

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

*Petitioners Below-  
Appellants,*

v.

THE UNIVERSITY OF DELAWARE,

*Respondent Below-  
Appellee.*

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) No. 402,2022  
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) On Appeal from C.A. No. N20A-  
) 07-001 MMJ in the Superior Court  
) of the State of Delaware  
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APPELLANTS' OPENING BRIEF

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Dated: December 13, 2022

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF CITATIONS .....	ii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF THE ARGUMENT .....	4
STATEMENT OF FACTS .....	5
ARGUMENT .....	11
I. THE UNIVERSITY FAILED TO CARRY ITS BURDEN TO PROVE THAT THE REQUESTED RECORDS ARE NOT SUBJECT TO FOIA .....	11
Question Presented .....	11
Standard and Scope of Review .....	11
Merits of the Argument .....	12
CONCLUSION .....	20
Opinion, dated October 19, 2022 .....	Ex. A



## **TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Brokenbrough v. State</i> , 522 A.2d 851 (Del. 1987) .....	13
<i>Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.</i> , 1994 WL 274295 (Del. Ch. May 19, 1994) .....	18
<i>Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.</i> , 177 A.3d 610 (Table) (Del. 2017) .....	4, 11
<i>Judicial Watch, Inc. v. University of Delaware</i> , 267 A.3d 996 (Del. Dec. 6, 2021) .....	<i>passim</i>
<i>Judicial Watch, Inc. v. University of Delaware</i> , 2022 WL 2037923 (Del. Sup. June 7, 2022) .....	2, 7
<i>Klig v. Deloitte LLP</i> , 2010 WL 3489735 (Del. Ch. Sept. 7, 2010) .....	18-19
<i>O’Neill v. Town of Middletown</i> , 2007 WL 1114019 (Del. Ch. Mar. 29, 2007) .....	18
<i>Unitrin, Inc. v. Am. Gen. Corp.</i> , 651 A.2d 1361 (Del. 1995) .....	19
<b><u>Statutes and Rules</u></b>	
29 Del. C. § 10005 .....	<i>passim</i>
29 Del. C. § 10003 .....	18
Del. R. Evid. 801(c) .....	14
<b><u>Other Sources</u></b>	
<i>Del. Op. Att’y Gen.</i> 02-IB30, 2002 WL 31867904 (Dec. 2, 2002) .....	18

## **NATURE OF PROCEEDINGS**

This is the second appeal of Plaintiffs Below/Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (the “DCNF”) (together, “Appellants”) regarding the interpretation of the Delaware Freedom of Information Act (“FOIA”), 29 *Del. C.* § 10001-10007, as applied to Defendant Below/Appellee the University of Delaware (the “University”).

On December 6, 2022, this Court held, in relevant part, that the University failed to carry its burden of proof to justify its denial of Appellants’ FOIA requests on the record below, and remanded to the Superior Court for further proceedings.<sup>1</sup>

On December 22, 2021, the Supreme Court Mandate was entered on the Superior Court docket. On January 5, 2021, the Superior 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.

In yet-again, another cursory stab at satisfying its statutory burden, on February 4, 2022, the University filed the Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (the “Original Affidavit”)<sup>2</sup> along with a supporting brief.<sup>3</sup> On March 7, 2022, Appellants filed an “Answering Brief on

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<sup>1</sup> *Judicial Watch, Inc., et al. v. University of Delaware*, 267 A.3d 996, 999 (Del. Dec. 6, 2021).

<sup>2</sup> A-184.

<sup>3</sup> A-188.

Remand” pointing out the failures to satisfy the requisite burden in the Original Affidavit and seeking “further discovery regarding the University’s search, or lack thereof, for responsive records.”<sup>4</sup>

On June 7, 2022, the Superior Court issued a Memorandum Opinion which held, in relevant part, that the Original Affidavit did not satisfy the University’s burden, but granted the University leave to submit additional information under oath within 45 days.<sup>5</sup>

On July 22, 2022, the University filed the Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (the “Supplemented Affidavit”).<sup>6</sup> Appellants again highlighted the University’s failures in their July 27, 2022 objection filed with the Court,<sup>7</sup> to which the University’s counsel responded on September 22, 2022.<sup>8</sup>

On October 19, 2022, the Superior Court issued a memorandum opinion (the “Opinion”),<sup>9</sup> that erroneously holds that the University, on its second bite at the

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<sup>4</sup> A-199; A-212.

