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PRELIMINARY STATEMENT

Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) (together “Judicial Watch” or “Appellants”) hereby submit this objection to the Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esq., purportedly providing additional information as ordered by this Court in further support of the refusal of the University of Delaware (the “University” or “Appellee”) to produce documents subject to Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA,” or the “Act”). Even after having several opportunities to satisfy its burden of proof, the University submits a five-page affidavit filled with nothing more than hearsay and conclusory statements. By and large, the “Supplemented” affidavit is duplicative of what the University has previously submitted to justify its position. The University continues to fail to satisfy its burden.

What is now clear after the University has tried and tried again is that it cannot or, for whatever reason, refuses to satisfy its burden of proof to justify the denial of access to the records sought by Judicial Watch and DCNF. The Court must require either the turn-over of the records, or, in the least, allow Appellants the opportunity for limited discovery to confirm that the University’s position is totally without merit.

NATURE AND STAGE OF PROCEEDINGS

On December 6, 2021, the Delaware Supreme Court held that that “the unsworn assertions of fact below were insufficient to create a record upon which the Superior Court could find that the University had satisfied its burden of proof,”¹ and remanded for further proceedings before this Court. The Delaware Supreme Court further stated that “[o]n remand, the Superior Court shall determine whether the University has *satisfied its burden of proof* based on *competent evidence* in accordance with this ruling.”² As the Supreme Court noted, “[T]o meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”³

On December 22, 2021, the Supreme Court Mandate was entered on the Superior Court docket. On January 5, 2021, the Court wrote to counsel ordering the University to submit an affidavit within 30 days, and for Appellants to file any response within 30 days thereafter.

On February 4, 2022, the University filed its Opening Brief on Remand (the “University’s Opening Brief” or “Op. Br.”), along with the Affidavit of Jennifer M.

¹ *Judicial Watch, Inc. et. al. v. University of Delaware*, 267 A.3d 996, 1012 (Del. Dec. 6, 2021) (hereinafter, “*Supreme Court Op.*”).

² *Id.* at 31 (emphasis added).

³ *Id.* at 30.

Becnel-Guzzo, Esq., University FOIA Coordinator, dated February 3, 2022 (the “Original Affidavit”).

On March 7, 2022, Appellants filed their Answering Brief on Remand.

On June 7, 2022, the Court entered a Memorandum Opinion, holding, in relevant part, that the University had not carried its burden to create a record from which the Court could determine whether the University had performed an adequate search for responsive documents, and granting the University leave to submit additional information, under oath, within 45 days of the date of the Memorandum Opinion. *Judicial Watch v. University of Delaware*, 2022 WL 2037923, at *3 (Del. Super. June 7, 2022) (the “June 7 Opinion”).

On July 22, 2022, the University filed the Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esq. University FOIA Coordinator and Deputy General Counsel (the “Supplemented Affidavit”), which sought to supplement the Original Affidavit.

This is Appellants’ Objection to the University’s Supplemented Affidavit.

QUESTIONS PRESENTED

1. Does the Supplemented Affidavit satisfy the University's burden of proof under *29 Del. C. § 100005(c)*?
2. Should the Court award Appellants their attorneys' fees and costs under *29 Del. C. § 10005(d)*?

STATEMENT OF FACTS

The Court is familiar with the background facts and Appellants' outstanding requests for the Communications Records and the Agreement.⁴

On June 7, 2022, the Court entered the June 7 Opinion, holding, in relevant part, that the University had not carried its burden to create a record from which the Court could determine whether the University had performed an adequate search for responsive documents, and granting the University leave to submit additional information, under oath, within 45 days of the date of the June 7 Opinion. *June 7 Opinion*, 2022 WL 2037923, at *3.

On July 22, 2022, the University filed the Supplemented Affidavit, the first four paragraphs of which are identical to the Original Affidavit.⁵

⁴ See, e.g., *Judicial Watch, Inc. v. Delaware Dep't of Justice*, 2021 WL 22550, at *1-3 (Del. Sup. Jan. 4, 2021); *June 7 Opinion*, 2022 WL 2037923, at *1-3 (Del. Sup. Jun. 7, 2022). Capitalized terms not otherwise defined herein have the definitions set forth in the opinions.

