiently supported by the record and are the result of orderly and logical reasoning.” *Id.* (reversing in part and remanding).

Merits of the Argument

The Opinion should be reversed because the University did not carry its burden to prove that the requested records are not subject to FOIA. The Superior Court’s conclusion is based on the misallocation of the burden of proof, and a factual

finding that no public funds are used to support the Biden Senatorial Papers, which is unsupported by the record.

As discussed above, the Opinion erroneously holds that a custodian of records may satisfy its burden of proof under FOIA via the representations of its counsel. Ex. A at 12. The Opinion states that “Appellants have provided nothing other than unsupported speculation in opposition to University Counsel’s representation,” thereby effectively rewriting FOIA to reallocate the burden of proof to the requester of records. Indeed, Delaware law recognizes that “the plaintiff asserting a freedom of information claim is at a disadvantage because only 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). *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.”).

At no point in the preceding below has the University attempted to carry either the burden of proof or the burden of production. There is no indication that the University made a substantive inquiry into the source of the funds that support the Biden Senatorial Papers or reviewed any of the requested records. The University’s counsel did not include a supporting affidavit, identify the source of the information, or represent that the statement was based on a diligent inquiry. The language the University used to reject the Requests could be used in any perfunctory form letter: “[t]here have been no expenditures of public funds regarding or related to” the requested documents. *See, e.g.*, A-32. The University’s references to the Biden Senatorial Papers could be replaced with any category of documents that the University seeks to withhold in response to a FOIA request.

DCNF countered the University’s uncorroborated assertion by listing University personnel who maintain the Biden Senatorial Papers, whose salaries, it must be inferred, are paid with State funds. A-58. Similarly, 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. A-29.

Along these lines, a quick review of the University's publicly available financial statements shows that in 2019, the University received more than \$95 million of State appropriations for "general unrestricted operations."⁹ 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." A-43. Cash is fungible. It is fair to infer that the University and its library would not be able to accept the Biden Senatorial Papers without the expenditure of public funds. Appellees further fail to mention that the University accepted governmental funds for the support of the Senatorial Papers, in the form of a 2012 grant in the amount of \$30,000 from the National Endowment for the Humanities.¹⁰ While these funds may or may not constitute "public funds" under 29 *Del. C.* § 10002(k) (which denotes solely "those funds derived from the State or any political subdivision of the State"), the terseness of the University's categorical, but

⁹ See A-99 n.3.(citing 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)).

¹⁰ See A-148 n.2 (citing *Storage of Electronic Files of the Senatorial Papers of Joseph R. Biden, Jr.*, National Endowment of the Humanities, <https://securegrants.neh.gov/publicquery/main.aspx?f=1&gn=PW-51259-12> (last visited Oct. 5, 2020) (identifying grant for "immediate preservation related to the processing" of the Senatorial Papers)).

unverified and unverifiable denial that no public funds have been expended related to the Senatorial Papers invites justifiable skepticism. This is especially so when the National Endowment of the Humanities grant relates to computer storage, and the University admits that it has expended funds on other means of non-computer storage to house the “immense collection.”¹¹ Indeed, it is impossible to independently verify that no public funds are used to support the University’s hosting of the Biden Senatorial Papers when the only basis for this fact is counsel’s representation.

The University’s failure to carry its burden of proof is brought into sharp focus by the Superior Court’s query regarding the Gift Agreement. *See* Ex. A. at 11 n.38. Appellants argued to the Superior Court that the Gift Agreement presumably outlines the arrangements by which costs will be split between the publicly-funded University and private donors in support of the Biden Senatorial Records. While the Superior Court ruled against Appellants, in the same breath, the Superior Court ordered the University to review the Gift Agreement and report back within 30 days as to whether the Gift Agreement discusses the University’s use of public funds to

¹¹ A-48 n.3 (citing Andrea Boyle Tippett, *Biden Papers Arrive*, UDaily, June 11, 2012, <http://www1.udel.edu/udaily/2012/jun/library-biden-papers-061112.html> (last visited October 5, 2020) (noting the installation of “[n]ew compact shelving” “to house the immense collection,” *and* the receipt of grant from the National Endowment of the Humanities)).

support the Biden Senatorial Papers. Ex. A at 11 n.38. The University subsequently reported that the Gift Agreement does not discuss the University's use of public funds to support the Biden Senatorial Papers. A-157.

Even assuming for the sake of argument that the Superior Court correctly held that representations of the University's General Counsel satisfy the University's burden of proof under 29 *Del. C.* § 10005(c)¹² (and they should not—*see* discussion, *supra*, at Section I), the Superior Court's directive to the University *prima facie* demonstrates that there was previously no factual support in the record for the conclusion that the Gift Agreement does not relate to the expenditure of public funds and is therefore exempt from FOIA. Appellants believe that under the circumstances, the University can only carry its burden of proof if, at minimum, the Gift Agreement and the expenditures and sources of funds related to the maintenance of the Biden Senatorial Papers were disclosed for review.

It was incumbent upon the University to prove that the requested records are not subject to FOIA by showing that the requested records do not relate to the expenditure of public funds—and that showing was not made in the preceding below. The Superior Court's factual finding that the requested records do not relate to the expenditure of public funds, or are otherwise exempt from FOIA, is not supported by the record and should be reversed. *See Unitrin, Inc. v. Am. Gen. Corp.*,

¹² Ex A at 12.

651 A.2d 1361, 1385 (Del. 1995) (reversing and remanding where the “Court of Chancery finding ... was based on faulty factual predicates, unsupported by the record.”).

III. THE SUPERIOR COURT ERRONEOUSLY CONCLUDED THAT THE REQUESTED RECORDS ARE NOT “PUBLIC RECORDS” AS DEFINED BY 29 DEL. C. § 10002.

Questions Presented

Whether the Superior Court erred by concluding that the requested records are not “public records” as defined by 29 Del. C. § 10002. A-100, A-149.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Delaware Dept. of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d at 1090.

Merits of the Argument

The Superior Court crafted an erroneously narrow definition of “public record” to conclude that the records sought by Appellants 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). Specifically, the Superior Court ruled that records of any Board meeting at which the Biden Senatorial Papers were discussed would only be subject to FOIA if the entirety of the Board were present. Ex. A at 10.

The Superior Court also erred by holding that 29 Del. C. § 10002(i)’s reference to documents “relating to the expenditure of public funds” denotes only

those records “that discuss or show how the University itself spends public funds.” Ex. A. at 11. Under a proper reading of FOIA, the requested documents constitute public records and should be produced.

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 Biden Senatorial Papers. 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 President Biden. If public funds support the Biden Senatorial Papers, both of these categories of documents relate to the University’s expenditure of public funds to support the Biden Senatorial Papers. Separately, because the Biden Senatorial Papers are voluminous and historically important, it is likely, if not certain, that such high-profile gift would be discussed by and among the Trustees.

Even if the University’s uncorroborated assertion that the Senatorial Papers are entirely supported by private funds were verified, President Biden’s and his staff’s communications with the University regarding the release of the Biden

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[.]” A-43. 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.¹³

The records sought by the DCNF Request are public documents. If public funds support the Senatorial Papers, the 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)*.

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

¹³ As noted above, Appellants do not appeal those aspects of the Opinion relating to the DCNF Request’s request for visitors logs and the Biden Senatorial Papers themselves.

1973 through 2009” (the “Gift Agreement,” as defined above). The University is admittedly publicly-funded, and the Gift Agreement necessarily pertains to the expenditure of public funds to curate and maintain the Biden Senatorial Papers. Notably, the Gift Agreement is the only document the Superior Court identified as possibly relating to the expenditure of public funds, even under the Superior Court’s improperly narrow application of FOIA. Ex. A. at 11 n.38. The Opinion should be reversed and the Gift Agreement ordered to be produced.

2. Communications and correspondence between 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 President Biden’s representatives about the Biden 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 Biden Senatorial Papers are not supported with public funds, communications with the University regarding the Biden 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 Biden 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 III.A., *supra*.

IV. THE SUPERIOR COURT ERRONEOUSLY PERMITTED THE UNIVERSITY TO DENY APPELLANTS THEIR LEGAL RIGHT TO INSPECT COVERED DOCUMENTS BY FAILING TO PERFORM AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

Question Presented

Whether the Superior Court erred by permitting the University to deny Appellants their rights under FOIA to inspect covered documents by failing to perform an adequate search for responsive records. A-105.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Delaware Dept. of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d at 1090.

Merits of the Argument

There is no indication that the University undertook any search for records responsive to the Requests. A-43 to A-44, A-75 to A-76. Rather, the University determined categorically that no responsive public records exist based on the unsupported assertions that public funds are not expended to support the Biden Senatorial Papers, and that the Biden Senatorial Papers were never discussed at a meeting of the full Board. *See, e.g.*, A-76 (“[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 Opinion’s erroneous validation of the

University's response, have denied Appellants their legal right to inspect public records under FOIA. 29 *Del. C.* § 10003.

The Opinion should be reversed and access to the requested records should be granted.

V. THE SUPERIOR COURT ERRED BY NOT AWARDING APPELLANTS THEIR ATTORNEYS' FEES AND COSTS UNDER 29 DEL. C. § 10005(d).

Questions Presented

Whether the Superior Court erred by not awarding Appellants their attorneys' fees and costs under 29 *Del. C.* § 10005(d). A-106, A-155.

Standard and Scope of Review

“This Court reviews for abuse of discretion the Superior Court’s award of attorneys’ fees. To the extent the award requires the formulation of legal principles, however, that formulation is subject to *de novo* review.” *Gannett Co., Inc. v. Board of Managers of the Del. Criminal Justice Information System*, 840 A.2d 1232, 1240 (Del. 2003) (citations omitted).

Merits of the Argument

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). The Superior Court should have corrected the errors of law discussed above, rather than affirming the Attorney General Opinions, and awarded Appellants’ their attorneys’ fees as 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 partial attorneys’ fees to successful FOIA plaintiff).

As discussed above in Section II, the Superior Court ordered the University to review the Gift Agreement and report whether it discusses the University's use of public funds to support the Biden Senatorial Papers. Ex. A at 11 n. 38. Even assuming for the sake of argument that (a) the Superior Court's ruling under 29 *Del. C.* § 10002(i) that University documents which "relate to the expenditure of public funds" means *only* those documents "that discuss or show how the University itself spends public funds,"¹⁴ is correct, and (b) that the Superior Court correctly held that representations of the University's General Counsel satisfy the University's burden of proof under 29 *Del. C.* § 10005(c),¹⁵ the Opinion demonstrates that there was no factual support for the Attorney General's determination that the Gift Agreement was exempt from FOIA.

On this basis alone, Appellants should be deemed successful FOIA plaintiffs and awarded some or all of their attorneys' fees and costs under 29 *Del. C.* § 10005(d). The Opinion should be reversed.

¹⁴ Ex A at 11.

¹⁵ Ex A at 12.

CONCLUSION

For all the reasons stated herein, Appellants respectfully request that this Honorable Court reverse the Opinion in accordance with the arguments outlined in this appeal.

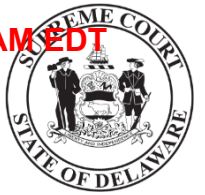
Dated: March 23, 2021

HALLORAN FARKAS + KITTLA LLP

/s/ William E. Green, Jr.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

*Petitioners Below-
Appellants,*

v.

THE UNIVERSITY OF DELAWARE,

*Respondent Below-
Appellees.*

)
)
)
) No. 32,2021
)
)

) On Appeal from C.A. No. N20A-
) 07-001 MMJ in the Superior Court
) of the State of Delaware
)
)
)

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2013.

2. The brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 6,667 words, exclusive of the caption and the signature block, which were counted by Microsoft Word 2013.

Dated: March 23, 2021

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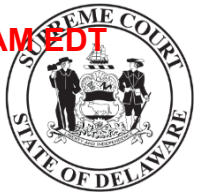
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CERTIFICATE OF SERVICE

I, William E. Green, Jr. (DE Bar No. 4864), certify that on March 23, 2021, I caused copies of the foregoing APPELLANTS' OPENING BRIEF and CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION to be served on the following counsel of record in the manner indicated below:

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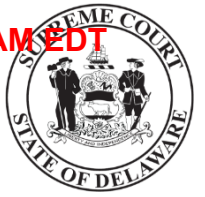


EXHIBIT A

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. N20A-07-001 MMJ

Appeal from Attorney General
Opinion No. 20-IB19 and
Opinion No. 20-IB20

Submitted: October 9, 2020
Decided: January 4, 2021

On Appeal from Attorney General Opinions 20-IB19 and 20-IB20

AFFIRMED

OPINION

Theodore A. Kittila, Esq., William E. Green, Jr., Esq., Halloran Farkas + Kittila
LLP, Wilmington, Delaware, *Attorneys for Petitioners Below- Appellants.*

William E. Manning, Esq., James D. Taylor, Jr., Esq., Saul Ewing Arnstein & Lehr
LLP, Wilmington, Delaware, *Attorneys for Respondent Below- Appellee University
of Delaware.*

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

Judicial Watch, Incorporated (“Judicial Watch”) and The Daily Caller News Foundation (“DCNF”) (together, “Appellants”) appeal two decisions issued by the Attorney General of the State of Delaware¹ (the “Opinions”). Appellants seek a number of documents donated to the University of Delaware (the “University”) by then-Senator Joseph Biden.² The Joseph R. Biden, Jr., Senatorial Papers (the “Papers”) include “[m]ore than 1,850 boxes of archival records from the Vice President’s Senate Career.”³ The Papers will be available to the public after “they have been properly processed and archived.”⁴

Judicial Watch’s FOIA Request

On April 30, 2020, Judicial Watch submitted a request under Delaware’s Freedom of Information Act (“FOIA”)⁵ to the University for the following documents:

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

¹ Del. Op. Att’y Gen. 20-IB19, 2020 WL 4013788, at *1; Del. Op. Att’y Gen. 20-IB20, 2020 WL 4013789, at *1.

² For complete clarity, all references to “then-senator Biden,” “Vice President Biden,” “former Vice President Joe Biden,” or “President-elect Biden” refer to Joseph R. Biden, Jr.

³ The University of Delaware, *The Joseph R. Biden, Jr., Senatorial Papers*, <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/> (last visited January 1, 2020).

⁴ *Id.*

⁵ 29 Del. C. §§ 10001-10007.

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

The University denied Judicial Watch's request via email on May 20, 2020.

In support of its denial, the University stated that “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. Senatorial papers.”⁷ The University additionally stated 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.”⁸ Subsequently, on May 26, 2020, Judicial Watch filed a petition with the Office of the Attorney General pursuant to 29 *Del. C.* § 10005(b).⁹ The petition sought a determination of whether the University's denial of Judicial Watch's request constituted a violation of FOIA.¹⁰

⁶ Appellants' Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 (“OB”), at 4.

⁷ Certified Record at 000006.

⁸ *Id.*

⁹ OB at 5.

¹⁰ *Id.*

On June 25, 2020, the Attorney General issued an opinion concluding that the University had not violated FOIA.¹¹ The Attorney General noted that, except in two specific instances, FOIA does not apply to the University. In the first instance, the University's Board of Trustees is considered a "public body" and "each meeting of the full Board of Trustees. . . shall be a 'meeting.'"¹² Thus, information about matters discussed by the full Board of Trustees in a "meeting" may be requested under FOIA. In the second instance, "university documents relating to the expenditure of public funds" may be requested under FOIA as "public records."¹³ The Attorney General found that the documents requested by Judicial Watch did not fall under either exception because there was nothing in the record to suggest that the requested documents related to the expenditure of public funds.¹⁴

The Daily Caller News Foundation's FOIA Request

On April 30, 2020, DCNF submitted a FOIA request to the University for the following documents:

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.

¹¹ 2020 WL 4013788, at *1.

¹² 29 *Del. C.* § 10002(i).

¹³ *Id.*

¹⁴ 2020 WL 4013788, at *1.

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.¹⁵

On May 20, 2020, the University denied DCFN's request, primarily because it did not relate to the expenditure of public funds.¹⁶ On May 29, 2020, DCFN filed a petition with the Office of the Attorney General pursuant to 29 *Del. C.* § 10005(b).¹⁷ The petition sought a determination of whether the University's denial of DCFN's request constituted a violation of FOIA.¹⁸

On July 1, 2020, the Attorney General issued an opinion concluding that the University had not acted in violation of FOIA.¹⁹ The Attorney General found that: (1) DCFN's first two requests did not seek documents related to the expenditure of public funds; (2) the University's library patron log is exempt from FOIA; and (3)

¹⁵ OB at 6-7.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 2020 WL 4013789, at *1.