<sup>5</sup> A-214; *see also Judicial Watch, Inc. v. University of Delaware*, 2022 WL 2037923, at \*3 (Del. Sup. June 7, 2022) (the “June 7 Opinion”).

<sup>6</sup> A-222.

<sup>7</sup> A-227.

<sup>8</sup> A-243.

<sup>9</sup> Attached as Exhibit A.

apple after remand, had finally carried its burden of proof to justify its denial of records under FOIA.

Appellants timely appealed the Opinion on October 25, 2022. *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

This appeal challenges the Opinion's finding that the Supplemented Affidavit satisfies the University's burden of proof to justify its denial of the Requests. Appellants respectfully request that this Court reverse the Opinion of the Superior Court, hold that the University has still not met its burden of proof, and remand for further proceedings to include discovery into the fact assertions of the Supplemented Affidavit. Alternatively, the Court should grant Appellants access to the requested documents as the University has had more than enough opportunities to satisfy its burden and, for whatever reason, has not done so.

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## **SUMMARY OF THE ARGUMENT**

1. The University failed to carry its burden of proof to justify its denial of access to the requested records. *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 1012-13 (Del. 2021) (reversing in part and remanding where FOIA respondent did not satisfy its burden of proof); *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-209 to 211; A-237 to A-240.

## **STATEMENT OF FACTS**

The background facts are familiar to the Court:

In 2012, then-Vice President Joseph R. Biden, Jr. donated his Senatorial papers (“Biden Senatorial Papers” or “Papers”) to the University of Delaware (the “University”). The donation was made pursuant to a gift agreement (the “Agreement”) that placed certain restrictions on the University’s ability to make the Biden Senatorial Papers publicly available. In April 2020, Judicial Watch, Inc. (“Judicial Watch”) and The Daily Caller News Foundation (“DCNF”) (collectively, the “Appellants”) submitted requests under the Delaware Freedom of Information Act (“FOIA”), 29 *Del. C.* §§ 10001-10007, to access the Papers and any records relevant to or discussing the Papers.

The University denied both requests, stating that the Papers are not subject to FOIA because the Papers do not meet the definition of “public records” and because the full Board of Trustees never discussed the Papers. Appellants then filed separate petitions with the Office of the Attorney General of the State of Delaware challenging the University’s denial of their requests. The Deputy Attorney General issued individual opinions to Judicial Watch and DCNF concluding that the University had not violated FOIA because the records Appellants requested are not subject to FOIA. Appellants then appealed to the Superior Court, which affirmed the Deputy Attorney General’s opinions.<sup>10</sup>

On appeal, this 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,”<sup>11</sup> and remanded for further proceedings. This Court further stated that “[o]n remand, the Superior Court shall

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<sup>10</sup> *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 999-1001 (Del. 2021).

<sup>11</sup> *Id.* at 1012.

determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling.”<sup>12</sup> “[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.”<sup>13</sup>

On remand, Judicial Watch sought 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.<sup>14</sup> DCNF sought the agreement governing President Biden’s donation of the Biden Senatorial Papers to the University, plus any communication between University staff and anyone representing President Biden.<sup>15</sup> This Court defined the records sought in the requests as the “Communication Records”<sup>16</sup> and the “Agreement.”<sup>17</sup>

On February 4, 2022, the University filed its Opening Brief on Remand, along with the Affidavit of Jennifer M. Becnel-Guzzo, Esq., University FOIA Coordinator, (as defined above, the “Original Affidavit”). The Superior Court thereafter held, in

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<sup>12</sup> *Id.* at 1013.

<sup>13</sup> *Id.* at 1012.

<sup>14</sup> *Id.* at 1000.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 999.

relevant part, that the University failed to carry its burden to create a record from which the Court could determine whether the University had performed an adequate search for responsive documents, and granted the University leave to submit additional information, under oath, within 45 days of the date of the Memorandum 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.<sup>18</sup> Critically, the Supplemented Affidavit shows that the University *did not perform any inquiry or search* related to Judicial Watch’s and/or DCNF’s records request (the “Requests”). Instead, the University simply relied on information gathered before the Requests were ever made—ostensibly in response to “earlier inquiries for access to the Biden Senate Papers.”<sup>19</sup> Although both of the Requests were made on April 30, 2020,<sup>20</sup> the University’s inquiries—as set forth in the Supplemented Affidavit—took place between May 2019 and January 2020.<sup>21</sup> Thus, the University’s latest inquiry took place more than four months before the Requests were made by Judicial Watch and DCNF.