⁵ Compare Original Affidavit at ¶¶ 1-4 (Trans. ID 67293246) with Supplemented Affidavit at ¶¶ 1-4 (Trans. ID 67851029).

As an initial matter, the Supplemented Affidavit shows that the University did not make any new inquiry or perform any new search related to the records requested by Judicial Watch and DCNF (as previously defined, the “Requests”). While both of the Request were made on April 30, 2020, the University’s inquiries—as set forth in the Supplemented Affidavit—took place between May 2019 and January 2020, *over four months before the Requests were made.*⁶

Moreover, beginning with the fifth paragraph, the Supplemented Affidavit describes, again in general terms, the results of prior searches in response to FOIA requests made by other persons, not Judicial Watch or DCNF.⁷ Instead, the FOIA Coordinator avers that on “several occasions” she inquired of University personnel whether State funds were spent on the Biden Senate Papers.⁸ The University personnel contacted by the FOIA Coordinator are identified as the University’s Budget Director, Lionel Gilibert, and the University’s Vice Provost of Libraries and Museums, Trevor Dawes.⁹ The Supplemented Affidavit asserts that the communications relied on in responding to the Requests occurred in January 2020—again, four months prior to when Judicial Watch and DCNF made the Requests.

⁶ Supplemented Affidavit at ¶¶ 7-10.

⁷ *Id.* at ¶ 5.

⁸ *Id.*

⁹ *Id.* at ¶ 5.

Paragraph 9 of the Supplemented Affidavit cites a January 2020 communication with Mr. Gilibert and Mr. Dawes as the basis of the University's representation that no salaries of any University personnel involved in the custody and curation of the Biden Senate Papers are paid with State funds.¹⁰ However, as the FOIA Coordinator freely admits, no documents were consulted or reviewed in connection with this inquiry.¹¹ Although the Supplemented Affidavit states that the FOIA Coordinator inquired into the salaries of personnel involved in the "custody and curation"¹² of the Biden Senate Papers, it does state whether State funds are used in the storage, housing, and upkeep of the Biden Senate Papers, or even whether such inquiry was made.

Paragraph 10 of the Supplemented Affidavit cites a January 2020 communication with Mr. Gilibert as the basis for the University's representation that no State funds have been spent on the University's email system over which email communications between University personnel and any representative of now-President Biden might have been exchanged.¹³ Again, no documents were consulted or reviewed in connection with this inquiry.¹⁴ Here again, the Affidavit is

¹⁰ *Id.* at ¶ 9.

¹¹ *Id.* at ¶ 12.

¹² *Id.* at ¶ 9.

¹³ *Id.* at ¶ 10.

¹⁴ *Id.* at ¶ 12.

ambiguous with respect to whether State funds are used to pay the salaries of personnel responsible for the maintenance of the University's email system, or the salaries of University personnel who communicated with representatives of President Biden.

Paragraph 11, addressing the Gift Agreement, is similarly opaque. Although the FOIA Coordinator reviewed the Gift Agreement, and states that "State funds are not mentioned in the [A]greement," there is no statement as to whether the Gift Agreement identifies the source of the funds used for the University's upkeep of the Biden Senate Papers.¹⁵ Apparently, no documents other than the Gift Agreement were reviewed in connection with the Supplemented Affidavit.¹⁶

¹⁵ *Id.* at ¶ 12.

¹⁶ *Id.*

ARGUMENT

I. THE UNIVERSITY HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER 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). The Delaware Supreme Court reiterated this, holding that the University had not met its burden of proof below and providing the following guidance to the parties and the Court:

Unless it is clear on the face of the request that the demanded records are not subject to FOIA, the public body must search for responsive records. A description of the search and the outcome of the search must be reflected through statements made under oath, such as statements in an affidavit, in order for the public body to satisfy its burden of proof. We note that it is not clear on the face of the requests for the Agreement or Communication Records that they are not subject to FOIA, and the University does not contend otherwise. On remand, the University bears the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.¹⁷

The University has already had two chances on remand to satisfy its obligations but still has not met its burden. As an initial matter, with the exception of the Agreement, the representations in the Supplemented Affidavit are entirely

¹⁷ *Supreme Court Op.*, 267 A.3d at 1012-13.

based on hearsay.¹⁸ Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing, and that a party offers in evidence to prove the truth of the matter asserted in the statement. Del. R. Evid. 801(c)(1)-(2). Apart from the question as to whether the University can satisfy its burden of proof via hearsay, the declarations in the Supplemented Affidavit are stale, as the communications took place at least four months *before* the Requests were even submitted to the University.¹⁹ The Supplemented Affidavit is silent as to how the “communications” took place, and whether the declarations are based on personal knowledge, a review of University records, or further hearsay.