DCNF's attempt to access "all records from Joe Biden's Senate career" is inappropriate.²⁰ The Attorney General additionally stated that "[a]ttempting 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."²¹

Appellants Challenge the Attorney General's Opinions

Appellants have combined their individual FOIA requests to file one consolidated appeal of the Opinions.²² On July 2, 2020, Appellants filed a Notice of Appeal seeking reversal of the Opinions.²³ On July 22, 2020, the Delaware Department of Justice ("DDOJ") filed the Certification of Record.²⁴ On July 30, 2020, the New Castle County Sheriff filed a Writ *Non Est Inventus* stating that there had been several unsuccessful attempts to serve the University.²⁵ On July 31, 2020, the University's general counsel accepted service.²⁶ On August 11, 2020,

²⁰ *Id.*

²¹ *Id.*

²² The DDOJ was included as a defendant in this appeal. On July 15, 2020, the DDOJ informed the Court that it would not participate in this appeal because "the 'adverse' interests in this matter are between [] Appellant[s] and the University of Delaware." Trans. ID 65772279.

²³ OB at 1.

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.*

Appellants filed a letter with the Court, countersigned by the University, which acknowledged that service was accepted.²⁷

On August 28, 2020, Appellants filed their Opening Brief.²⁸ On September 28, 2020, the University filed its Answering Brief. On October 8, 2020, Appellants filed their Reply Brief.

STANDARD OF REVIEW

Decisions made by the Attorney General concerning FOIA requests may be appealed to the Superior Court “on the record.”²⁹ As this appeal concerns issues of statutory interpretation, the parties’ arguments are reviewed *de novo*.³⁰

ANALYSIS

Appellants’ Contentions

Appellants argue that the Opinions should be reversed for five reasons. First, the Attorney General impermissibly shifted the burden of proof to Appellants. Second, the University failed to prove that no public funds are utilized for the Papers. Third, the Opinions erroneously concluded that the documents

²⁷ *Id.*

²⁸ During the briefing period, the case was transferred from the Honorable Charles E. Butler to the Honorable Mary M. Johnston.

²⁹ 29 *Del. C.* § 10005(b).

³⁰ See *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087, 1090 (Del. 2011); *Flowers v. Office of the Governor, et. al.*, 167 A.3d 530, 541 (Del. Super. 2017).

requested by Appellants are not “public records,” and thus not subject to FOIA. Fourth, the requested visitor log-in sheets are not covered by a library exception. Fifth, the University denied Appellants their legal right to inspect covered documents by failing to adequately search the Papers for responsive documents before denying Appellants’ requests.

In addition to reversing the Opinions, Appellants ask the Court to: (1) require the University to search for responsive documents; (2) require the University to promptly grant Appellants access to any responsive documents; and (3) award them their attorneys’ costs and fees.³¹

The University's Contentions

The University argues that the Opinions should be affirmed. The University posits that Appellants’ reading of FOIA is overly broad and would essentially require any entity that receives any public funds to produce all documents in their possession. Further, the University contends that the Attorney General, and this Court, may rely on a statement from the University’s General Counsel that no public funds are used for the Papers. The University next argues that it was not required by FOIA to review every document included in the Papers prior to

³¹ Appellants’ last request does not necessitate a lengthy discussion. For the reasons set forth in this opinion, Appellants are not successful plaintiffs and thus are not entitled to attorney’s costs and fees under 29 *Del. C.* § 10005(d).

denying Appellants' requests. Finally, the University maintains that the requested visitor log-in sheets are covered by FOIA's library record exemption.

Appellants' Requests are Not Subject to FOIA

The purpose of FOIA is to "further the accountability of government to the citizens of [Delaware]." ³² FOIA's Declaration of Policy states the policy considerations behind this legislation.

It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. ³³

While FOIA is meant to cover a wide array of information, it does not provide unlimited access to every document that is of interest to the public. This is especially true with regard to documents belonging to the University. When enacting FOIA, the General Assembly specifically addressed how FOIA would apply to the University. ³⁴ As the Attorney General stated in the Opinions, FOIA only covers: (1) matters discussed in meetings by the full Board of Trustees; and (2) university documents relating to the expenditure of public funds. ³⁵

³² 29 Del. C. § 10001.

³³ *Id.*

³⁴ *Id.* at § 10002(i).

³⁵ *Id.*

The Papers were Never Discussed Before the Full Board

In response to Appellants' requests, the University stated that the Papers had not been discussed before the full Board of Trustees. Appellants do not challenge this assertion, but rather argue that "[t]he 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."³⁶ Regardless of whether FOIA provides a potential loophole, it is clear that the General Assembly took care to define exactly how the legislation would apply to the University. Applying FOIA as clearly written, Appellants' request for information from any meeting where the Board discussed the Papers may be properly denied because the matter was never discussed before the full Board.

The Papers Do Not "Relate to the Expenditure of Public Funds"

The second exception is the main point of contention in the briefs. Appellants argue that every document contained in the Papers is covered by FOIA because the University receives some public funding and it can be inferred that at least a portion of that public funding is used to house, maintain, or otherwise support the Papers. The University argues that this interpretation of FOIA is impermissibly broad.

³⁶ OB at 14.

FOIA does not define what it means for a document to “relate to the expenditure of public funds.” However, it does include specific examples of covered documents including: requests for proposals; requests for quotes; or other documents “soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure.”³⁷ In light of these examples, the Court finds that documents which “relate to the expenditure of public funds” are those that discuss or show how the University itself spends public funds. Therefore, none of the documents requested by Appellants fall under FOIA.³⁸

The University has Adequately Shown that the Papers are Not Supported by Public Funds

In an action alleging a FOIA violation, “the burden of proof shall be on the custodian of records to justify the denial of access to records.”³⁹ Appellants dedicate a great deal of their opening brief to arguing that the “uncorroborated representation [made by the University’s General Counsel] that no public funds are

³⁷ 29 Del. C. § 10002.

³⁸ The Court relies on the statement from the University’s General Counsel that none of the requested documents are responsive. The only document that possibly could “relate to the expenditure of public funds” is the Gift Agreement. If, upon further review **within 30 days of the date of this Opinion**, the University finds that the Gift Agreement discusses the University using public funds to support the Papers, the University must immediately notify the Court so that this opinion can be amended.

³⁹ 29 Del. C. § 10005(c).

used to support the [] Papers” is insufficient to meet the University’s burden of proof.⁴⁰

Every lawyer licensed in Delaware is bound by a duty of candor.⁴¹ “Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.”⁴² A Delaware attorney who makes a false statement in the course of legal representation is subject to discipline by the Delaware Supreme Court.⁴³ In light of this duty, statements made by the University’s General Counsel may be given proper weight. Further, Appellants have provided nothing other than unsupported speculation in opposition to University Counsel’s representation. The Court also notes that FOIA only requires a public body to provide its reasons for denying a request; there is no requirement to provide supporting proof.⁴⁴ Therefore, the Court finds that the University met its burden to justify denial of access to the Papers.

The University was Not Required Review Every Document Included in the Papers

Appellants argue that the University’s “categorical” determination “that no responsive public records exist based on the unsupported assertion that public

⁴⁰ OB at 9-13.

⁴¹ Del. Principles Professionalism for Lawyers A(1).

⁴² *Id.*

⁴³ DLRPC 3.3.

⁴⁴ 29 Del. C. § 10003(h)(2).

funds are not expended to support the Senatorial Papers. . .denied Appellants their legal right to inspect records under FOIA.”⁴⁵ Appellants appear to believe that it would have been simple for the University to thoroughly examine the Papers before responding to Appellants’ requests. The Papers include “more than 1,850 archival records” in addition to “extensive electronic records and media.”⁴⁶ The University has been meticulously cataloging all of this information for years. It would be unduly burdensome and unreasonable as a practical matter to require that the University speed up its process so that it could inspect each and every document before denying Appellants’ requests.

Further, the decision to grant or deny Appellants’ requests did not require knowledge of any information *contained in* the Papers. This decision turned on whether or not the Papers related to the University’s expenditure of public funds. As President-elect Biden is not, and never was, an employee of the University, there is no reason to believe that any information contained in the Papers would relate to the University’s financial expenditures. Additionally, the question of whether the University expends public funds to maintain the Papers is answered by examining the University’s spending, which likely would not be accounted for in

⁴⁵ OB at 18-19.

⁴⁶ <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

the Papers themselves. Therefore, the University did not err by failing to examine the Papers before denying Appellants' requests.

The University was Not Required to Produce Log-in Sheets

Appellants' final argument is that the University improperly withheld "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."⁴⁷ However, under 29 *Del. C.* § 10002(1)(12), "any 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" are specifically exempted from "public records" and thus are not subject to FOIA.

The Papers are housed in the University's Morris Library, which is a public library. Once properly archived, the Papers will be available to the entire public. The two-pronged application of 29 *Del. C.* § 10002(1)(12) is straightforward. First, the log-in sheets requested by Appellants are "records of a public library which contain the identity of a user." As for the second prong—the identity of the documents accessed—Appellants argue that "the request for visitor log does not seek the specific documents within the Senatorial Papers a visitor has accessed." This argument is without merit. The Papers belong to the library in the same way a

⁴⁷ OB at 7, 16-17.

collection of books would. Even if the requested log-in sheets did not identify the *exact* document a visitor accessed, they would still identify the “documents...of the library which a patron has used.” As the requested log-in sheets are not subject to FOIA, the University did not err by failing to give Appellants access to them.

CONCLUSION

The Court finds that the University’s denial of Appellants’ requests does not violate FOIA. The requested information is not subject to FOIA. The Papers were never discussed during a meeting of the University’s Board of Trustees and the Papers do not relate to the expenditure of public funds. The Attorney General, and this Court, may rely on the statement of University Counsel that no public funds are used to maintain the Papers. The University was not required to inspect the Papers or provide log-in sheets for persons who have accessed the Papers.

After a careful *de novo* review, this appeal is **HEREBY DENIED** and the Opinions are **HEREBY AFFIRMED**.

IT IS SO ORDERED.



The Honorable Mary M. Johnston

EXHIBIT B



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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 C



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

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FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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

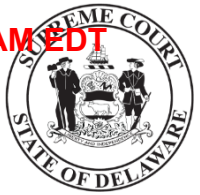
Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

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



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUDICIAL WATCH, INC., a District of
Columbia corporation, and THE DAILY
CALLER NEWS FOUNDATION,)
)
) No. 32,2021
)
) *Petitioners Below-*
) *Appellants,*)
)
) v.)
) On Appeal from C.A. No. N20A-
) 07-001 MMJ in the Superior Court
) of the State of Delaware
)
)
)
) *Respondent Below-*
) *Appellees.*)
)

APPENDIX TO APPELLANTS' OPENING BRIEF

HALLORAN FARKAS + KITTILA LLP

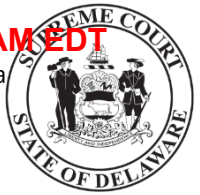
Theodore A. Kittila (Bar No. 3963)
William E. Green, Jr. (Bar No. 4864)
5801 Kennett Pike, Suite C/D
Wilmington, Delaware 19807
Phone: (302) 257-2025
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Email: tk@hfk.law / wg@hfk.law

*Counsel for Plaintiffs Below/Appellants
Judicial Watch, Inc. and the Daily
Caller News Foundation*

Dated: March 23, 2021

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Case History Search Case Number 32,2021

Search Created:
 3/16/2021 17:41:52 GMT-0400 (Eastern Daylight Time)

Court: DE Superior Court-New Castle County **Judge:** Johnston, Mary M **File & ServeXpress Live Date:** 7/2/2020

Division: N/A **Case Number:** N20A-07-001 MMJ **Document(s) Filed:** 33

Case Type: Administrative Agency **Case Name:** CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware **Date Range:** All

Linked Case(s): 32,2021 [View Case History]

1-19 of 19 transactions <<Prev Page 1 of 1 Next>>

Transaction	Date/Time	Option	Case Number Case Name	Authorizer Organization	#	Document Type	Document Title	Review Status	Size
65742461	7/2/2020 12:34 PM EDT	File Only	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Theodore A Kittila, Halloran Farkas Kittila LLP	1	Notice of Appeal-Administrative Agency	Notice of Appeal of the Chief Deputy Attorney General's June 25, 2020 Opinion and July 1, 2020 Opinion • Linked from (6)	Accepted	0.1MB
						Exhibits	Exhibits A and B to Notice of Appeal • Linked from (2)	Accepted	0.2MB
						Case Information Statement	Civil Case Information Sheet • Linked from (2)	Accepted	0.1MB
						Praecipe	Praecipe for Service on Delaware Department of Justice and University of Delaware • Linked from (2)	Accepted	0.1MB
						Writ-Citation on Appeal	Citation on Appeal Writ - Delaware Department of Justice • Linked from (2)	Accepted	0.1MB

						Writ-Citation on Appeal	Citation on Appeal Writ - University of Delaware • Linked from (2)	Accepted	0.1MB
65756569	7/9/2020 1:41 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Lisa LG Gonzalez, DE Superior Court-New Castle County	2	Writ(s) Issued	(2) WRITS ISSUED 7-9-20 NCC Sheriff ck# 3049 \$30.00	Accepted	0.4MB
65772279	7/15/2020 4:55 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Patricia Davis, Department of Justice-Wilmington	3	Letter	Letter to the Court that DDOJ will not take a position on appeal	Accepted	0.1MB
65776291	7/17/2020 8:43 AM EDT	File Only	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Sheriff New Castle County, New Castle County DE Sheriffs Office	4	Sheriffs Return	WRIT RETURN - DELAWARE DEPARTMENT OF JUSTICE - Corporation or Business Without A Registered Agent Served 07-13-2020	Accepted	0.1MB
65789621	7/22/2020 1:23 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Dorey Cole, Department of Justice-Wilmington	5	Verification	Certification of Record • Linked to (1)	Accepted	2.4MB
65810597	7/30/2020 9:49 AM EDT	File Only	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Sheriff New Castle County, New Castle County DE Sheriffs Office	6	Sheriffs Return	WRIT RETURN - UNIVERSITY OF DELAWARE - Non Est Inventus 07-30-2020 • Linked from (1)	Accepted	0.1MB
65846379	8/13/2020 1:48 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and	William E Green, Halloran Farkas Kittila LLP	7	Affidavit	Letter Acknowledging Acceptance of Service • Linked to (7)	Accepted	0.1MB

			University of Delaware						
65853985	8/17/2020 3:08 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	James D Taylor, Saul Ewing Arnstein & Lehr LLP	8	Entry of Appearance	Entry of Appearance of William E. Manning and James D. Taylor, Jr. for University of Delaware with certificate of service <ul style="list-style-type: none"> • Linked to (1) • Linked from (1) 	Accepted	0.1MB
65854574	8/17/2020 4:12 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Theodore A Kittila, Halloran Farkas Kittila LLP	9	Stipulation & Order	Stipulated and [Proposed] Order Governing Appeal Schedule <ul style="list-style-type: none"> • Linked to (2) • Linked from (2) 	Accepted	0.1MB
65856530	8/18/2020 11:47 AM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Charles E Butler, DE Superior Court-New Castle County	10	Order	So Ordered (Stipulated and [Proposed] Order Governing Appeal Schedule) <ul style="list-style-type: none"> • Linked to (1) • Linked from (2) 	Accepted	0.2MB
65884536	8/28/2020 12:16 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	William E Green, Halloran Farkas Kittila LLP	11	Opening Brief	Appellants' Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 <ul style="list-style-type: none"> • Linked to (7) • Linked from (2) 	Accepted	0.3MB
						Certificate of Compliance	Certificate of Compliance with Typeface Requirement and Type-Volume Limitation <ul style="list-style-type: none"> • Linked from (2) 	Accepted	0.1MB
						Certificate of Service	Certificate of Service to Appellants' Opening Brief in Support of their Appeal from Attorney General	Accepted	0.1MB