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<sup>18</sup> Compare A-184 to A-186, ¶¶ 1-4 with A-122 to A-224 at ¶¶ 1-4.

<sup>19</sup> A-225 at ¶ 8.

<sup>20</sup> A-20; A-25.

<sup>21</sup> A-225 at ¶¶ 7-10.



Apart from relying on outdated information gathered in earlier inquiries, the Supplemented Affidavit is impermissibly vague. Beginning with the fifth paragraph, the Supplemented Affidavit describes, in general terms, the results of prior searches in response to unidentified FOIA requests submitted by persons other than Judicial Watch or DCNF.<sup>22</sup> The Supplemented Affidavit avers that on “several occasions” the University FOIA Coordinator inquired of University personnel whether State funds were spent on the Biden Senatorial Papers.<sup>23</sup> 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.<sup>24</sup> The Supplemented Affidavit states that these communications relied on in responding to the Requests occurred in January 2020—long before Judicial Watch and DCNF submitted the Requests in April 2020. The Supplemented Affidavit is silent as to how these communications took place—whether face to face, via telephone, or via email, or by other written correspondence.

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

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<sup>22</sup> *Id.* at ¶ 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

and curation of the Biden Senatorial Papers are paid with State funds.<sup>25</sup> However, the FOIA Coordinator freely admits that *no documents were consulted or reviewed* in connection with this inquiry.<sup>26</sup> Although the Supplemented Affidavit states that the FOIA Coordinator inquired into the salaries of personnel involved in the “custody and curation”<sup>27</sup> of the Biden Senatorial Papers, in a glaring omission, the Supplemented Affidavit does not state whether State funds are used in the storage, housing, or upkeep of the Biden Senatorial Papers. Nor does the Supplemented Affidavit reveal 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.<sup>28</sup> Again, *no documents were consulted or reviewed* in connection with this inquiry.<sup>29</sup> And again, the Supplemented Affidavit is ambiguous with respect to whether State funds are used to pay the salaries of personnel responsible for the maintenance of the University’s

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<sup>25</sup> *Id.* at ¶ 9.

<sup>26</sup> *Id.* at ¶ 12.

<sup>27</sup> *Id.* at ¶ 9.

<sup>28</sup> *Id.* at ¶ 10.

<sup>29</sup> *Id.* at ¶ 12.

email system, or the salaries of University personnel who communicated with representatives of President Biden.

Paragraph 11, addressing the Agreement, is similarly opaque. Although the FOIA Coordinator reviewed the Agreement, and states that “State funds are not mentioned in the [A]greement,” there is no statement as to whether the Agreement identifies the source of the funds used for the University’s upkeep of the Biden Senatorial Papers.<sup>30</sup> No documents other than the Agreement were reviewed in connection with the Supplemented Affidavit.<sup>31</sup>

Despite the Supplemented Affidavit’s glaring infirmities—all of which were pointed out by Appellants<sup>32</sup>—on October 19, 2022, the Superior Court issued the Opinion, which approved the deficient Supplemented Affidavit, and held that the University had finally—more than two years after the Requests were submitted—satisfied its burden of proof to justify its denial of records.

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<sup>30</sup> *Id.* at ¶ 12.

<sup>31</sup> *Id.*

<sup>32</sup> *See* A-227.

## **ARGUMENT**

### **I. 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 Supplemented Affidavit does not satisfy the University's burden of proof under 29 *Del. C.* § 100005(c) to justify its denial of the Requests. A-209 to 211; A-237 to A-240.

#### **Standard and Scope of Review**

“Questions of law are reviewed *de novo*. Statutory interpretation is a question of law. Accordingly, this Court does not defer to ... the Superior Court's interpretation of the statute[ ] in question.” *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 1003 (Del. 2021) (quoting *Del. Dep't. of Nat. Res. & Env't Control v. Sussex Cnty.*, 34 A.3d 1087, 1090 (Del. 2011)).

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. The Supplemented Affidavit is nothing more than a document filled with stale hearsay and vague *ipse dixit* assertions which at best shows that the University did not engage in a diligent effort, as required by law, to review Appellants' Requests. Appellants identified the deficiencies and asked to vet the assertions themselves. The Superior Court, however, simply granted the University "do overs." Even after multiple attempts, the University has still not carried its burden to prove that the requested records are not subject to FOIA.