This information is vital not only to vet the hearsay in the Supplemented Affidavit, but because the University’s representations in Paragraphs 9 and 10 thereof are implausible and invite skepticism. It is hard to believe that no salaries of University personnel involved in the custody and curation of the Biden Senate Papers are paid with State funds, and that no State funds have been spent on the University’s email system. Are we to conclude that the salaries of the personnel involved in the custody and curation of the Biden Senate Papers are paid for exclusively by private donations? It similarly strains credulity to accept that the

¹⁸ See Supplemented Affidavit at ¶¶ 5-10 (relying on “communications” between May 2019 and January 2020 with three University personnel).

¹⁹ *E.g., id.* at ¶ 5 (“The particular communications on which I relied in responding to Petitioners’ later FOIA requests occurred in January 2020.”).

University’s email system—a core piece of technical infrastructure that would require near constant maintenance, upkeep, and upgrading—is not paid for in whole or in part with State funds. The conclusion that the University is hiding something is inescapable.

The only potentially responsive document the University reviewed is the Gift Agreement.²⁰ The University reviewed no other potentially responsive documents. Despite clear guidance from the Delaware Supreme Court and this Court, the University decided that it was not obligated to review *any* Communication Records for responsive documents, on the premises that the University has never spent State funds on any “matter or undertaking” related to Mr. Biden.²¹ This is an insufficient basis to infer that *none* of the Communication Records relate to the University’s expenditure of State funds are therefore not subject to FOIA. This is, however, a sufficient basis to infer that the University reviewed no Communication Records in response to the requests. The University has not carried its burden to create a record from which the Court can determine whether the University performed an adequate search for responsive documents.

The Supplemented Affidavit is also notable for what it does not include. There is no mention of inquiries into the sources of the funds used for the storage,

²⁰ *Id.* at ¶ 12.

²¹ *Id.* at ¶ 5.

housing, and upkeep of the Biden Senate Papers or the sources of the funds to pay for the salaries of personnel responsible for such actions. There is also no mention of whether State funds pay the salaries of personnel responsible for the maintenance of the University's email system, or the University personnel who corresponded with President Biden's representatives.

Because of the Original and Supplemented Affidavits' deficiencies, the University has failed to satisfy its burden of proof, and the Court should order the turnover of the requested documents. Alternatively, Appellants should be permitted limited discovery—to include at minimum, a deposition of a representative of the University and production of documents—in order to create a factual record upon which this Court can determine whether the University performed an adequate search for responsive documents, consistent with the rulings by Delaware Supreme Court and this Court.

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

Appellants have demonstrated that the University did not carry its burden on the record below, and even after a second bite at the apple, the University has not carried its burden on remand. A litigant that fails to satisfy its burden of proof is typically not deemed to be a prevailing party. But this is not a typical case, as the University has had two “do-overs” in its efforts to satisfy its burden of proof. Even

if the Court were to conclude that the University has met its burden of proof with the Supplemented Affidavit—and it should not—the Court should exercise its discretion to grant Petitioners their reasonable attorneys’ fees and costs in bringing this action.

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). Further discovery is warranted to determine whether the University has performed an adequate search for responsive documents. Appellants should be awarded their attorneys’ fees and costs as successful plaintiffs. *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 partially successful FOIA plaintiff).

CONCLUSION

For the reasons stated above, Appellants Judicial Watch, Inc. and the Daily Caller News Foundation respectfully request that the Court enter an order (1) providing for further discovery regarding the University’s search, or lack thereof, for responsive records, and (2) awarding Appellants their attorneys’ fees and costs.

Dated: July 27, 2022

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