							Opinions 20-IB19 and 20-IB20 • Linked from (2)		
65913324	9/9/2020 11:06 AM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Lisa LG Gonzalez, DE Superior Court-New Castle County	12	Order	ORDER - PLEASE TAKE NOTICE that effective immediately, pursuant to the assignment authority under Judicial Branch Operating Procedures § VI 2 and Superior Court Civil Rule 40(a), the above matter previously assigned to the Honorable Charles E. Butler is reassigned for all purposes until disposition to the Honorable Mary M. Johnston. It is so ordered, President Judge Jurden, September 8, 2020	Accepted	0.1MB
65913716	9/9/2020 12:04 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Lisa LG Gonzalez, DE Superior Court-New Castle County	13	Letter	As of this date the above captioned case has been reassigned to Judge Mary M Johnston. Please remember that on all future documents and filings on this case, counsel must reference the assigned Judge by including the Judge's initials (MMJ) as a suffix to the civil action number.	Accepted	0.1MB
65970801	9/28/2020 4:18 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	William E Manning, Saul Ewing Arnstein & Lehr LLP	14	Answering Brief	Appellee, the University of Delaware's Answering Brief • Linked to (2) • Linked from (1)	Accepted	0.2MB
						Exhibits	Exhibit A to Appellee's Answering Brief	Accepted	0.2MB

							<ul style="list-style-type: none"> • Linked from (1) 		
						Exhibits	Exhibit B to Appellee's Answering Brief <ul style="list-style-type: none"> • Linked from (1) 	Accepted	0.2MB
						Certificate of Service	Certificate of Service of Appellee's Answering Brief <ul style="list-style-type: none"> • Linked from (1) 	Accepted	0.1MB
66002909	10/8/2020 1:31 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	William E Green, Halloran Farkas Kittila LLP	15	Reply Brief	Appellants' Reply Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 <ul style="list-style-type: none"> • Linked to (8) • Linked from (1) 	Accepted	0.1MB
						Certificate of Compliance	Certificate of Compliance to Appellants' Reply Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 <ul style="list-style-type: none"> • Linked from (1) 	Accepted	0.1MB
						Certificate of Service	Certificate of Service to Appellants' Reply Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 <ul style="list-style-type: none"> • Linked from (1) 	Accepted	0.1MB
66006094	10/9/2020 9:53 AM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	William E Green, Halloran Farkas Kittila LLP	16	Letter	Letter to Judge Johnston Enclosing Courtesy Copies of Appellants' Briefs <ul style="list-style-type: none"> • Linked to (6) 	Accepted	0.1MB
66223143	1/4/2021 2:10 PM EST	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v.	Mary M Johnston, DE Superior	17	Opinion	OPINION. On Appeal from Attorney General Opinions 20-IB19	Accepted	0.6MB

			Delaware Department of Justice and University of Delaware	Court-New Castle County			and 201B-20, Affirmed • Linked from (1)		
66231631	1/6/2021 3:18 PM EST	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	William E Manning, Saul Ewing Arnstein & Lehr LLP	18	Letter	Letter from William E. Manning to the Honorable Mary M. Johnston conveying correspondence from Jennifer Becnel Guzzo, Esquire • Linked to (1)	Accepted	0.1MB
						Exhibits	Letter from Jennifer M. Becnel-Guzzo, Esquire to the Honorable Mary M. Johnston regarding response to footnote 38 of Opinion of January 4, 2021	Accepted	0.2MB
66312809	2/5/2021 10:53 AM EST	File Only	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Mary M Johnston, DE Superior Court-New Castle County	19	Notice of Appeal to Supreme Court	Copy of notice of appeal to the Supreme Court filed 1-29-21.	Accepted	0.1MB
					20	Letter	Copy of letter captioned in the Supreme Court dated 2-5-21 from Senior Court Clerk to the Chief Deputy Prothonotary, advising the record is due 3-2-21.	Accepted	0.1MB



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(l).

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.

Theodore A. Kittila (Bar No. 3963)
William E. Green, Jr. (Bar No. 4864)
5801 Kennett Pike, Suite C/D
Wilmington, Delaware 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law / wg@hfk.law

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



EXHIBIT A



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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



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,)
Appellant,)

v.)

C.A. # N20A-07-001 CEB

DELAWARE DEPARTMENT OF)
JUSTICE and UNIVERSITY OF)
DELAWARE,)
Respondents Below,)
Appellees.)

CERTIFICATION OF RECORD

I, Kim Siegel, FOIA Coordinator, as custodian of the records for the Delaware Department of Justice, do hereby certify that the documents contained herein are copies of the original records as maintained in the files for the Delaware Department of Justice for the determination in this matter.

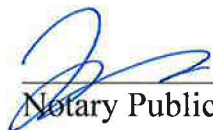
In testimony whereof, I have hereunto set my hand of office at Wilmington, New Castle County, Delaware, this 22nd day of July, 2020. I further certify that the above information is true and correct.



Kim Siegel
FOIA Coordinator

STATE OF DELAWARE)
)
COUNTY OF NEW CASTLE)

Sworn to and subscribed before me this 22nd day of July, 2020

 Bar ID 5415
Notary Public 200 Plerhops, PA6

(My commission expires _____).

Email from Sean Dunagan to FOIA Coordinator re: Judicial Watch petition dated May 26, 2020	000001-000003
Email from Kim Siegel to Sean Dunagan requesting additional documentation to complete Judicial Watch petition dated May 27, 2020	000004
Email from Sean Dunagan to Kim Siegel completing Judicial Watch petition dated May 28, 2020	000005-000008
Letter from Kim Siegel to Laure Ergin and Sean Dunagan re: Judicial Watch petition dated May 28, 2020	000009-000015
Letter from Jen Becnel-Guzzo to Kim Siegel re: Judicial Watch petition response dated June 5, 2020	000016-000018
Email from Sean Dunagan to Kim Siegel re: status of Judicial Watch petition dated June 24, 2020	000019-000023
Email from Kim Siegel to Sean Dunagan re: Attorney General Opinion No. 20-IB19 dated June 25, 2020	000024
Attorney General Opinion No. 20-IB19 regarding Judicial Watch petition dated June 25, 2020	000025-000028
Email from Andrew Kerr to FOIA Coordinator re: Daily Caller petition dated May 28, 2020	000029-000031
Email from Kim Siegel to Andrew Kerr requesting additional documentation to complete Daily Caller petition dated May 29, 2020	000032-000033
Email from Andrew Kerr to Kim Siegel completing Daily Caller petition dated June 3, 2020	000034-000038
Letter from Kim Siegel to Laure Ergin and Andrew Kerr re: Daily Caller petition dated June 3, 2020	000039-000047
Letter from Jen Becnel-Guzzo to Kim Siegel re: Daily Caller petition response dated June 11, 2020	000048-000050
Email from Andrew Kerr to Kim Siegel re: status of Daily Caller petition dated June 27, 2020	000051
Email from Andrew Kerr to Kim Siegel re: status of Daily Caller petition dated June 30, 2020	000052-000053
Email from Kim Siegel to Andrew Kerr re: Attorney General Opinion No. 20-IB20 dated July 1, 2020	000054
Attorney General Opinion No. 20-IB20 regarding Daily Caller petition dated July 1, 2020	000055-000058

Siegel, Kim (DOJ)

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
Sent: Tuesday, May 26, 2020 2:37 PM
To: OpenGovernment (MailBox Resources)
Subject: Freedom of Information Act Petition
Attachments: Univ. of DE appeal.doc

Good afternoon. Please find attached a Freedom of Information Act petition for the Delaware Department of Justice.

Thank you for your time and consideration. If you have any questions, please don't hesitate to let me know.

Sincerely,

Sean A. Dunagan
Senior Investigator
Judicial Watch, Inc.
400 Scott Avenue
Fort Collins, CO 80521
(814) 691-9806

May 26, 2020

VIA EMAIL (opengovernment@delaware.gov)

Delaware Department of Justice
Attn: Kim Siegel, FOIA Coordinator
820 N. French Street
Wilmington, DE 19801

Re: Freedom of Information Act Petition

Dear FOIA Coordinator

This letter constitutes a timely petition requesting that the Delaware Department of Justice review a denial of a Freedom of Information Act request for potential violations of the FOIA statute.

On April 30, 2020, I submitted to the University of Delaware a request for 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, 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.
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.

On May 20, 2020, I received from University of Delaware Associate Vice President and Deputy General Counsel Jennifer Becnel-Guzzo an email advising me that the request was being denied on the grounds that, "there have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers" In addition, the email advised that, "meetings of the University's full Board of Trustees are public meetings under FOIA, and the agendas and the minutes of those meetings are public records. The 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

000002

A-28

Delaware Department of Justice

May 26, 2020

Page 2 of 2

responsive to your requests.”

With regard to part one of the request, the Biden senatorial records are housed at the University of Delaware library and overseen by University of Delaware library staff. As 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.

Part two of the request seeks records of communication between University of Delaware officials and former Vice President Biden and/or any individual acting on his behalf. The assertion that the Biden senatorial papers were never addressed during a meeting of the Board of Trustees is irrelevant to this request. The Board of Trustees is not the only component of the University that is subject to the Freedom of Information Act, and the request does not seek only Board of Trustee records. The University’s response does not provide any indication that records management systems utilized by the classes of individuals identified in the request were searched for potentially responsive records, as is its obligation under the statute.

Because the records sought pertain to an activity by the University that entails the expenditure of public funds, and because the University did not conduct an adequate search for responsive records, we believe that it has failed to fulfill its obligation to comply with the Freedom of Information Act. Accordingly, we petition the Department of Justice to review the adverse determination of this request.

Thank you for your cooperation. If you have any questions or are in need of any additional information, please don’t hesitate to contact me at sdunagan@judicialwatch.org or 814-691-9806.

Sincerely,

Sean Dunagan

Judicial Watch, Inc.

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Wednesday, May 27, 2020 1:43 PM
To: 'Sean Dunagan'; OpenGovernment (MailBox Resources)
Subject: RE: Freedom of Information Act Petition

Dear Mr. Dunagan,

Thank you for your correspondence. Kindly provide copies of the original request to and response from UD, as well as any other correspondence you may have had with them related to this request, if available.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
Sent: Tuesday, May 26, 2020 2:37 PM
To: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: Freedom of Information Act Petition

Good afternoon. Please find attached a Freedom of Information Act petition for the Delaware Department of Justice.

Thank you for your time and consideration. If you have any questions, please don't hesitate to let me know.

Sincerely,

Sean A. Dunagan
Senior Investigator
Judicial Watch, Inc.
400 Scott Avenue
Fort Collins, CO 80521
(814) 691-9806

Siegel, Kim (DOJ)

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
Sent: Thursday, May 28, 2020 11:22 AM
To: OpenGovernment (MailBox Resources)
Subject: RE: Freedom of Information Act Petition
Attachments: Freedom of Information Act response; 5884 req.pdf

Thank you for your prompt reply. Attached are the original request and the response that I received. If you have any questions or need anything else, please don't hesitate to let me know.

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Wednesday, May 27, 2020 1:43 PM
To: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>; OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: RE: Freedom of Information Act Petition

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Delaware Department of Justice

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
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Sincerely,

Sean A. Dunagan
Senior Investigator
Judicial Watch, Inc.
400 Scott Avenue
Fort Collins, CO 80521
(814) 691-9806

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 6:43 PM
To: Sean Dunagan
Subject: Freedom of Information Act response

Dear Mr. Dunagan:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 Del. C. §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). There have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.

Further, meetings of the University's full Board of Trustees are public meetings under FOIA, and the agendas and the minutes of those meetings are public records. The 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 requests.

By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 Hullihen Hall, Newark, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

April 30, 2020

VIA ONLINE SUBMISSION

Jennifer Becnel-Guzzo, FOIA Coordinator
University of Delaware

Re: Delaware Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the provisions of the Delaware Freedom of Information Act, Del. Code Ann. § 10001 *et seq.*, Judicial Watch, Inc. requests from the University of Delaware access to and a copy of the following record(s) within ten (10) business days:

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, 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.
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.

Delaware law allows an agency to set its fee structure, but these fees should be limited only to the cost of finding and reproducing the records. In addition, the Office of the Attorney General has stated that the fee can be waived if the public interest would be served. Delaware Freedom of Information Act Policy Manual Judicial Watch is a 501(c)(3), not-for-profit, educational organization. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of state governments and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its

Delaware Freedom of Information Act Request

April 30, 2020

Page 2 of 2

analysis, as well as the records themselves. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through open records laws to the public, and we believe a fee waiver in this instance would be in the public interest. In the event that our request for a fee waiver is denied, please notify us in advance if the expected cost is likely to exceed \$150.00.

If you do not understand this request or any portion thereof, or if you feel you require clarification, please contact us immediately at 202-646-5172 or sdunagan@judicialwatch.org. We look forward to receiving the requested documents in ten (10) days and a waiver of both search and duplication costs. Thank you for your cooperation.

Sincerely,

Sean Dunagan
Judicial Watch, Inc.

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Thursday, May 28, 2020 2:34 PM
To: 'lbergin@udel.edu'; 'Sean Dunagan'
Cc: 'jbg@udel.edu'
Subject: FOIA Petition Regarding the University of Delaware
Attachments: Petition Transmittal Letter-UD Judicial Watch 052820.pdf; Petition & Supporting Docs- UD Judicial Watch 052820.pdf

Dear Ms. Ergin and Mr. Dunagan,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

May 28, 2020

VIA EMAIL

Laure Bachich Ergin
Vice President and General Counsel, University of Delaware
lbergin@udel.edu

VIA EMAIL

Sean Dunagan
SDunagan@JUDICIALWATCH.ORG

RE: FOIA Petition Regarding the University of Delaware

Dear Ms. Ergin and Mr. Dunagan:

Enclosed is a petition from Mr. Dunagan alleging that the University of Delaware (the "University") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA").

We request that the University provide a response to the allegation(s), including the factual basis and any legal authorities for its position. The Rules of Procedure for FOIA petitions typically allow six business days for a response. However, as part of the *Fourth Modification of the Declaration of a State Of Emergency for the State of Delaware due to a Public Health Threat*, signed by Governor Carney on March 22, 2020, the statutory time period "for the . . . response to petitions filed pursuant to 29 *Del. C.* § 10005(e) . . . [have been] extended to 15 business days following the termination of any active Declaration of a State of Emergency." Please note our Office is continuing to process petitions and will accept the University's response any time prior to the deadline provided in the State of Emergency.

To the extent that there are factual issues that the University addresses in its response, the University may wish to provide us with an affidavit signed by someone with knowledge of the information alleged. After we receive the University's submission, we will determine whether additional information from either party is required and decide what further action, if any, is appropriate.

We ask that the University email its submission to OpenGovernment@delaware.gov and the parties copy each other on any correspondence with this Office regarding this matter. We also ask that the parties notify us immediately if the parties resolve this matter and no longer require a written determination from this Office. For more information on FOIA petition procedures, please visit <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>.

Very truly yours,

/s/ Kim Siegel

Kim Siegel, MPA
FOIA Coordinator

Enclosure

cc: Jennifer Becnel-Guzzo, Associate Vice President and Deputy General Counsel, University of Delaware

000010

May 26, 2020

VIA EMAIL (opengovernment@delaware.gov)

Delaware Department of Justice
Attn: Kim Siegel, FOIA Coordinator
820 N. French Street
Wilmington, DE 19801

Re: Freedom of Information Act Petition

Dear FOIA Coordinator

This letter constitutes a timely petition requesting that the Delaware Department of Justice review a denial of a Freedom of Information Act request for potential violations of the FOIA statute.

On April 30, 2020, I submitted to the University of Delaware a request for 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, 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.
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.

On May 20, 2020, I received from University of Delaware Associate Vice President and Deputy General Counsel Jennifer Becnel-Guzzo an email advising me that the request was being denied on the grounds that, "there have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers" In addition, the email advised that, "meetings of the University's full Board of Trustees are public meetings under FOIA, and the agendas and the minutes of those meetings are public records. The 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

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A-37

Delaware Department of Justice

May 26, 2020

Page 2 of 2

responsive to your requests.”

With regard to part one of the request, the Biden senatorial records are housed at the University of Delaware library and overseen by University of Delaware library staff. As 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.

Part two of the request seeks records of communication between University of Delaware officials and former Vice President Biden and/or any individual acting on his behalf. The assertion that the Biden senatorial papers were never addressed during a meeting of the Board of Trustees is irrelevant to this request. The Board of Trustees is not the only component of the University that is subject to the Freedom of Information Act, and the request does not seek only Board of Trustee records. The University’s response does not provide any indication that records management systems utilized by the classes of individuals identified in the request were searched for potentially responsive records, as is its obligation under the statute.