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). Accordingly, this Court held that the University had not met its burden of proof below, and provided the following guidance to the parties and the Superior 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.<sup>33</sup>

Despite two attempts on remand, the University still has not satisfied its burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents. This Court held:

In a FOIA proceeding, the public body has a unilateral opportunity to characterize the requested documents, a characterization that establishes whether the records are subject to FOIA. As a result, the Chief Deputy Attorney General and the courts are forced to assess whether records are subject to FOIA relying largely on the representations of the public body. Requiring sworn statements, which subject the affiant or witness to the penalties for perjury, helps offset the inherent disadvantage in the FOIA process.<sup>34</sup>

Recognizing Appellants' inherent disadvantage, this Court noted that "the resolution of a legal action must rest on *competent, reliable evidence*. And the Court has held that when an attorney seeks to establish facts based on *personal knowledge*, those facts must be asserted under oath." 267 A.3d at 1010-11 (emphasis added) (citing *Brokenbrough v. State*, 522 A.2d 851, 858 (Del. 1987) (noting that attorneys at trial are prohibited from asserting personal knowledge of facts at issue unless they are giving witness testimony)).

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<sup>33</sup> 267 A.3d at 1012-13.

<sup>34</sup> *Id.* at 1011-12.

As an initial matter, with the sole exception of assertions regarding the Agreement, the “personal knowledge” asserted in the Supplemented Affidavit is entirely based on hearsay.<sup>35</sup> 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). This Court rejected hearsay as the basis for the required sworn statement. *See, e.g.*, 267 A.3d at 1010 n. 105 (“[W]hen the public body is seeking to assert a fact based on ***personal knowledge***, that assertion must be made under oath in order to establish some competent record.”) (emphasis added).

The “personal knowledge” asserted in the Supplemented Affidavit is not that of Jennifer M. Becnel-Guzzo, Esq., University FOIA Coordinator. It rather appears to be that of University Budget Director, Lionel Gilibert, and University Vice Provost of Libraries and Museums, Trevor Dawes.<sup>36</sup> The Supplemented Affidavit is silent, however, as to how Mr. Gilibert and Mr. Dawes obtained the personal knowledge conveyed by Ms. Becnel-Guzzo in the Supplemented Affidavit. Indeed, the Supplemented Affidavit does not state whether the declarations are in fact based on Mr. Gilibert’s and Mr. Dawes’ personal knowledge, or are based on their review

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<sup>35</sup> A-225 to A-226 at ¶¶ 5-10 (relying on “communications” between May 2019 and January 2020 with three University personnel).

<sup>36</sup> A-225 to A-226 at ¶¶ 5-10.

of University records, or even further hearsay. The University has thus not satisfied its burden to justify its denial of records through competent, reliable evidence on its second bite at the apple after remand.

Separate and apart from whether the University can satisfy its burden of proof via hearsay, the declarations in the Supplemented Affidavit are outdated, as the earliest communications on which they are based took place *four months* before the Requests, dated April 30, 2020, were even submitted to the University.<sup>37</sup>

How Mr. Gilibert and Mr. Dawes obtained the information conveyed in the Supplemented Affidavit is vital not only to vet the stale hearsay set forth therein, but because the University's representations in Paragraphs 9 and 10 are facially implausible and invite skepticism.<sup>38</sup> It is difficult to believe that *no* salaries of University personnel involved in the custody and curation of the Biden Senatorial Papers are paid with State funds, and that no State funds have been—or will be—spent on the University's email system. The implication here is that the salaries of the personnel involved in the custody and curation of the Biden Senatorial Papers are paid for exclusively by private donations. It is similarly implausible that the University's email system—a core piece of technical infrastructure requires near

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<sup>37</sup> A-225 at ¶ 5 (“The particular communications on which I relied in responding to Petitioners’ later FOIA requests occurred in January 2020.”).

<sup>38</sup> A-225.



constant maintenance, upkeep, and upgrading—is not paid for in whole or in part with State funds. The conclusion that the University is not being fully transparent is inescapable.

In briefing before the Superior Court, the University grumbled that Appellants should have reviewed the University’s website<sup>39</sup> and asserted that the University has “several other sources of revenue,”<sup>40</sup> such as tuition and fees. In doing so, the University invites Appellants and the Court to partake in a guessing game, despite the fact that this litigation is well into its third year and it is the University’s burden to meet. The University has chosen not to put the matter to rest by satisfying its burden and stating from where the funds that support the Biden Senatorial Papers come.

Separately, in responding to the Requests, the only potentially responsive document the University reviewed is the Agreement.<sup>41</sup> Despite clear guidance from this Court and the Superior Court, the University decided that it was not obligated to review *any* Communication Records for responsive documents, on the premise that the University has never previously spent State funds on any “matter or

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<sup>39</sup> See A-248.

<sup>40</sup> A-249.

<sup>41</sup> A-226 at ¶ 12 (“The specific responses to the inquiries to which I refer above did not include documents.”).

undertaking” related to Mr. Biden.<sup>42</sup> This is an insufficient basis to infer that *none* of the Communication Records relate to the University’s expenditure of State funds, and are therefore not subject to FOIA. The Request for Communication Records is not limited by a timeframe, yet the University categorically asserts—based on information purportedly gleaned responding to prior FOIA requests—that no responsive documents exist.<sup>43</sup> 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 noteworthy for what it does not include. There is no mention of inquiries into the sources of the funds used for the storage, housing, and upkeep of the Biden Senatorial 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.

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<sup>42</sup> A-224 at ¶ 5.

<sup>43</sup> Importantly, to the extent a search was ever conducted – which Appellants do not concede – it did not include the months between when the search was conducted and Appellants submitted their requests.

Typically, a FOIA respondent who fails to carry its burden of proof is found to have violated FOIA.<sup>44</sup> In analogous circumstances, litigants who fail to carry their burden to adequately describe documents withheld on privilege logs are routinely found to have waived the privilege, and may be ordered to produce the withheld documents. The Court of Chancery has noted that:

The [privilege] log is supposed to provide sufficient information to enable the adversary to assess the privilege claim and decide whether to mount a challenge. Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.

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<sup>44</sup> *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.").

*Klig v. Deloitte LLP*, 2010 WL 3489735, at \*6 (Del. Ch. Sept. 7, 2010). Although FOIA respondents are not required to submit an index of records denied,<sup>45</sup> the University has put Appellants through a procedural odyssey similar to that described by Vice Chancellor Laster in *Klig*. Here, prior to the first appeal to this Court, the University failed to carry its burden of proof before the Attorney General, then failed to carry its burden of proof before the Superior Court. Even after the first appeal and remand, the University failed to carry its burden of proof with the Original Affidavit. And on its second attempt after remand, the University's Supplemented Affidavit relies on outdated and impermissibly vague hearsay.

It was, and is, 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. The University has not made that showing. The Superior Court's conclusion 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.*, 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.").

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<sup>45</sup> 29 *Del. C.* § 10003(h)(2).

Because of the Supplemented Affidavit's deficiencies, the University has failed to satisfy its burden of proof, and the Court should reverse the Opinion and remand to allow Appellants the opportunity to conduct 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 the Superior Court can determine whether the University performed an adequate search for responsive documents, consistent with the rulings of this Court. Alternatively, the Court should remand this case with instructions to order the turnover of the requested documents since the University has had more than adequate opportunity to satisfy its burden.

## **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.

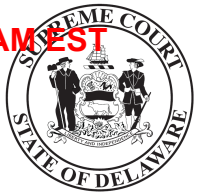
Dated: December 13, 2022

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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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JUDICIAL WATCH, INC., a District of  
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**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 365.

2. The brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,053 words, exclusive of the caption, the tables, and the signature block, which were counted by Microsoft Word 365.

Dated: December 13, 2022

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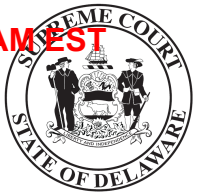
Phone: (302) 257-2011

Fax: (302) 257-2019

Email: [tk@hfk.law](mailto:tk@hfk.law) / [wg@hfk.law](mailto:wg@hfk.law)

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





# **EXHIBIT A**

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

JUDICIAL WATCH., a District of	)	
Columbia corporation, and THE	)	
DAILY CALLER NEWS	)	
FOUNDATION,	)	
	)	C.A. No. N20A-07-001 MMJ
Petitioners Below,	)	
Appellants	)	
	)	
v.	)	
	)	
UNIVERSITY OF DELAWARE,	)	
	)	
Respondent Below,	)	
Appellee.	)	

Submitted: September 22, 2022

Decided: October 19, 2022

On Remand from the December 6, 2021 Opinion  
of the Supreme Court of the State of Delaware