Because the records sought pertain to an activity by the University that entails the expenditure of public funds, and because the University did not conduct an adequate search for responsive records, we believe that it has failed to fulfill its obligation to comply with the Freedom of Information Act. Accordingly, we petition the Department of Justice to review the adverse determination of this request.

Thank you for your cooperation. If you have any questions or are in need of any additional information, please don’t hesitate to contact me at sdunagan@judicialwatch.org or 814-691-9806.

Sincerely,

Sean Dunagan

Judicial Watch, Inc.

April 30, 2020

VIA ONLINE SUBMISSION

Jennifer Becnel-Guzzo, FOIA Coordinator
University of Delaware

Re: Delaware Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the provisions of the Delaware Freedom of Information Act, Del. Code Ann. § 10001 *et seq.*, Judicial Watch, Inc. requests from the University of Delaware access to and a copy of the following record(s) within ten (10) business days:

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, 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.
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.

Delaware law allows an agency to set its fee structure, but these fees should be limited only to the cost of finding and reproducing the records. In addition, the Office of the Attorney General has stated that the fee can be waived if the public interest would be served. Delaware Freedom of Information Act Policy Manual Judicial Watch is a 501(c)(3), not-for-profit, educational organization. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of state governments and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its

Delaware Freedom of Information Act Request

April 30, 2020

Page 2 of 2

analysis, as well as the records themselves. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through open records laws to the public, and we believe a fee waiver in this instance would be in the public interest. In the event that our request for a fee waiver is denied, please notify us in advance if the expected cost is likely to exceed \$150.00.

If you do not understand this request or any portion thereof, or if you feel you require clarification, please contact us immediately at 202-646-5172 or sdunagan@judicialwatch.org. We look forward to receiving the requested documents in ten (10) days and a waiver of both search and duplication costs. Thank you for your cooperation.

Sincerely,

Sean Dunagan
Judicial Watch, Inc.

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 6:43 PM
To: Sean Dunagan
Subject: Freedom of Information Act response

Dear Mr. Dunagan:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 *Del. C.* §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). There have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.

Further, meetings of the University's full Board of Trustees are public meetings under FOIA, and the agendas and the minutes of those meetings are public records. The 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 requests.

By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 HULLIHEN HALL, NEWARK, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Friday, June 5, 2020 1:25 PM
To: OpenGovernment (MailBox Resources)
Cc: lbergin@udel.edu; Sean Dunagan
Subject: Re: FOIA Petition Regarding the University of Delaware
Attachments: 20200605 - UD response to Dunagan FOIA petition.pdf

Dear Ms. Siegel:

Attached is the University of Delaware's response to Mr. Dunagan's petition.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 Hullahen Hall, Newark, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

On Thu, May 28, 2020 at 2:34 PM OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov> wrote:

Dear Ms. Ergin and Mr. Dunagan,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA

Delaware Department of Justice



Office of General Counsel

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

University of Delaware
112 Hullen Hall
Newark, Delaware 19716-0101
Phone: 302-831-7367
Email: jbg@udel.edu

June 5, 2020

VIA EMAIL

Ms. Kim Siegel, MPA
FOIA Coordinator
Department of Justice
820 North French Street
Wilmington, DE 19801

Re: FOIA Petition Regarding the University of Delaware

Dear Ms. Siegel:

Thank you for allowing us the opportunity to respond to the petition filed by Sean Dunagan of Judicial Watch, Inc. alleging that the University failed to comply with the Delaware Freedom of Information Act (“FOIA”). Mr. Dunagan’s complaint is without merit, as the documents he sought are not public records under FOIA.

When the Delaware Freedom of Information Act (“FOIA”) was adopted in 1976, the General Assembly recognized the unique nature of the University of Delaware – it is not a state agency, but it spends state dollars. The solution, captured in FOIA from the outset, was simple – when the University spends state dollars, treat it like a state agency and require production of documents “relating to the expenditure of public funds.” 29 *Del. C.* §10002(i). “Public funds’ are those funds derived from the State or any political subdivision of the State.” *Id.* at §10002(k). Therefore, only University documents that relate to the expenditure of State dollars are “public records” under FOIA. In addition, FOIA provides that when the University’s full Board of Trustees meets, the Board is treated as a “public body” and the meeting is a “meeting” under FOIA. *Id.* at 10002(i).

The State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget. The state appropriation makes up about 11% of the University’s operating budget. This means many areas of the University are not supported with public funds.

The University responded appropriately and accurately to Mr. Dunagan’s request. Public funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers. Therefore, the Biden Papers and documents that relate to those papers are not public records under FOIA. Further, as we stated to Mr. Dunagan, the Biden Papers were not discussed during meetings of our full Board of Trustees, therefore we have no agendas or

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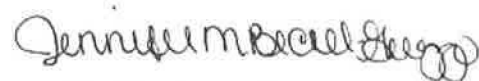
A-43

Ms. Kim Siegel
June 5, 2020
Page 2

minutes to provide. If the Board of Trustees had discussed the Biden Papers, those documents would have been provided to Mr. Dunagan as public records under FOIA. Finally, the communications sought through the second request cannot relate to the expenditure of public funds, as the University has not provided public funds to Vice President Biden or his presidential campaign.

The University takes its obligations under FOIA very seriously. We receive scores of FOIA requests each year and carefully review and respond to each one. We look forward to working with you to resolve this matter. Thank you.

Sincerely,



Jennifer M. Becnel-Guzzo

cc: Laure Bachich Ergin, Esquire (via email)
Sean Dunagan (via email)

Siegel, Kim (DOJ)

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
Sent: Wednesday, June 24, 2020 1:26 PM
To: OpenGovernment (MailBox Resources)
Subject: FW: Freedom of Information Act Petition
Attachments: Freedom of Information Act response; 5884 req.pdf

Good afternoon. I was wondering if you could provide me with an update on the status of this petition. I received a copy of the University of Delaware's response, but have not heard anything further. At your convenience, would you kindly let me know where things stand?

Thank you very much for your time and assistance.

Sincerely,

Sean Dunagan

From: Sean Dunagan
Sent: Thursday, May 28, 2020 11:22 AM
To: 'OpenGovernment (MailBox Resources)' <OpenGovernment@delaware.gov>
Subject: RE: Freedom of Information Act Petition

Thank you for your prompt reply. Attached are the original request and the response that I received. If you have any questions or need anything else, please don't hesitate to let me know.

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Wednesday, May 27, 2020 1:43 PM
To: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>; OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: RE: Freedom of Information Act Petition

Dear Mr. Dunagan,

Thank you for your correspondence. Kindly provide copies of the original request to and response from UD, as well as any other correspondence you may have had with them related to this request, if available.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

From: Sean Dunagan <SDunagan@JUDICIALWATCH.ORG>
Sent: Tuesday, May 26, 2020 2:37 PM
To: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: Freedom of Information Act Petition

Good afternoon. Please find attached a Freedom of Information Act petition for the Delaware Department of Justice.

Thank you for your time and consideration. If you have any questions, please don't hesitate to let me know.

Sincerely,

Sean A. Dunagan
Senior Investigator
Judicial Watch, Inc.
400 Scott Avenue
Fort Collins, CO 80521
(814) 691-9806

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 6:43 PM
To: Sean Dunagan
Subject: Freedom of Information Act response

Dear Mr. Dunagan:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 *Del. C.* §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). There have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.

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By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 HULLIHEN HALL, NEWARK, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

April 30, 2020

VIA ONLINE SUBMISSION

Jennifer Becnel-Guzzo, FOIA Coordinator
University of Delaware

Re: Delaware Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the provisions of the Delaware Freedom of Information Act, Del. Code Ann. § 10001 *et seq.*, Judicial Watch, Inc. requests from the University of Delaware access to and a copy of the following record(s) within ten (10) business days:

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, 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.
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.

Delaware law allows an agency to set its fee structure, but these fees should be limited only to the cost of finding and reproducing the records. In addition, the Office of the Attorney General has stated that the fee can be waived if the public interest would be served. Delaware Freedom of Information Act Policy Manual Judicial Watch is a 501(c)(3), not-for-profit, educational organization. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of state governments and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its

Delaware Freedom of Information Act Request

April 30, 2020

Page 2 of 2

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If you do not understand this request or any portion thereof, or if you feel you require clarification, please contact us immediately at 202-646-5172 or sdunagan@judicialwatch.org. We look forward to receiving the requested documents in ten (10) days and a waiver of both search and duplication costs. Thank you for your cooperation.

Sincerely,

Sean Dunagan
Judicial Watch, Inc.

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Thursday, June 25, 2020 4:18 PM
To: 'SDunagan@JUDICIALWATCH.ORG'
Cc: 'jbg@udel.edu'
Subject: Attorney General Opinion No. 20-IB19
Attachments: Attorney General Opinion No. 20-IB19.pdf

Categories: Egress Switch: Unprotected

Dear Mr. Dunagan,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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

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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

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Thursday, May 28, 2020 7:23 PM
To: OpenGovernment (MailBox Resources)
Subject: Submission of petition
Attachments: Freedom of Information Act response

Dear FOIA Coordinator

This email is a petition requesting that the Delaware Department of Justice review a denial of a Freedom of Information Act request for potential violations of the FOIA statute.

On April 30, 2020, the Daily Caller News Foundation submitted a FOIA request to the University of Delaware for records pertaining to the senatorial papers of former Sen. Joe Biden, which he donated to the University of Delaware Library on June 6, 2012. The FOIA request included copies of all agreements between the University of Delaware Library and Biden pertaining to the storage of his senatorial papers, correspondence between staff of the University of Delaware Library and Biden or members of his staff, logs or sign-in sheets recording any individuals who have visited the special-collections department where Biden's senatorial papers are stored, and all records Biden donated to the University of Delaware library.

On May 20, 2020, University of Delaware Associate Vice President and Deputy General Counsel Jennifer Becnel-Guzzo denied the Daily Caller News Foundation's FOIA request, saying that none of the documents requested relate to the expenditure of public funds, and therefore the university has no public records responsive to its request.

The Daily Caller News Foundation appeals this decision as the records requested do relate to the expenditure of public funds. 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. Furthermore, Delaware provided a \$3.6 million contingency fund to the University in the 2019 fiscal year exclusively for personnel costs, funds which could have been used to pay the salaries of University of Delaware Library employees L. Rebecca Johnson Melvin, who serves as the Manuscripts Librarian and Curator for Biden's senatorial papers and Andrea Boyle Tippett, the Director of External Relations for the Office of Communications and Marketing who is managing public relations for media requests related to Biden's senatorial papers.

In addition, the documents Biden donated to the University of Delaware are public documents as he donated them for the expressed purpose of providing public access to the documents.

Below is the FOIA request submitted on April 30, 2020 by the Daily Caller News Foundation.

I request that copies of the following documents be provided to me:

- 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.*

The records will be used in news articles disseminated to the public through the Daily Caller News Foundation, a nonprofit media organization and online wire service. The Daily Caller News Foundation also allows other news outlets to publish its stories free of charge.

Please waive any applicable fees. Release of the information will contribute significantly to the public interest.

If, however, I am denied a fee waiver, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. However, please notify me prior to your incurring any expenses in excess of that amount.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

If there is anything that may cause denial, I am willing to amend my request and discuss it with you.

Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 4:51 PM
To: akerr@dailycallernewsfoundation.org
Subject: Freedom of Information Act response

Dear Mr. Kerr:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 *Del. C.* §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). The documents you have requested do not relate to the expenditure of public funds. Therefore, the University has no public records responsive to your request.

By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire

Associate Vice President and Deputy General Counsel

Office of General Counsel

112 Hullahen Hall, Newark, DE 19716

University of Delaware

(302) 831-7367 | (302) 831-3055 (facsimile)

www.udel.edu/generalcounsel

jbg@udel.edu

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Friday, May 29, 2020 12:56 PM
To: 'Andrew Kerr'; OpenGovernment (MailBox Resources)
Subject: RE: Submission of petition

Dear Mr. Kerr,

Thank you for your correspondence. Kindly provide a copy of the original request to UD, as well as any other correspondence you may have had with them related to this request, if available.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Thursday, May 28, 2020 7:23 PM
To: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: Submission of petition

Dear FOIA Coordinator

This email is a petition requesting that the Delaware Department of Justice review a denial of a Freedom of Information Act request for potential violations of the FOIA statute.

On April 30, 2020, the Daily Caller News Foundation submitted a FOIA request to the University of Delaware for records pertaining to the senatorial papers of former Sen. Joe Biden, which he donated to the University of Delaware Library on June 6, 2012. The FOIA request included copies of all agreements between the University of Delaware Library and Biden pertaining to the storage of his senatorial papers, correspondence between staff of the University of Delaware Library and Biden or members of his staff, logs or sign-in sheets recording any individuals who have visited the special-collections department where Biden's senatorial papers are stored, and all records Biden donated to the University of Delaware library.

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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. The records will be used in news articles disseminated to the public through the Daily Caller News Foundation, a nonprofit media organization and online wire service. The Daily Caller News Foundation also allows other news outlets to publish its stories free of charge.*

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If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

If there is anything that may cause denial, I am willing to amend my request and discuss it with you.

Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Wednesday, June 3, 2020 9:38 AM
To: OpenGovernment (MailBox Resources)
Subject: RE: Submission of petition
Attachments: UD Foia.png; Freedom of Information Act response

Hi Kim,

Apologies for delay. I submitted the request using the university's online submission form here:
<https://sites.udel.edu/generalcounsel/freedom-of-information-act-foia-request/>

Below is the original request I sent to UD and attached is the receipt I received after submitting the request online and the email I received from the university denying the request.

I request that copies of the following documents be provided to me:

- 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.*
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Best,

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Andrew Kerr
Investigative Reporter

Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Friday, May 29, 2020 12:56 PM
To: 'Andrew Kerr' <akerr@dailycallernewsfoundation.org>; OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: RE: Submission of petition

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Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

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On May 20, 2020, University of Delaware Associate Vice President and Deputy General Counsel Jennifer Becnel-Guzzo denied the Daily Caller News Foundation's FOIA request, saying that none of the documents requested relate to the expenditure of public funds, and therefore the university has no public records responsive to its request.

The Daily Caller News Foundation appeals this decision as the records requested do relate to the expenditure of public funds. 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. Furthermore, Delaware provided a \$3.6 million contingency fund to the University in the 2019 fiscal year exclusively for personnel costs, funds which could have been used to pay the salaries of University of Delaware Library employees L. Rebecca Johnson Melvin, who serves as the Manuscripts Librarian and Curator for Biden's senatorial papers and Andrea Boyle Tippett, the Director of External Relations for the Office of Communications and Marketing who is managing public relations for media requests related to Biden's senatorial papers.

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Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

Delaware Freedom of Information Act Request

The University of Delaware FOIA Coordinator is Jennifer Becnel-Guzzo. To submit a request under the Delaware Freedom of Information Act (29 Del. C. ch. 100), please complete the form below.

FOIA Request Form

Your responses were successfully submitted. This confirms receipt of your request. Thank you!

* Within 15 business days from receipt of your request the University must either provide you with access to the records, deny your request, or state that additional time is needed.*

NOTICE : Under Delaware's Freedom of Information Act, 29 Del. C. §§10001-10006 ("FOIA"), a FOIA request or petition, along with any information contained therein or any documents attached thereto, submitted to any "public body" subject to FOIA, including, without limitation, any board, bureau, commission, department, agency or committee of the State, may itself be deemed a "public record" subject to disclosure under FOIA. More information on FOIA is available at foia.delaware.gov.

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 4:51 PM
To: akerr@dailycallernewsfoundation.org
Subject: Freedom of Information Act response

Dear Mr. Kerr:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 *Del. C.* §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). The documents you have requested do not relate to the expenditure of public funds. Therefore, the University has no public records responsive to your request.

By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 Hullahen Hall, Newark, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Wednesday, June 3, 2020 11:39 AM
To: 'lbergin@udel.edu'; 'Andrew Kerr'
Cc: 'jbg@udel.edu'
Subject: FOIA Petition Regarding the University of Delaware
Attachments: Petition Transmittal Letter-UD Daily Caller 060320.pdf; Petition & Supporting Docs- UD Daily Caller 060320.pdf

Dear Ms. Ergin and Mr. Kerr,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

June 3, 2020

VIA EMAIL

Laure Bachich Ergin
Vice President and General Counsel, University of Delaware
lbergin@udel.edu

VIA EMAIL

Andrew Kerr
akerr@dailycallernewsfoundation.org

RE: FOIA Petition Regarding the University of Delaware

Dear Ms. Ergin and Mr. Kerr:

Enclosed is a petition from Mr. Kerr of the Daily Caller News Foundation alleging that the University of Delaware (the "University") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA").

We request that the University provide a response to the allegation(s), including the factual basis and any legal authorities for its position. The Rules of Procedure for FOIA petitions typically allow six business days for a response. However, as part of the *Fourth Modification of the Declaration of a State Of Emergency for the State of Delaware due to a Public Health Threat*, signed by Governor Carney on March 22, 2020, the statutory time period "for the . . . response to petitions filed pursuant to 29 *Del. C.* § 10005(e) . . . [have been] extended to 15 business days following the termination of any active Declaration of a State of Emergency." Please note our Office is continuing to process petitions and will accept the University's response any time prior to the deadline provided in the State of Emergency.

To the extent that there are factual issues that the University addresses in its response, the University may wish to provide us with an affidavit signed by someone with knowledge of the information alleged. After we receive the University's submission, we will determine whether additional information from either party is required and decide what further action, if any, is appropriate.

We ask that the University email its submission to OpenGovernment@delaware.gov and the parties copy each other on any correspondence with this Office regarding this matter. We also ask that the parties notify us immediately if the parties resolve this matter and no longer require a written determination from this Office. For more information on FOIA petition procedures, please visit <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>.

Very truly yours,

/s/ Kim Siegel

Kim Siegel, MPA
FOIA Coordinator

Enclosure

cc: Jennifer Becnel-Guzzo, Associate Vice President and Deputy General Counsel, University of Delaware

000040

A-66

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Thursday, May 28, 2020 7:23 PM
To: OpenGovernment (MailBox Resources)
Subject: Submission of petition
Attachments: Freedom of Information Act response

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The records will be used in news articles disseminated to the public through the Daily Caller News Foundation, a nonprofit media organization and online wire service. The Daily Caller News Foundation also allows other news outlets to publish its stories free of charge.

Please waive any applicable fees. Release of the information will contribute significantly to the public interest.

If, however, I am denied a fee waiver, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. However, please notify me prior to your incurring any expenses in excess of that amount.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

If there is anything that may cause denial, I am willing to amend my request and discuss it with you.

Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Wednesday, June 3, 2020 9:38 AM
To: OpenGovernment (MailBox Resources)
Subject: RE: Submission of petition
Attachments: UD Foia.png; Freedom of Information Act response

Hi Kim,

Apologies for delay. I submitted the request using the university's online submission form here:
<https://sites.udel.edu/generalcounsel/freedom-of-information-act-foia-request/>

Below is the original request I sent to UD and attached is the receipt I received after submitting the request online and the email I received from the university denying the request.

I request that copies of the following documents be provided to me:

- 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.*

The records will be used in news articles disseminated to the public through the Daily Caller News Foundation, a nonprofit media organization and online wire service. The Daily Caller News Foundation also allows other news outlets to publish its stories free of charge.

Please waive any applicable fees. Release of the information will contribute significantly to the public interest.

If, however, I am denied a fee waiver, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. However, please notify me prior to your incurring any expenses in excess of that amount.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

If there is anything that may cause denial, I am willing to amend my request and discuss it with you.

Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

--

Andrew Kerr
Investigative Reporter

Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Friday, May 29, 2020 12:56 PM
To: 'Andrew Kerr' <akerr@dailycallernewsfoundation.org>; OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: RE: Submission of petition

Dear Mr. Kerr,

Thank you for your correspondence. Kindly provide a copy of the original request to UD, as well as any other correspondence you may have had with them related to this request, if available.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Thursday, May 28, 2020 7:23 PM
To: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Subject: Submission of petition

Dear FOIA Coordinator

This email is a petition requesting that the Delaware Department of Justice review a denial of a Freedom of Information Act request for potential violations of the FOIA statute.

On April 30, 2020, the Daily Caller News Foundation submitted a FOIA request to the University of Delaware for records pertaining to the senatorial papers of former Sen. Joe Biden, which he donated to the University of Delaware Library on June 6, 2012. The FOIA request included copies of all agreements between the University of Delaware Library and Biden pertaining to the storage of his senatorial papers, correspondence between staff of the University of Delaware Library and Biden or members of his staff, logs or sign-in sheets recording any individuals who have visited the special-collections department where Biden's senatorial papers are stored, and all records Biden donated to the University of Delaware library.

On May 20, 2020, University of Delaware Associate Vice President and Deputy General Counsel Jennifer Becnel-Guzzo denied the Daily Caller News Foundation's FOIA request, saying that none of the documents requested relate to the expenditure of public funds, and therefore the university has no public records responsive to its request.

The Daily Caller News Foundation appeals this decision as the records requested do relate to the expenditure of public funds. 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. Furthermore, Delaware provided a \$3.6 million contingency fund to the University in the 2019 fiscal year exclusively for personnel costs, funds which could have been used to pay the salaries of University of Delaware Library employees L. Rebecca Johnson Melvin, who serves as the Manuscripts Librarian and Curator for Biden's senatorial papers and Andrea Boyle Tippet, the Director of External Relations for the Office of Communications and Marketing who is managing public relations for media requests related to Biden's senatorial papers.

In addition, the documents Biden donated to the University of Delaware are public documents as he donated them for the expressed purpose of providing public access to the documents.

Below is the FOIA request submitted on April 30, 2020 by the Daily Caller News Foundation.

I request that copies of the following documents be provided to me:

- 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.*

The records will be used in news articles disseminated to the public through the Daily Caller News Foundation, a nonprofit media organization and online wire service. The Daily Caller News Foundation also allows other news outlets to publish its stories free of charge.

Please waive any applicable fees. Release of the information will contribute significantly to the public interest.

If, however, I am denied a fee waiver, I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$25. However, please notify me prior to your incurring any expenses in excess of that amount.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

If there is anything that may cause denial, I am willing to amend my request and discuss it with you.

Please do not hesitate to call me with any questions or comments. I would appreciate your communicating with me by email or telephone, rather than by mail. I can be reached at akerr@dailycallernewsfoundation.org or 704-770-5938.

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

Delaware Freedom of Information Act Request

The University of Delaware FOIA Coordinator Is Jennifer Becnel-Guzzo. To submit a request under the Delaware Freedom of Information Act (29 Del. C. ch. 100), please complete the form below.

FOIA Request Form

Your responses were successfully submitted. This confirms receipt of your request. Thank you!

* Within 15 business days from receipt of your request the University must either provide you with access to the records, deny your request, or state that additional time is needed.*

NOTICE : Under Delaware's Freedom of Information Act, 29 Del. C. §§10001-10006 ("FOIA"), a FOIA request or petition, along with any information contained therein or any documents attached thereto, submitted to any "public body" subject to FOIA, including, without limitation, any board, bureau, commission, department, agency or committee of the State, may itself be deemed a "public record" subject to disclosure under FOIA. More information on FOIA is available at foia.delaware.gov.

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Wednesday, May 20, 2020 4:51 PM
To: akerr@dailycallernewsfoundation.org
Subject: Freedom of Information Act response

Dear Mr. Kerr:

I write in response to the request you submitted to the University of Delaware on April 30, 2020, under the Delaware Freedom of Information Act ("FOIA"). Pursuant to Delaware's FOIA, only university records that relate to the expenditure of public funds are public records subject to disclosure under the Act. 29 *Del. C.* §10002(i). Public funds are "those funds derived from the State or any political subdivision of the State." *Id.* at §10002(k). The documents you have requested do not relate to the expenditure of public funds. Therefore, the University has no public records responsive to your request.

By way of further response, I refer you to the University's statement regarding access to the Biden Senatorial Papers found at <https://library.udel.edu/special/joseph-r-biden-jr-senatorial-papers/>.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire
Associate Vice President and Deputy General Counsel
Office of General Counsel
112 Hullihen Hall, Newark, DE 19716
University of Delaware
(302) 831-7367 | (302) 831-3055 (facsimile)
www.udel.edu/generalcounsel
jbg@udel.edu

Siegel, Kim (DOJ)

From: Jen Becnel-Guzzo <jbg@udel.edu>
Sent: Thursday, June 11, 2020 2:40 PM
To: OpenGovernment (MailBox Resources)
Cc: lbergin@udel.edu; Andrew Kerr
Subject: Re: FOIA Petition Regarding the University of Delaware
Attachments: 20200611 - Kerr - response to FOIA petition.pdf

Dear Ms. Siegel:

Attached is the University's response to Mr. Kerr's petition.

Thank you,



Jennifer M. Becnel-Guzzo, Esquire

Associate Vice President and Deputy General Counsel

Office of General Counsel

112 Hullihen Hall, Newark, DE 19716

University of Delaware

(302) 831-7367 | (302) 831-3055 (facsimile)

www.udel.edu/generalcounsel

jbg@udel.edu

On Wed, Jun 3, 2020 at 11:38 AM OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov> wrote:

Dear Ms. Ergin and Mr. Kerr,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA

Delaware Department of Justice



Office of General Counsel

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

University of Delaware
112 Hullahen Hall
Newark, Delaware 19716-0101
Phone: 302-831-7367
Email: jbg@udel.edu

June 11, 2020

VIA EMAIL

Ms. Kim Siegel, MPA
FOIA Coordinator
Department of Justice
820 North French Street
Wilmington, DE 19801

Re: FOIA Petition Regarding the University of Delaware

Dear Ms. Siegel:

Thank you for allowing us the opportunity to respond to the petition filed by Andrew Kerr of the Daily Caller News Foundation alleging that the University failed to comply with the Delaware Freedom of Information Act (“FOIA”). The documents sought by Mr. Kerr are not public records under FOIA, and his petition should be denied.

When the Delaware Freedom of Information Act (“FOIA”) was adopted in 1976, the General Assembly recognized the unique nature of the University of Delaware – it is not a state agency, but it spends state dollars. The solution, captured in FOIA from the outset, was simple – when the University spends state dollars, treat it like a state agency and require production of documents “relating to the expenditure of public funds.” 29 *Del. C.* §10002(i). “Public funds” are those funds derived from the State or any political subdivision of the State.” *Id.* at §10002(k). Therefore, only University documents that relate to the expenditure of State dollars are “public records” under FOIA. In addition, FOIA provides that when the University’s full Board of Trustees meets, the Board is treated as a “public body” and the meeting is a “meeting” under FOIA. *Id.* at §10002(i). Finally, “Any 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[,]” are excluded from the definition of “public record” under FOIA. *Id.* at §10002(l)(12).

The State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget. The state appropriation makes up about 11% of the University’s operating budget. This means many areas of the University are not supported with public funds.

Public funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers. Therefore, the Biden papers and documents related to those papers, including the gift

000049

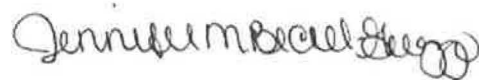
A-75

Ms. Kim Siegel
June 11, 2020
Page 2

agreement and correspondence regarding the papers, are not public records under FOIA. That is the end of the inquiry. However, Mr. Kerr speculates that public funds might be used to pay the salaries of Rebecca Johnson Melvin and Andrea Boyle. To clear: they are not. But, as importantly, the mere fact that an employee's salary might be publicly funded does not render every document created, received or reviewed by that employee a document that relates to the expenditure of public funds. Further, the Biden papers were not discussed during meetings of our full Board of Trustees, therefore there are no public records from those meetings to provide. Finally, the logs or sign-in sheets sought by Mr. Kerr are not public records because they do not relate to the expenditure of public funds. Even if they did, they still are not public records under FOIA as they would contain the identity of a patron of the library and the materials that patron accessed.

The University responded appropriately to Mr. Kerr's FOIA request, as the documents sought are not public records under FOIA. We look forward to working with you to resolve this matter. Thank you.

Sincerely,



Jennifer M. Becnel-Guzzo

cc: Laure Bachich Ergin, Esquire (via email)
Andrew Kerr (via email)

000050

A-76

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Saturday, June 27, 2020 12:21 PM
To: OpenGovernment (MailBox Resources); lbergin@udel.edu
Cc: jbg@udel.edu
Subject: RE: FOIA Petition Regarding the University of Delaware

Hi Kim,

Does the Delaware Attorney General have a response to this petition?

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Wednesday, June 3, 2020 11:39 AM
To: 'lbergin@udel.edu' <lbergin@udel.edu>; 'Andrew Kerr' <akerr@dailycallernewsfoundation.org>
Cc: 'jbg@udel.edu' <jbg@udel.edu>
Subject: FOIA Petition Regarding the University of Delaware

Dear Ms. Ergin and Mr. Kerr,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

Siegel, Kim (DOJ)

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Tuesday, June 30, 2020 2:13 PM
To: OpenGovernment (MailBox Resources); lbergin@udel.edu
Cc: jbg@udel.edu
Subject: RE: FOIA Petition Regarding the University of Delaware

Hello,

Just checking in to see if the AGs office has issued a response to this petition yet.

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

From: Andrew Kerr <akerr@dailycallernewsfoundation.org>
Sent: Saturday, June 27, 2020 12:21 PM
To: 'OpenGovernment (MailBox Resources)' <OpenGovernment@delaware.gov>; lbergin@udel.edu
Cc: jbg@udel.edu
Subject: RE: FOIA Petition Regarding the University of Delaware

Hi Kim,

Does the Delaware Attorney General have a response to this petition?

Best,

--

Andrew Kerr
Investigative Reporter
Daily Caller News Foundation
(704)770-5938
@AndrewKerrNC

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Wednesday, June 3, 2020 11:39 AM
To: 'lbergin@udel.edu' <lbergin@udel.edu>; 'Andrew Kerr' <akerr@dailycallernewsfoundation.org>
Cc: 'jbg@udel.edu' <jbg@udel.edu>
Subject: FOIA Petition Regarding the University of Delaware

Dear Ms. Ergin and Mr. Kerr,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice

Siegel, Kim (DOJ)

From: OpenGovernment (MailBox Resources)
Sent: Wednesday, July 1, 2020 10:41 AM
To: 'Andrew Kerr'
Cc: 'jbg@udel.edu'
Subject: Attorney General Opinion No. 20-IB20
Attachments: Attorney General Opinion No. 20-IB20.pdf

Dear Mr. Kerr,

Please see the attached correspondence.

Sincerely,

Kim Siegel, MPA
Delaware Department of Justice



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

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.

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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

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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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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. N20A-07-001 MMJ

) Appeal from Attorney General
) Opinion No. 20-IB19 and
) Opinion No. 20-IB20

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NATURE AND STAGE OF THE PROCEEDINGS

Pursuant to 29 Del. C. § 10005(e),¹ Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) have appealed from Attorney General’s Opinions Nos. 20-IB19 and 20-IB20 (“AG Opinions”), each of which concluded that the University of Delaware (“University”) had not violated FOIA when it denied Appellants’ separate requests for: a) (in the case of DCNF’s FOIA request) the U. S. Senate records of Joseph R. Biden (“Senatorial Papers”); b) records or communications about the Senatorial Papers, including “logs or sign-in sheets” identifying visitors who might have inspected the Senatorial Papers; and c) communications on any subject between the University and former Vice President Biden or his representative.

Appellants filed their Opening Brief (“OB”) on August 28, 2020. This is the University’s Answer Brief.

INTRODUCTION

By layering unsupported inferences onto a distorted reading of FOIA, Appellants render meaningless a critical statutory provision – one tailored to the University’s unique status: “not a state agency, but it spends state dollars.”²

¹ Delaware’s Freedom of Information Act is codified at Chapter 100 of the Delaware Code’s Title 29 and will be hereinafter referred to as “FOIA § ____.”

Despite FOIA's requirement that only "university documents relating to the expenditure of public funds shall be 'public records,'"³ Appellants offer a construction of FOIA that would render virtually every document in the University's possession a "public record," including those which had nothing to do with the expenditure of *any* funds.

The AG Opinions were correct and should be affirmed.

COUNTER-STATEMENT OF FACTS

The facts and record are not disputed. The Appellants' FOIA requests said nothing about, and did not seek, records "related to the expenditure of public funds." The Appellants do not allege (let alone demonstrate) that public funds were expended by the University in connection with its receipt of the Senatorial Papers. Instead, they urge hand-crafted inferences which are contrary to the University's factual determination, reported by its Deputy General Counsel, that no such funds were expended in connection with the Senatorial Papers.

SUMMARY OF THE ARGUMENT

² June 5 Letter from Jennifer M. Becnel-Guzzo, Esq., University Deputy General Counsel, *Record* at 17.

³ FOIA § 10002(i).

I. The Attorney General correctly concluded that “records related to the expenditure of public funds” are not records “on [just] any topic,”⁴ but rather are limited to records having content that deals with the University’s expenditure of the funds appropriated to it by the General Assembly – appropriations which make up approximately 11% of the University’s revenues.

II. Even if one applied *arguendo* the Appellants’ unsupported and overly expansive reading of FOIA, the Attorney General correctly accepted the representations of the University’s counsel that “no public funds were *used for* the senatorial papers.”⁵ The University met its burden under FOIA § 10005(c) to “justify” its denial of access to the Senatorial Papers.

III. FOIA does not require a custodian to review each document found in more than 1,850 boxes, many of which are unopened, in order to conclude that the papers of a U.S. Senator (who was never an agent or officer of the University), have nothing to do with the expenditure by the University of State funds, particularly in a case in which the requestors do not seek information about the University’s expenditure of State funds.

IV. Records identifying patrons of a public library may be withheld under FOIA § 10002(l)(12).

⁴ Del. Op. Att’y Gen. 20-IB19, Record at 27.

⁵ *Id.* (emphasis supplied).

ARGUMENT

I. Appellants Urge An Incorrect Interpretation of FOIA.

In arguing that the requested documents “relate to the expenditure of public funds,” Appellants offer the following:

- FOIA § 10002(i) must be read to go well beyond the plain meaning of documents “relating to the expenditure of public funds.” Instead, they suggest that the *contents* of requested documents are irrelevant and conjure the following construction: “[i]f 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[;]”⁶
- Because the University gets 11% of its total budget from the State, “[i]t is fair to infer that the University and its library would not be able to accept the Senatorial Papers without the expenditure of public funds[;]”⁷
- “Communications with the University regarding the release of the Senatorial Papers necessarily involve communicating with individuals whose salaries are paid with public funds[;]”⁸

⁶ OB at 13-14.

⁷ OB at 12-13.

- *“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*
Note 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.”⁹

Each of these interpretations, assumptions and inferences is incorrect.

A. FOIA’s treatment of the University’s documents mirrors the University’s unique status.

As the General Assembly considered opening governmental activity up to public scrutiny in the mid-1970s, it was easy to decide how to treat documents within the custody of State agencies – unless they fall into very narrow exceptions, each must be produced at the public’s request. But, what to do with the University’s documents? On the one hand -

- it has a perpetual Charter that may not be altered except with the Trustees’ consent.¹⁰

⁸ OB at 14.

⁹ OB at 18.

¹⁰ The University’s Charter is found at 14 Del. C. Ch. 51 (hereinafter cited as “*Charter* § ___”). The University has “perpetual succession and existence.” *Charter* § 5101(a). Moreover, Article I, Section 10 of the U. S. Constitution prohibits state laws “impairing the obligations of contract.” This applies to a charter granted to a private college. *See, Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

- the University is privately governed by a Board of Trustees, the majority of whom are selected by the Board itself;¹¹
- its Charter provides that no State law may “impos[e] any duty upon, or creat[e] the occasion for, any state official ... to audit, question or inquire into the receipt, handling or expenditure of any funds coming to the University from any source other than a state appropriation ...;”¹²
- except where Constitutional civil rights are implicated,¹³ the University is not an “arm or alter ego of the state of Delaware.”¹⁴

On the other hand, a portion of the University’s budget comes from State appropriations and the public has an interest in knowing how those funds are spent.

Indeed, what to do? On June 28, 1975, the leaders of the State Senate and House of Representatives wrote the Chair of the University’s Board of Trustees, acknowledging the tension between the University’s autonomy under the Charter and the public’s right to know.¹⁵ The result of those communications was the

¹¹ See *Charter* § 5105.

¹² *Charter* § 5109.

¹³ *Parker v. Univ. of Del.*, 75 A.2d 225, 228-30 (Del. Ch. Ct. 1950).

¹⁴ *Gordenstein v. Univ. of Del.*, 381 F. Supp. 718, 722 (D. Del. 1974). See also, *Del. Bldg. & Const. Trades Council v. University of Delaware*, 2016 WL3703113 (Del. Super. 2016) (the University is not a “subdivision of the state” under Delaware’s prevailing wage statute, 29 *Del. C.* § 6960).

adoption of a provision in FOIA that recognized the University’s unique status: only the meetings of the full Board would be considered a “meeting” under FOIA and, in the case of documents, only those “relating to the expenditure of public funds” would be deemed “public records.”¹⁶ To avoid doubt, “public funds” were defined as “those funds derived from the State or any political subdivision of the State.”¹⁷ Thus, the General Assembly resolved the tension with an elegantly simple provision – only those documents that might inform the public about how State funds were spent would be subject to disclosure under FOIA.

B. The Requested Documents Are not “Public Records.”¹⁸

¹⁵ Letter from the Hon. J. Donald Isaacs and Casimir S. Jonkiert to Dr. Samuel Lehner, attached at Exhibit A. The Court may take Judicial Notice of this legislative record. *See* Del. R. Evid. 201.

¹⁶ FOIA § 10002(i).

¹⁷ FOIA § 10002(k). As an aside, the Appellants’ generalized view of the term “public” is part of their problem. It may be true, in some sense, that “[t]hen-Senator Biden was a public official” or that “the Senatorial Papers relate to public business,” OB at 18, but neither proposition has any relevance here. Instead, “public funds” means what the General Assembly says it means.

¹⁸ For reasons not clear, the Appellants assert in their OB that “the University has not argued that the Senatorial Papers are *not* public records under FOIA,” suggesting that argument has been waived. OB at 17. Not so. The University denied the original requests and asserted continuously to the Attorney General that the Senatorial Papers are not “public records” under FOIA. Indeed, that is the centerpiece of this dispute. Perhaps Appellants’ confusion arises from their reliance on an irrelevant provision from FOIA. They quote FOIA’s general definition of “public records,” OB at 17-18, ignoring the provision especially tailored to the University’s unique status and which was the basis for the University’s denial.

The Appellants ignore FOIA's history and obvious meaning. Under their inappropriate construction, if the University receives any unrestricted appropriation from the General Assembly, one must "infer" that all University operations and employees are funded with State dollars and, incredibly, that no custody of any documents would be possible without the State appropriation. Their baseless inferences result in the assertion that everything "relate[s] to the expenditures of public funds" and virtually all documents in the University's custody are "public records."¹⁹ Despite the care with which "public funds" are defined, according to Appellants, the contents of those documents are irrelevant and requested documents need not deal with any funds at all to be considered "public records." Even documents which deal with indisputably private matters become, nonetheless, "public records" because the University employee in whose files those documents sit must, according to Appellants, be inferred to be paid by the State. No support is offered for any of Appellants' inferences.

The Attorney General has consistently rejected such interpretations of "related to the expenditure of public funds." In *Del. Op. Att'y Gen. 10-IB14*, the Attorney General upheld the University's decision to decline the production of "all records, including e-mails, related to the Wind Turbine Project at the University's

¹⁹ OB at 13.

Lewes, DE campus.” After accepting the University’s determination that no “funds derived from the State or any political subdivision of the State” were used for the wind turbine project,” the Attorney General found it unnecessary to consider “the meaning of ‘relating to’ as it is used in [FOIA].”²⁰ Instead, the University’s prior acquisition with public funds of the property on which the wind turbine was later to be erected was “unrelated to the wind turbine project.”²¹ In other words, there must be a direct link between an appropriation and the subject about which disclosure is requested.

Appellant’s reading of FOIA, as it relates to the University, is hardly reflective of the delicate balance struck when FOIA was first enacted. The AG Opinions have correctly rejected the Appellants’ interpretation of FOIA, including the notion that it calls for the production of “records on any topic,”²² as opposed to documents, the content of which relates to the expenditure of State dollars.

II. Even If One Were To Accept The Appellants’ Flawed Interpretation Of FOIA, The Attorney General Was Correct In Relying On A Representation By The University’s Deputy General Counsel That No State Funds Were Used To Pay The Expenses Incurred In “Hosting” The Senatorial Papers.

²⁰ Del. Op. Att’y Gen. 10-IB14, 2010 WL 5090031 (2010) at *1-2.

²¹ *Id.*

²² Del. Op. Att’y Gen. 20-IB19. *Record* at 27.

Before we accept *arguendo* the Appellants' flawed view of FOIA, it bears mention that they did not seek information "related to the expenditure of public funds," and do not allege that the contents of any of the documents they seek have anything to do with the University's expenditure of State funds. In other words, without their flawed reading of FOIA, there would be no discussion of the University's burden because the requests were, on their face, inconsistent with FOIA.

But the University, anticipating that the Appellants were misreading FOIA, inquired into whether the librarians' salaries, their office space, etc. was paid for with State funds. Based on that inquiry, the University's Deputy General Counsel reported that such was not the case.²³

In their OB, Appellants criticize the Attorney General for relying on the representation by a fellow member of the Bar, even though both AG Opinions point out that the Department's practice is to rely on such representations from the "public body's attorney."²⁴

AG Opinion No. 02-IB30,²⁵ on which Appellants rely in their brief, does not support them. In that matter, the requestor had threatened to sue New Castle

²³ June 11, 2020 Letter from Jennifer M. Becnel-Guzzo, Esq., *Record* at 50.

²⁴ AG Opinions, *Record* at 27 and 57.

²⁵ Del. Op. Att'y Gen. 02-IB30, 2002 WL 31867904.

County (the “County”) for libel. He then demanded, under FOIA, documents distributed at a particular meeting of County employees. The County rejected the request, saying that the requestor had created a threat of potential litigation, for which an exclusion is provided under FOIA.²⁶ The Attorney General noted, however, that the County, *in its own description of the documents withheld*, failed to provide any link between the documents and the threatened libel suit. In other words, the Attorney General accepted the County’s factual description of the documents, but disagreed with the County’s legal conclusion that the described documents had anything to do with the requestor’s threat of a libel suit. In our case, the University’s Deputy General Counsel reported the fact that “[t]here have been no expenditures of public funds regarding or related to the [Senatorial Papers].”²⁷

That factual representation was sufficient. FOIA, § 10003(h)(2) provides:

If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial. The public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.

²⁶ FOIA, § 10002(l)(9).

²⁷ May 20, 2020 email from Jennifer M. Becnel-Guzzo, Esq., *Record* at 21. *See also*, June 11, 2020 Letter from Jennifer M. Becnel-Guzzo, Esq., *Record* at 50.

This Court has considered the relationship between the second of the quoted sentences and a separate provision in which Appellants take comfort, FOIA, § 10005(c):

In 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, and shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.

In *Flowers v. Office of the Governor, et. al.*, 167 A.3d 530 (Del. Super. 2017), the Court heard an appeal from an AG Opinion confirming a rejection by the Governor’s Office of a FOIA request for a host of emails. The Court concluded that the General Assembly intended “that a public body could meet its burden of proof without resorting to the production of an index or compilation of each document withheld under each FOIA exemption.”²⁸ Thus, the legislative judgment inherent in FOIA, § 10003(h)(2) is that it is sufficient for the public body to state the reasons for its refusal to produce documents and that it need not prove up the facts supporting that stated reason as if it were in an adversarial adjudication. The *Flowers* Court noted that our FOIA may leave requestors with less than ideal tools for challenging a denial, but held “[n]onetheless, the Court must apply the unambiguous language of § 10003(h)(2). Section 10003(h)(2) only requires a

²⁸ *Flowers v. Office of the Governor, et. al.*, 167 A.3d 530, 549 (Del. Super. 2017)

public body to provide ‘reasons’ for withholding records without the requirement of submitting an index.”²⁹

Following *Flowers*, the Attorney General’s Office noted

that Delaware’s FOIA does not require this Office – or the courts – to conduct an investigation or an *in camera* review of records that a public body has withheld in response to a FOIA request. Rather, as the Superior Court has recently made clear, FOIA *only* requires a determination of whether the Council provided sufficient *reasons* for withholding the redacted information to satisfy its burden of proof.³⁰

None of the cases cited by Appellants say to the contrary. Appellants cite³¹ *Guy v. Judicial Nominating Com’n*,³² for its recognition that FOIA requestors are at a disadvantage “because only the public body holding the information can speak confidently regarding the nature of the material and circumstances of its preparation and use which might support an exemption defense.”³³ In *Guy*, the court criticized the Judicial Nominating Commission for offering nothing in support of its claim of several exemptions permitted by FOIA and, but for the Court’s conclusion that the requested materials were protected by the common law doctrine of executive privilege, summary judgment might have been denied. In

²⁹ *Id.* at 548.

³⁰ Del. Op. Att’y Gen. 17-IB59, 2017 WL 6348853 (emphasis original).

³¹ OB at 11-12.

³² 659 A.2d 777 (1995)

³³ *Id.* at 781.

our case, the University complied with *Flowers* by citing its reason why disclosure was not required under FOIA and the factual basis for that reason was supported by the representation of the University's Deputy General Counsel.

Appellants cite³⁴ to two other cases regarding the duty of the public body in response to a FOIA request.³⁵ Those cases, however, require no detailed discussion here because they each involve a challenge to executive sessions held by a public body. They offer no guidance regarding FOIA's requirements concerning the disclosure of "public records."

While the General Assembly decided to offer an appeal to the Attorney General, there is no suggestion that such petitions were entitled to the full panoply of adversarial process. FOIA is silent on such matters as an evidentiary hearing; live testimony; cross-examination; etc., instead committing such matters to the Attorney General's discretion.

The exercise of that discretion is entitled to this Court's deference. In *Stanford v. State Merit Employee Relations Bd.*,³⁶ the Delaware Supreme Court affirmed this Court's denial of an appeal from the Merit Employee Relations Board

³⁴ OB at 9-10.

³⁵ *O'Neill v. Town of Middletown*, 2007 WL 1114019 (Del. Ch. 2007); *Chem. Ind. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295 (Del. Ch. 1994).

³⁶ 44 A.3d 923 (Table)(Del. 2012)("Order" attached as Exhibit B).

(“MERB”). Among the contested issues was Appellant’s claim that the MERB considered evidence of the Appellant’s deficient performance that was more than 2 years old, despite MERB Rule 12.8, which prohibits an agency from using “[a]dverse documentation’ from more than two years before ‘a similar subsequent offense’ when that agency seeks to discipline an employee for that ‘subsequent offense.’”³⁷ The Court held that the lower court correctly deferred to the MERB’s interpretations of its own regulations and properly considered the challenged evidence.

So it should be in this case. It was hardly an abuse of discretion for the Attorney General’s Office to continue its practice of reliance on the duty of candor and faithfulness owed by members of our Bar to both judicial and administrative forums, particularly when a contrary view would require a tedious proceeding in which the University was charged with proving a negative – *i.e.*, that no State funds were used to pay any particular salaries or other expenses of “hosting” a set of donated papers. As the Attorney General noted in an earlier opinion:

Pursuant to the Delaware Lawyers’ Rules of Professional Conduct, “[a] lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall . . . conform to the provisions of Rules 3.3(a) through (c) . . .” Del. Lawyers’ R. Prof’l Conduct 3.9. Rule 3.3(a) provides that a lawyer shall not knowingly make a false statement of law or fact. The reasoning behind this duty of candor is that “[t]he decision-making body, like a court, should be able to rely on the integrity of the

³⁷ Exhibit B, Order at ¶ 7.

submissions made to it.” Del. Lawyers’ R. Prof’l Conduct 3.9 cmt. 1.³⁸

In short, the Attorney General’s Office appropriately accepted the representation of the University’s Deputy General Counsel regarding facts determined by the University in considering Appellants’ FOIA requests. Nothing more was necessary.

III. Given That Appellants Fail Even To Allege That The Senatorial Papers Say Anything About The “Expenditure Of Public Funds,” There Was No Reason For The University To Accelerate Its Inspection And Curation Of The Senatorial Papers.

Appellants respond to the proposition that neither the Senatorial Papers nor any communication about them are “public records” by asking, essentially, “how do you know? You never looked.” But, under *either* the Attorney General’s (and University’s) reading of FOIA *or* the Appellants’ flawed construction, the answer to the central question – do you have any documents “relating to the expenditure of public funds?” – will be the same. The answer is “no,” regardless whether the question turns on the contents of the documents sought (as the Attorney General and the University believe) or, as Appellants contend, turns on whether the University’s expense incurred in “hosting” the Senatorial Papers was defrayed with State funds. Neither formulation requires an examination of the Senatorial Papers themselves, or any of the requested communications about them. Either the

³⁸ Del. Op. Att’y Gen. 17-IB59, 2017 WL 6348853 at n. 12.

University's reading of FOIA is correct, in which case no review of the documents is necessary given that then-Senator Biden was never an officer or employee of the University and there is no reason to imagine that his decades-old papers have anything to do with the *University's* expenditure of State funds. Conversely, even if Appellants' interpretation were entertained, their "inferred" facts are simply wrong – something that will not be saved by a review of the documents. In either case, the response to Appellants' FOIA requests does not lie in the documents themselves.

IV. Records Identifying Patrons Of A Public Library May Be Withheld Under FOIA § 10002(l)(12).

In its FOIA request, the DCNF demanded "[a]ny 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." While these documents do not relate to the expenditure of public funds and are not public records in the hands of the Morris Library, as a department at the University, there is another FOIA exception that also protects such records: FOIA expressly protects the identity of those using public libraries. Among the records deemed not public are "[a]ny 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[.]”³⁹ Appellants do not contend that the University’s library is not public,⁴⁰ yet they ignore this provision in their OB. Because its application is clear, nothing further need be said.

CONCLUSION⁴¹

Appellants misunderstand and misapply Delaware’s FOIA. Because their appeal is without merit, the University asks that it be denied.

³⁹ FOIA § 10002(1)(12).

⁴⁰ Nor could they; the Morris Library is clearly open to the public. *See,*

⁴¹ The Appellants devote a portion of their OB to their request for attorneys’ fees. The University opposes any such award but will await a decision on the merits and any subsequent application before making any further response.

SAUL EWING ARNSTEIN & LEHR LLP

/s/ William E. Manning _____

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September 28, 2020

Counsel for Appellee University of Delaware

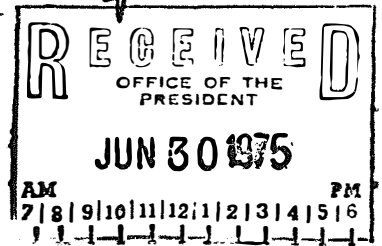
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EXHIBIT A



SENATE
STATE OF DELAWARE
LEGISLATIVE HALL
DOVER, DELAWARE 19901



J. DONALD ISAACS
PRESIDENT PRO TEMPORE
LEVELS ROAD
TOWNSEND, DELAWARE 19784
HOME. 802/834.1400
OFFICE. 802/678.4144.45.46

COMMITTEES
EXECUTIVE COMMITTEE, CHMN.
NATURAL RESOURCES, CHMN.

June 28, 1975

Dr. Samuel Lenher
1900 Woodlawn Avenue
Wilmington, Delaware 19806

Dear Dr. Lenher:

We write to you on a matter of considerable concern. You are aware that the Common Cause organization asked to have legislation introduced that would specifically require the meetings of the Board of Trustees to be open to the public. We recognize that such language in the proposed law could be construed to be an abrogation of the charter granted in perpetuity to the University by the General Assembly. In this time of need for openness in matters affecting the public, however, it seems important that the Trustees consult with the legislative leadership to see if suitable language might be included in proposed legislation that would restore confidence in the public mind that the stewardship of the University is as sound as we know it to be. It would seem that wording could be constructed that would satisfy the public that the trustees welcome public input without infringing on the sound management of the University as determined by the Board of Trustees. To that end we wish to meet and discuss with you this vital subject. It is important that we meet early in the fall prior to the beginning of the next legislative session.

Sincerely,

J. Donald Isaacs
President Pro Tempore

Casimir S. Jonkiert
Speaker

JDI:mah

cc: Honorable Sherman W. Tribbitt
Honorable E. A. Trabant
Honorable Elbert Carvel
Mrs. Madalín James

A-132



EXHIBIT B

44 A.3d 923 (Table)

Unpublished Disposition

This unpublished disposition is referenced in the Atlantic Reporter. Supreme Court of Delaware.

Trina M. STANFORD,
Appellant Below, Appellant,

v.

STATE of Delaware **MERIT EMPLOYEE RELATIONS BOARD**, and Delaware Department of Health and Social Services, Appellees Below, Appellees.

No. 700, 2011.

|
Submitted: April 4, 2012.

|
Decided: May 1, 2012.

Synopsis

Background: Former employee of state Department of Health and Social Services (DHSS) appealed decision of Merit Employee Relations Board (MERB) denying former employee's grievance that she was wrongfully fired. The Superior Court, New Castle County, affirmed MERB's decision. Former employee appealed.

Holdings: The Supreme Court, [Jack B. Jacobs, J.](#), held that:

- [1] substantial evidence supported MERB's finding that there was just cause to fire former employee;
- [2] former employee had a property interest in her state employment that merited constitutional protection;
- [3] former employee received meaningful opportunity to present her case;
- [4] even if comments by MERB's chairwoman regarding her understanding of existing operating procedures of DHSS were factual, comments did not warrant reversing MERB's decision; and

[5] MERB's interpretation that its merit rule's reference to "a similar subsequent offense" prevented use of documentation of outdated past disciplinary offenses but not use of old negative employment reviews in performance-based dismissals was not clearly wrong.

Affirmed.

West Headnotes (5)

[1] **Public Employment** 🔑 Removal, separation, termination, and discharge in general

Substantial evidence supported finding of Merit Employee Relations Board (MERB) in grievance proceeding that there was just cause to fire employee, who worked as accounting specialist in Division of Child Support Enforcement (DCSE) within state Department of Health and Social Services (DHSS); evidence indicated that employee was given notice of her unacceptable performance and written reprimand, employee's first performance review after receiving reprimand described severe deficiencies in producing accurate results, and employee incorrectly processed 17 checks during 11-day period.

[2] **Constitutional Law** 🔑 Termination or discharge

State employee had a property interest in her state employment that merited protection under due process clause, and thus employee was entitled to certain procedural rights before her employment could be terminated; under state law, employee could be fired only if there was just cause. [U.S.C.A. Const.Amend. 14.](#)

[1 Cases that cite this headnote](#)

[3] **Constitutional Law** 🔑 Termination or discharge

State employee received meaningful opportunity to present her case before her employment was terminated, and thus employee's right

to due process was not violated; state held pre-termination hearing, and employee filed grievance after she was discharged. [U.S.C.A. Const.Amend. 14](#).

[2 Cases that cite this headnote](#)

[4] Public Employment 🔑 Harmless, prejudicial, and reversible error

Even if comments by chairwoman of Merit Employee Relations Board (MERB) regarding her understanding of existing operating procedures of state Department of Health and Social Services (DHSS) were factual, as would support conclusion that MERB considered facts outside the record in denying grievance of DHSS's former employee challenging termination of her employment, comments did not warrant reversal of MERB's decision; there was other sufficient competent evidence to support MERB's decision.

[3 Cases that cite this headnote](#)

[5] Public Employment 🔑 Documentary and demonstrative evidence

Interpretation of Merit Employee Relations Board (MERB) that its merit rule's reference to "a similar subsequent offense" prevented use of documentation of outdated past disciplinary offenses but not use of old negative employment reviews in performance-based dismissals was not clearly wrong, and thus Supreme Court would be required to defer to MERB's interpretation when reviewing MERB's decision denying state employee's grievance challenging termination of employment.

Court Below: Superior Court of the State of Delaware, in and for New Castle County, C.A. No. N10A-12-009.

Before [STEELE](#), Chief Justice, [HOLLAND](#) and [JACOBS](#), Justices.

ORDER

[JACK B. JACOBS](#), Justice.

*1 This 1st day of May 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Trina Stanford, the plaintiff-below ("Stanford"), appeals from a Superior Court order affirming a decision by the Merit Employee Relations Board ("MERB") denying Stanford's grievance that she was wrongfully fired from her job at the Department of Health and Social Services ("DHSS"). Stanford claims that both the Superior Court and the MERB erred by considering evidence that was improperly admitted and that also was insufficient to satisfy the "just cause" standard. Stanford further claims her MERB hearing was procedurally unfair. We find no merit to these claims and affirm.

2. From November 5, 2001 to October 5, 2009, Stanford worked as an accounting specialist in the Division of Child Support Enforcement ("DCSE") within the DHSS. Her unit processed child support payments. One of Stanford's responsibilities was to ensure that those payments were properly completed and posted to the correct account.¹ Stanford's performance was officially reviewed many times before she was fired. A review of her work for the period January 4, 2008 through May 29, 2008 found her performance "unsatisfactory," because Stanford had committed 18 routine technical errors such as posting bad checks or posting checks to an incorrect account. On June 16, 2008, Stanford received a written reprimand to the effect that based on her previous performance reviews, her "total error margin" (.15%) was significantly higher than her unit's average (.051%) in 2006, and remained high (at .085%) in 2007. One of Stanford's supervisors later testified that her errors from January 2008 to May 2008 accounted for 55% of her unit's total mistakes during that period.

3. Stanford's performance did not improve after the reprimand.² For the period ending February 6, 2009, she received another unsatisfactory performance review that found, among other problems, "severe deficiencies in producing accurate results even with supervisory counseling." In an effort to increase efficiency, in February 2009, the State ended its "paper-based" processing system,

and implemented an image-based system known as “RAPID.” The MERB found that the new system “did not [improve] Stanford's work performance.”³ On August 27, 2009, Stanford was notified she was being fired. Stanford's termination letter stated that despite repeated efforts by her supervisors to help improve her job performance, her “performance continued to be unsatisfactory.” That letter specified that between June 16, 2008 and February 6, 2009, Stanford had committed 43 errors, and that from February 10, 2009 to June 16, 2009, she had committed 16 errors.

4. A “pre-termination hearing” was held on September 23, 2009, after which Stanford was formally discharged, effective October 5, 2009. She then filed a grievance which, after a hearing, was denied on November 25, 2009. Stanford appealed that denial to the MERB, which by a 4–1 vote found that DHSS had “just cause” to fire her. At the MERB proceeding, one of Stanford's supervisors testified that “we're shooting for no errors” and that “the ultimate goal in this position was to correctly identify and post every payment with a low margin of error.”

*2 5. The MERB openly deliberated on October 17, 2010. During those deliberations, the MERB chairwoman “referred to her experience in human resource management at DHSS” in explaining her judgment that DHSS had properly terminated Stanford. At that point Stanford's counsel “asked the Chair to recuse herself,” and “contended the Board was considering evidence outside the record in violation of due process [sic].” The MERB denied counsel's request on the ground that “it is permissible to draw on [personal] experience in factual inquiries.”

6. In its final decision, the MERB held that the “just cause standard applies to a termination based on unsatisfactory job performance,” and that that standard required “a legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee's competency and ability to perform [her] duties.” The MERB found that the “record is replete with Stanford's [processing] errors,” and that Stanford “did not convince the Board of any mitigating circumstances to show that termination ... was inappropriate.” Although Stanford claimed that her unit's “100% error-free check processing [goal] is unrealistic,” the MERB concluded that the “record demonstrates that the DSCE did not hold any employee in the Payment Processing Unit to an error-free standard....”

7. In its ruling, the MERB also addressed Stanford's claim that State Merit Rule 12.8 precluded the MERB from considering evidence of “an employee's unsatisfactory job performance more than two years [before] the notice of intent to terminate.”⁴ Merit Rule 12.8 does not allow an **agency** to use “[a]dverse documentation” from more than two years before “a similar subsequent offense” when that **agency** seeks to discipline an employee for that “subsequent offense.”⁵ The MERB concluded as a matter of law that Merit Rule 12.8 applies to disciplinary actions for specific “offenses,” not to performance-based dismissals. The MERB stated that it did not “rely” on Stanford's 2006 and 2007 performance reviews (which occurred more than two years before her firing) when concluding that there was “substantial evidence” to justify Stanford's dismissal. Yet, the MERB did cite the 2008 “reprimand,” which discussed the results of Stanford's performance reviews in 2006 and 2007. The MERB also concluded that DHSS' evaluation of Stanford was based on a comparison of Stanford's error rates against her unit's average error rates.⁶

8. Stanford challenged the MERB's decision in the Superior Court, claiming violations of her constitutional due process rights and the Merit Rules. Among Stanford's claims was that the MERB had improperly considered “adverse” evidence that arose more than two years before her “termination notice” (the 2006 and 2007 performance reviews), in violation of Merit Rule 12.8. On November 30, 2011, the Superior Court affirmed the MERB's decision. The court found that “it appears that the Board did not [rely on] the 2006 and 2007 performance reviews” to justify Stanford's firing; moreover, substantial evidence warranted Stanford's dismissal. The court denied Stanford's claim related to the MERB chairwoman's reference to her personal experience, because “Stanford has not overcome the presumption of honesty and integrity” required to demonstrate a finding of “unconstitutional bias.” This appeal followed.

*3 9. Stanford presents four claims on her appeal to this Court. First, she claims that the State's undefined standards were arbitrary and capricious and that her firing “was not based on any identifiable standard,” in violation of the Merit Rules and her due process rights under the Fourteenth Amendment of the United States Constitution. Second, the MERB chairwoman's reference to her personal experience was improper. Third, the MERB's interpretation of Merit Rule 12.8 was “wrong;” and fourth, the MERB improperly denied Stanford the right to present certain evidence, which resulted in an unfair hearing.

10. “We review decisions of the MERB ‘to determine whether [it] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on ... substantial evidence and is not arbitrary.’”⁷ Substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion.”⁸ This Court reviews questions of law, including claimed constitutional violations and the interpretation of statutes and regulations, *de novo*.⁹ That said, “[j]udicial deference is usually given to an administrative agency’s construction of its own rules in recognition of its expertise in a given field,” and that construction will be reversed only if it is “clearly wrong.”¹⁰

[1] 11. Stanford first claims that the MERB accepted insufficient evidence of her substandard work performance as warranting a “just cause” dismissal, because DHSS never set any performance standards for error rates other than the aspirational goal of “100% error-free check processing.” Therefore, Stanford argues, there is no way to judge whether Stanford’s error rate was sufficiently poor to justify firing her.

12. In *Vann v. Town of Cheswold*,¹¹ this Court defined “just cause” as “a legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee’s competency and ability to perform [her] duties.” The MERB applied the *Vann* standard in denying Stanford’s grievance. The record supports the MERB’s determination that there was “just cause” to fire Stanford. After Stanford was given notice of her “unacceptable” performance and a written reprimand in mid-2008, her first performance review in 2009 described “severe deficiencies in producing accurate results.” Later, between April 2 and August 13, 2009, Stanford’s supervisor notified her of 17 incorrectly processed checks. The MERB credited the employer’s evaluations, observing that “the record is replete with Stanford’s errors” and that her “job performance showed little if any improvement despite frequent counseling about these deficiencies.” These findings are sufficient for acceptance by a reasonable person; that is, they constitute “substantial evidence” that supports a finding of “just cause.” The findings are also “supported by job-related factors that rationally and logically touch upon the employee’s competency and ability to perform [her] duties,” as *Vann* requires.¹²

*4 [2] [3] 13. We agree that Stanford had a “property interest” (derived from the “for cause” standard imposed by

state law) in her state employment that merited constitutional protection.¹³ Federal constitutional law confers certain procedural rights upon Stanford. In the employment area, those rights include “some opportunity for the employee to present [her] side of the case [before the firing].”¹⁴ Stanford received that procedural protection, which is intended to ensure “that [affected parties] are given a meaningful opportunity to present their case.”¹⁵ The record establishes that Stanford received such a meaningful opportunity. Moreover, and as earlier discussed, the record shows that Stanford was held to Delaware’s “just case” standard, which is the specific state law entitlement to which Stanford claims a property right. Stanford’s claim that her firing violated her constitutional rights, therefore, lacks merit.

[4] 14. Stanford next claims that the MERB relied on facts outside the record in reaching its decision, specifically, allegedly improper remarks by the MERB chairwoman about her past experience at DHSS.¹⁶ Stanford relies on *Trader v. Caulk*,¹⁷ a Superior Court decision reversing an Industrial Accident Board (“IAB”) ruling that denied benefits to an injured employee, after IAB members had observed the employee walk to his car and on that basis judged him not to be “totally disabled.” What Stanford complains of in this case, however, is that the MERB chairwoman conveyed her understanding of existing operating procedures, or rules, as distinguished from specific evidentiary facts bearing on the merits of the case. Even if that information were deemed “factual,” these statements were not legally consequential, because (in the language of *Trader*) “there is other sufficient competent evidence to support the administrative agency’s decision.”¹⁸ This Court has previously approved a board member’s use of her expertise “as a tool for evaluating evidence,” as the MERB chairwoman apparently did here.¹⁹ Therefore, Stanford’s second claim lacks merit.

15. Third, Stanford claims that the MERB violated Merit Rule 12.8 by admitting “adverse documentation” of her work performance that arose more than two years before. That documentation was submitted during the course of Stanford’s appeal from her firing. The documents included a 2008 reprimand that, in turn, referred to Stanford’s 2006 and 2007 performance reviews. The MERB ruled that Rule 12.8 did not bar that evidence, because “the [2008] reprimand [itself] was within two years” of Stanford’s firing. Separately, the MERB also ruled that Rule 12.8 applied to documentation of disciplinary action for an “offense,” but not to a “termination ... based on unsatisfactory job performance.”

For that reason, “the **agency's** ‘consideration is not limited to unsatisfactory performance within the past two years.’ “

[5] 16. The MERB specifically cited the statistical analysis of Stanford's performance in relation to her unit's average in the 2006 and 2007 reviews that were described in the 2008 reprimand. It is plain from that reference that the MERB relied on “adverse documentation” that came into existence more than two years before Stanford's firing. That fact requires us to evaluate *de novo* the MERB's interpretation of Rule 12.8 as not barring the use of negative performance reviews in performance-based dismissals. A state **agency's** interpretation of its own regulations is entitled to deference, and will only be reversed if it is clearly wrong.²⁰ We conclude that the Rule's reference to “a similar subsequent offense” can be read to mean that Rule 12.8 is intended to prevent the use of documentation of outdated past disciplinary “offenses,” but not the use of “old” negative employment reviews in performance-based dismissals. We defer to the **agency's** interpretation, and conclude that the MERB's holding on that point was not clearly wrong.

*5 17. Finally, Stanford claims that her MERB hearing was unfair, because the MERB denied her request to

present certain evidence, including the determination by an Unemployment Referee that Stanford was entitled to unemployment benefits. The fatal flaw in this procedural unfairness claim is that Stanford makes no specific legal argument that would justify a finding of reversible error. Fairly read, her amorphous claims are, in substance, that the evidentiary rulings were generally unfair and, as such, violated her due process rights.²¹ As DHSS states on appeal, no provision in the Merit Rules “governs the conduct of” Stanford's grievance hearing, and “there is no record from the ... proceedings that can be reviewed on appeal.” The procedural protection to which Stanford was entitled is the right to appeal her firing to the MERB. She exercised that right. With no clear basis for finding any error in the MERB proceeding, this claim lacks merit as well.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

All Citations

44 A.3d 923 (Table), 2012 WL 1549811

Footnotes

- 1 In 2002, the State instituted an Employee Performance Plan that required Stanford to process payments quickly and accurately, consistent with federal regulations. By adhering to federal standards, the State qualified for funding amounting to about two-thirds of the administration costs associated with Stanford's unit. Stanford signed the plan in 2002.
- 2 In 2008 and 2009, Stanford also took “intermittent leave” under the Family Medical Leave Act for stress, anxiety, and depression, which she attributed to her employer's “insistence on error-free check processing.”
- 3 From April 2, 2009 to August 13, 2009 she improperly processed 17 checks.
- 4 Chapter 12 of the State of Delaware Merit Rules (the “Merit Rules”) governs **agency** “employee accountability” standards and procedures for “Merit” employees.
- 5 Merit Rule 12.8 states that “[a]dverse documentation shall not be cited by **agencies** in any action involving a similar subsequent offense after 2 years, except if employees raise their past work record as a defense or mitigating factor.”
- 6 The statistics derived from Stanford's 2006 and 2007 performance reviews were the only such specific comparisons cited in the MERB's decision.
- 7 *Avallone v. DHSS et al.*, 14 A.3d 566, 570 (Del.2011) (citations omitted).
- 8 *Id.*
- 9 *Id.*; *Ward v. Dept. of Elections*, 977 A.2d 900 (Del.2009).
- 10 *Id.* (citing *Div. of Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del.1981). The Merit Rules were adopted by the MERB pursuant to statutory delegation in 29 *Del. C.* § 5914.
- 11 945 A.2d 1118, 1122 (Del.2008).
- 12 *Vann*, 945 A.2d 1118, 1122 (Del.2008).
- 13 *Board of Regents of State Colleges et al. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).
- 14 *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542–43, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).
- 15 *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

- 16 Stanford describes the comments as being what the chairwoman “believed were the standard operating procedures ... [and she] was quite convinced that the State followed the same procedure.”
- 17 [1992 WL 148094 \(Del.Super. June 10, 1992\)](#).
- 18 *Id.*
- 19 [Turbitt v. Blue Hen Lines, Inc., 711 A.2d 1214, 1216 \(Del.1998\)](#).
- 20 [Ward v. Dept. of Elections, 977 A.2d 900 \(Del.2009\)](#).
- 21 For example, she asserts that the “MERB very clearly does not believe that any of the steps in the grievance procedure before the appeal to the MERB are of any importance” and that “the MERB does not see its role as a protector of employees' rights to due process.”

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PRELIMINARY STATEMENT

Appellee University of Delaware’s Answering Brief relies exclusively on the University’s¹ “unique status” to advocate for an interpretation of the Delaware Freedom of Information Act, 29 *Del. C.* § 10001, *et seq.*, (“FOIA”) that would prevent the public from having any access to the U.S. Senate records of Joseph R. Biden, Jr. (the “Senatorial Papers”) and documents *about* the University’s custody of the Senatorial Papers. The University concedes, as it must, that Joseph R. Biden, Jr. is a public official and that these documents are of public interest; however, the University’s preferred interpretation of FOIA leads to the absurd result that the requested records must be hidden away from public view. The documents at issue are unique, historically valuable, and contemporaneously important records of great, if not extraordinary, public interest. Despite the fact that Joseph R. Biden, Jr. is the presidential candidate of the Democratic Party, the University contends that simply by its custody of the Senatorial Papers, they are out of public reach.

At root, Appellee’s argument is that FOIA was written to accommodate the University’s “unique status,” and the University is thus effectively written outside of, if not above, the law. But this is not accurate: FOIA still applies to the University, and applies specifically in this context. Second, according to Appellee,

¹ Capitalized terms not otherwise herein defined shall the meanings ascribed to them in the Appellants’ Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 And 20-IB20 (the “Opening Brief”).

when it comes to the University, statutory language need not be given its usual and customary meaning, but should be contorted so that the University need not substantively respond to FOIA requests. Again, the University's argument falls short. While the University's argument essentially boils down to "move along," FOIA dictates otherwise.

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 in the Opening Brief).

SUMMARY OF THE ARGUMENTS

1. The Opinions improperly shift the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c).
2. The Opinions err by concluding that the requested records are not "public records" as defined by 29 *Del. C.* §§ 10002(l) and 10002(i).
3. The Court should award Appellants their attorneys' fees and costs under 29 *Del. C.* § 10005(d).

ARGUMENT

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

"In 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).

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). This Court has recognized that “the plaintiff asserting a freedom of information claim is at a disadvantage because only 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).

The “burden of proof” is:

the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.... Burden of proof is a term which describes two different concepts; first, the ‘burden of persuasion’, which under the traditional view never shifts from one party to the other at any stage of the proceeding, and second, the ‘burden of going forward with the evidence’, [the burden of production] which may shift back and forth between the parties as the trial progresses.

Black’s Law Dictionary 196 (6th ed. 1990); *see also Black’s Law Dictionary* 80 (2d Pocket ed. 2001) (describing secondary burden as “burden of production”). The University did not attempt to carry either component of their burden of proof. The

University, without reference to evidence, asserts that “there have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.” *See, e.g.*, Certified Record at 00006. The Opinions do not address the University’s burden of proof, nor do they analyze whether the University met its burdens, thereby implicitly and improperly shifting the burden of proof to Appellants. *See* Certified Record at 000025-28; *see also id.* at 000055-58. The University expressly advocates for such burden-shifting in its Answering Brief, stating that “Appellants do not allege (let alone demonstrate) that public funds were expended by the University in connection with its receipt of the Senatorial Papers.” Ans. Br. at 2.

To the contrary, Appellants’ Opening Brief does allege that public funds are used to support the Senatorial Papers. *See, e.g.*, Opening Br. at 10-13 (noting, for example, that the University received more than \$95 million in State appropriations for “general unrestricted operations,” and that the “State of Delaware provides the University with approximately \$120 million each year.”). The University, and the Chief Deputy Attorney General, apparently believe that a FOIA respondent’s counsel’s unsupported representation to the contrary satisfies the burden of proof under FOIA.

The General Assembly was unambiguous when it assigned the burden of proof, without qualification or caveat, to the custodian of records to justify any denial

of access to records under FOIA. 29 *Del. C.* § 10005(c). The plain and unambiguous language of a statute controls. *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008). The University, however, prefers a burden of proof less onerous than that placed on an attorney preparing a privilege log, and asserts that the Court should uncritically accept the Attorney General’s practice of relying on the uncorroborated representations of FOIA respondents’ counsel in all situations. Ans. Br. at 12-13. Even if the Attorney General’s practice of relying on the representations of counsel is appropriate in some circumstances, here the University goes so far as to argue that requiring the University to meaningfully satisfy the statutorily-mandated burden of proof “would require a tedious proceeding[.]” Ans. Br. at 16.

There is no indication that the University made a substantive inquiry into the source of the funds that support the Senatorial Papers. The University’s counsel did not include a supporting affidavit, identify the source of the information, or even include language that the representation was based on a diligent inquiry. The University’s rejection letter could be used as a stock form letter: “[t]here have been no expenditures of public funds regarding or related to” the requested documents. *See, e.g.*, Certified Record at 00006. The University’s references to the Senatorial Papers could be replaced with any category of documents that the University seeks to withhold in response to a FOIA request.

As set forth in the Opening Brief, Appellants have no way to independently verify counsel’s statement that “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.” Indeed, the University appears to argue that when it receives an unrestricted appropriation from the General Assembly, there are *no* documents that would “relate to” the University’s expenditure of those funds. *See* Ans. Br. at 8.

Appellees further fail to mention that the University accepted governmental funds for the support of the Senatorial Papers, in the form of a 2012 grant in the amount of \$30,000 from the National Endowment for the Humanities.² While these funds may or may not constitute “public funds” under 29 *Del. C.* § 10002(k) (which denotes solely “those funds derived from the State or any political subdivision of the State”), the terseness of the University’s categorical, but unverified, denial that public funds have been expended related to the Senatorial Papers invites skepticism. This is especially so when the National Endowment of the Humanities grant relates to computer storage, and the University admits that it has expended funds on other means of non-computer storage to house the “immense collection.”³

² *Storage of Electronic Files of the Senatorial Papers of Joseph R. Biden, Jr.*, National Endowment of the Humanities, <https://securegrants.neh.gov/publicquery/main.aspx?f=1&gn=PW-51259-12> (last visited October 5, 2020) (identifying grant for “immediate preservation related to the processing” of the Senatorial Papers).

³ Andrea Boyle Tippett, *Biden Papers Arrive*, UDaily, June 11, 2012, <http://www1.udel.edu/udaily/2012/jun/library-biden-papers-061112.html> (last

The Opinions should be reversed because they fail to address the burden of proof, and thereby implicitly and improperly place it on Appellants. It was, and is, incumbent upon the University to make a showing that no public funds 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) OR 29 DEL. C. § 10002(i).

“[E]xemptions are to be narrowly construed and [] FOIA is to be construed to further open access to public records.” *Flowers v. Office of the Governor*, 167 A.2d 530, 545 (Del. Super. 2017). The plain and unambiguous language of a statute controls. *Hoover v. State*, 958 A.2d 816, 820 (Del. 2008). “[U]niversity documents relating to the expenditure of public funds shall be ‘public records.’” 29 Del. C. § 10002(i). Appellee concedes that it “may be true, in some sense, that ‘[t]hen-Senator Biden was a public official’” and “that ‘the Senatorial Papers relate to public business[.]’” Ans. Br. at 7, n.17 (quoting Op. Br. at 18). Appellee, however, employs a Carrollian approach to the statutory language,⁴ and seeks to limit the usual

visited October 5, 2020) (noting the installation of “[n]ew compact shelving” “to house the immense collection,” *and* the receipt of grant from the National Endowment of the Humanities).

⁴ Appellee rejects Appellants’ interpretation of FOIA and remarks that “‘public funds’ means what the General Assembly says it means.” Ans. Br. at 7, n.2. This comment is reminiscent of the Humpty Dumpty’s comments: “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’” Lewis Carroll, *Through the Looking Glass* (1872).

and customary understanding of the phrase “relating to” in order to help shield documents of public import from public view.

Black’s Law Dictionary defines “relate” as “[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with” *Black’s Law Dictionary* 1288 (6th ed. 1990). The University does not argue that the requested records do not have a connection with the expenditure of public funds. Rather, the University argues that the requested record simply “do not *relate* to the expenditure of public funds.” Certified Record at 000038 (emphasis added); *see also* 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). The University tacitly concedes that neither the Attorney General nor a Delaware Court have opined on the meaning of “relating to” as it is used in FOIA, but asserts, without attribution to authority, that “there must be a direct link between an appropriation and the subject about which disclosure is requested.” Ans. Br. at 9.

Appellee thus asks the Court to overlook a commonly understood usage of the phrase “relating to,” and instead use an interpretation limited solely to the examples of documents “relating to” the expenditure of public funds mentioned in 29 *Del. C.* § 100002(i): “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[.]” There is no indication, however, that the General Assembly intended the enumerated documents to be an exclusive list.

Separately, Appellee does not differentiate among the Appellants’ various requests, or distinguish between the Senatorial Papers or documents about the Senatorial Papers, as under the power vested in the University by its perpetual charter, the answer to any FOIA request is apparently a pat “no.”

A. Records Sought by the Judicial Watch Request.

The first category of documents sought by the Judicial Watch Request are records regarding the proposed release of the Senatorial Papers (which 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 involve, or relate to, the University’s expenditure of public funds to support the Senatorial Papers.

As discussed in the Opening Brief, 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. As phrased, the University’s statement implies that a subset of the Board of Trustees may have discussed the Senatorial Papers. 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 when such executive sessions or subsets may have the ability to act as the full Board of Trustees. Notably, the University did not respond to this argument in its Answering Brief.

B. Records Sought by the DCNF Request.

If public funds support the Senatorial Papers, three of the four categories of documents sought by the DCNF Request relate to, or involve, 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 Gift Agreement pertains to the

expenditure of public funds to curate and maintain the Senatorial Papers. The Gift Agreement is 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.” Records of such correspondence and communications are thus public records and should be ordered to be produced.

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.

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.” 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).

As set forth in Appellants’ Opening Brief, the University’s analogy to the borrowing records of a public library is inapt. For one thing, 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, which is the stated purpose of FOIA.⁵

4. The Senatorial Papers.

The Senatorial Papers are public records. 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

⁵ “It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.” 29 *Del. C.* § 10001.

official elected by the people of Delaware, and the Senatorial Papers relate to public business. Finally, there is no doubt they are of public interest.

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 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: October 8, 2020

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EFiled: Jan 06 2021 03:18PM EST
Transaction ID 66231631
Case No. N20A-07-001 MMJ



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January 6, 2021

VIA FILE & SERVE
The Honorable Mary M. Johnston
Superior Court of the State of Delaware
Leonard L. Williams Justice Center
500 North King Street
Wilmington, DE 19801

Re: *Judicial Watch Inc. v. Delaware Dept. of Justice*
C. A. No. N20A-07-001 MMJ

Your Honor:

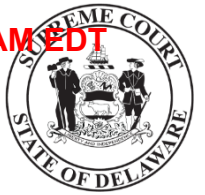
I write in response to footnote 38 in the opinion issued by Your Honor in the above referenced case on January 4, 2021. I have reviewed the gift agreement, and it does not discuss the use of public funds to support the Joseph R. Biden, Jr., Senatorial Papers.

I am available at the Court's convenience should Your Honor have any questions.

Respectfully,

Jennifer M. Becnel-Guzzo
Delaware Bar No. 4492

cc: William E. Manning, Esquire
James D. Taylor, Jr., Esquire
Theodore Kittila, Esquire
William E. Green, Jr. Esquire



CERTIFICATE OF SERVICE

I, William E. Green, Jr. (DE Bar No. 4864), certify that on March 23, 2021, I caused copies of the foregoing APPENDIX TO APPELLANTS' OPENING BRIEF to be served on the following counsel of record in the manner indicated below:

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