**MEMORANDUM OPINION**

Theodore A. Kittila, Esquire, William E. Green, Jr., Esquire, HALLORAN FARKAS + KITTILA LLP, Wilmington, Delaware; *for Appellants Judicial Watch, Inc. and The Daily Caller News Foundation.*

William E. Manning, Esquire, James D. Taylor, Jr., Esquire, Marisa R. DeFeo, Esquire, SAUL EWING ARNSTEIN & LEHR LLP, Wilmington, Delaware; *for Appellee University of Delaware.*

**JOHNSTON, J.**

## **Supreme Court Decision**

Judicial Watch, Inc. and The Daily Caller News Foundation (collectively “Appellants”) submitted requests under the Delaware Freedom of Information Act (“FOIA”), 29 *Del. C.* §§ 19991-10007, to access the Biden Senatorial Papers donated to the University of Delaware. The University denied the requests. Appellants filed petitions with the Office of the Attorney General of the State of Delaware challenging the denial. The Attorney General’s Office issued opinions concluding that the records requested by Appellants are not subject to FOIA. Appellants appealed these opinions to the Superior Court. This Court affirmed the opinions.<sup>1</sup> Appellants appealed the Superior Court’s ruling to the Supreme Court.

By Opinion dated December 6, 2021, the Delaware Supreme Court made the following findings.<sup>2</sup>

Thus, we hold that unless it is clear on the face of the request that the demanded records are not subject to FOIA, to 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. Because the University’s factual assertions to the Deputy Attorney General and the Superior Court were not made under oath and do not describe the efforts taken to identify responsive documents, they are not sufficient to meet FOIA’s burden of proof. On remand, the Superior Court shall determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling. The Superior Court is granted leave to accept

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<sup>1</sup> *Judicial Watch, Inc. v. Del. Dep’t. of Justice*, 2021 WL 22550 (Del. Super.).

<sup>2</sup> *Judicial Watch, Inc v. University of Delaware*, 267 A.3d 996 (Del. 2021).

additional evidence or submissions as it deems necessary and appropriate.

\* \* \*

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. Conversely, where it is clear on the face of a request that the demanded records are not subject to FOIA, the public body does not need to search the requested documents for responsive records. Nothing herein should be read to suggest that the University must search the Biden Senatorial Papers for responsive documents. The Superior Court held that the Biden Senatorial Papers are facially excluded from FOIA, and Appellants have not appealed that ruling.

\* \* \*

For the reasons provided above, the Court AFFIRMS in part and REVERSES and REMANDS in part the Superior Court's judgment. On remand, the Superior Court shall reconsider whether the University satisfied its burden of proof, consistent with this opinion. The court may accept any additional evidence or submissions it deems necessary to determine whether the University has violated FOIA in accordance with this ruling.

## **ANALYSIS ON REMAND**

The University of Delaware filed an Opening Brief on Remand, accompanied by the Affidavit of Jennifer M. Becnel-Guzzo, Esq., University FOIA Coordinator, dated February 3, 2022. Appellant filed an Answering Brief, challenging the sufficiency of the Affidavit in several respects. The University did not request permission to file a reply, or otherwise respond, to the Answering Brief.

By Memorandum Opinion dated March 7, 2022<sup>3</sup>, the Court found that the generalized statements in the Affidavit do not meet “the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.” The Court directed the University of Delaware to articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University’s email system for communications between University personnel and Biden representatives; when such inquiries were made; and what, if any, documents (other than the gift agreement) were reviewed.

Respondents were granted leave to submit additional information, under oath, within 45 days of the date of the Memorandum Opinion.

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<sup>3</sup> *Judicial Watch v. University of Delaware*, 2022 WL 2037923 (Del. Super.).

The University of Delaware filed a Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esq. University FOIA Coordinator and Deputy General Counsel, dated July 22, 2022. The Affidavit states in pertinent part:

5. In recent years, I have responded to numerous FOIA requests having to do with the University's relationship to Joseph R. Biden, Jr. Indeed, there were earlier FOIA requests regarding Biden Senate Papers. Thus, on several occasions I inquired of University personnel, including the University's Budget Director, Lionel Gilibert, and the University's Vice Provost of Libraries and Museums, Trevor Dawes, whether State funds have been spent on a variety of matters or undertaking related to Mr. Biden, including the Biden Senate Papers. The particular communications on which I relied in responding to Petitioners' later FOIA requests occurred in January 2020. In no case have I found that State funds were spent by the University on any such matter or undertaking.
6. Similarly, in reporting that the Biden Senate Papers were not the subject of any discussions held in meeting of the full Board of Trustees, I relied on communications with the University's Associate University Secretary, Brent Schrader first held in July 2019.
7. In May 2019, after receiving a request for documents related to any payments that might have been made to Mr. Biden, I inquired of Mr. Gilibert, the University's Budget Director, whether the University had made any payments with State funds to Mr. Biden. Mr. Gilibert confirmed the University had not made such payments to Mr. Biden.
8. In May, 2019, shortly after receiving earlier inquiries for access to the Biden Senate Papers, I inquired of Mr. Gilibert, the University's Budget Director, and Vice Provost Dawes, whether the University paid any consideration, State funded or otherwise, to Mr. Biden for the Senate Papers. I confirmed it did not.
9. In January 2020, after receiving additional requests for access to the Biden Senatorial papers, I inquired of Mr. Gilibert, the

University's Budget Director, and Vice Provost Dawes whether the salaries of any University personnel involved in the custody and curation of the Senate Papers are paid with State funds. I confirmed those salaries are not paid with State funds.


10. I inquired of Mr. Gilibert, the University's Budget Director, in January 2020 whether State funds have been spent on the University's email system over which email communications between University personnel and any representative of Mr. Biden might have been exchanged. I confirmed they were not.
11. I have, on several occasions before and after receipt of the FOIA requests from Petitioners, reviewed the gift agreement between the University and Mr. Biden relating to the Senate Papers and determined that State funds are not mentioned in the agreement.
12. In the Court's June 7, 2022 Memorandum Opinion, the Court directed that, in addition to the identities of those with whom I communicated in order to gather information and dates on which those communications occurred, I identify documents that I reviewed. The specific responses in the inquiries to which I refer above did not include documents. However, the University's auditors annually produce, and make available to the public, a Statement of State of Delaware Funds Received and Expended, which I frequently review in considering FOIA requests. The responses to my inquiries described above are consistent with that annual report on the University's receipt and expenditure of State funds.

On July 27, 2022, Appellants filed their Objection to the University's Supplemented Affidavit. The University filed its Response to Appellants' Objection on September 22, 2022.

The Court finds that the Supplemented Affidavit demonstrates that the University has met its burden of creating a record from which the Court can determine that the University performed an adequate search for responsive documents. The Court

confirms its prior holding that the University's denial of Appellants' requests does not violate FOIA. The requested information is not subject to FOIA.

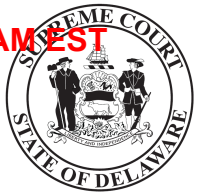
**IT IS SO ORDERED.**



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**The Honorable Mary M. Johnston**





**CERTIFICATE OF SERVICE**

I, William E. Green, Jr. (DE Bar No. 4864), certify that on December 13, 2022, 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:

**By File&ServeXpress**

William E. Manning (Bar No. 697)  
James D. Taylor, Jr. (Bar No. 4009)  
Marisa R. De Feo (Bar No. 6778)  
SAUL EWING ARNSTEIN & LEHR LLP  
1201 N. Market Street, Suite 2300  
P.O. Box 1266  
Wilmington, Delaware 19899-1226

*Counsel for Appellee University of Delaware*

/s/ William E. Green, Jr.

William E. Green, Jr. (Bar No. 4864)

Dated: December 13, 2022

## **TABLE OF CONTENTS**

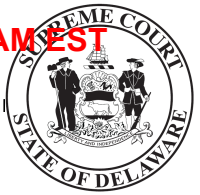
	<b><u>Page</u></b>
Docket .....	A-1
Notice of Appeal and Ex. A & B (filed July 2, 2020) .....	A-11
Certification of Record (filed July 22, 2020).....	A-29
Appellants’ Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 (filed Aug. 28, 2020) .....	A-89
Appellee University of Delaware’s Answering Brief and Exs. A & B (filed Sept. 28, 2020).....	A-112
Appellants’ Reply Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 (filed Oct. 8, 2020) .....	A-144
Opinion of the Superior Court (filed January 4, 2021).....	A-161
Letter from Jennifer M. Becnel-Guzzo, Esquire to the Honorable Mary M. Johnston regarding response to footnote 38 of Opinion of January 4, 2021 (filed January 6, 2021) .....	A-177
Letter from William E. Manning, Esquire to the Honorable Mary M. Johnston regarding appropriate proceedings on remand (filed December 27, 2021) .....	A-178
Letter from William E. Green, Esquire to the Honorable Mary M. Johnston regarding appropriate proceedings on remand (filed December 29, 2021) .....	A-180
Letter to counsel from the Honorable Mary M. Johnston regarding proceedings on remand (filed January 5, 2022).....	A-182
Letter from William E. Manning, Esquire to the Honorable Mary M. Johnston enclosing the Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (filed February 4, 2022) .....	A-183

Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (filed February 4, 2022).....	A-184
University of Delaware’s Opening Brief on Remand (filed February 4, 2022) .....	A-188
Appellants’ Answering Brief on Remand (filed March 7, 2022) .....	A-199
Memorandum Opinion (filed June 7, 2022) .....	A-214
Letter from William E. Manning, Esquire to the Honorable Mary M. Johnston enclosing the Supplemental Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (filed July 22, 2022).....	A-221
Supplemental Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (filed July 22, 2022) .....	A-222
Appellants’ Objection to the University’s Supplemented Affidavit (filed July 27, 2022) .....	A-227
University of Delaware’s Response to Appellants’ Objection (filed September 22, 2022) .....	A-243

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Case Number 402,2022D



### Case History Search

Search Created:

11/8/2022 10:11:55 GMT-0500 (Eastern Standard 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:** 61  
**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):** 32,2021D [View Case History]  
402,2022 [View Case History]

Export 1-37 of 37 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 (10)	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
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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 University of Delaware	William E Green, Halloran Farkas Kittila LLP	7	Affidavit	Letter Acknowledging Acceptance of Service • Linked to (7)	Accepted	0.1MB
65853985	8/17/2020 3:08 PM	File And Serve	N20A-07-001 MMJ	James D Taylor,	8	Entry of Appearance	Entry of Appearance of	Accepted	0.1MB

	EDT		CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Saul Ewing Arnstein & Lehr LLP			William E. Manning and James D. Taylor, Jr. for University of Delaware with certificate of service • Linked to (1) • Linked from (1)		
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 • 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) • 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 • Linked to (7) • Linked from (2)	Accepted	0.3MB
						Certificate of Compliance	Certificate of Compliance with Typeface Requirement and Type-Volume Limitation • Linked from (2)	Accepted	0.1MB
						Certificate of Service	Certificate of Service to Appellants' Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 • Linked from (2)	Accepted	0.1MB
65913324	9/9/2020 11:06 AM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v.	Lisa LG Gonzalez, DE Superior	12	Order	ORDER - PLEASE TAKE NOTICE that effective immediately,	Accepted	0.1MB

			Delaware Department of Justice and University of Delaware	Court-New Castle County			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		
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 <ul style="list-style-type: none"> <li>• Linked to (2)</li> <li>• Linked from (1)</li> </ul>	Accepted	0.2MB
						Exhibits	Exhibit A to Appellee's Answering Brief <ul style="list-style-type: none"> <li>• Linked from (1)</li> </ul>	Accepted	0.2MB
						Exhibits	Exhibit B to Appellee's Answering Brief <ul style="list-style-type: none"> <li>• Linked from (1)</li> </ul>	Accepted	0.2MB
						Certificate of Service	Certificate of Service of	Accepted	0.1MB



							Appellee's Answering Brief • Linked from (1)		
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 • 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 • 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 • 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 • 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. Delaware Department of Justice and University of Delaware	Mary M Johnston, DE Superior Court-New Castle County	17	Opinion	OPINION. On Appeal from Attorney General Opinions 20-IB19 and 20IB-20, Affirmed • Linked from (1)	Accepted	0.6MB
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	Accepted	0.1MB

							<ul style="list-style-type: none"> <li>Linked to (1)</li> </ul>		
						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
67188552	12/22/2021 11:28 AM EST	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Judge New Castle *Judgment, DE Superior Court-New Castle County	21	Supreme Court Mandate	Mandate to Clerk of Court below. Case closed. <ul style="list-style-type: none"> <li>Linked from (2)</li> </ul>	Accepted	0.6MB
67194424	12/27/2021 12:40 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	22	Letter	[Corrected] Letter from William E. Manning to the Honorable Mary M. Johnston re: Remand <ul style="list-style-type: none"> <li>Linked from (1)</li> </ul>	Accepted	0.3MB
67199101	12/29/2021 10:02 AM EST	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	23	Letter	Letter to Judge Mary M. Johnston from William E. Green, Jr., Esq. Regarding Remand <ul style="list-style-type: none"> <li>Linked to (2)</li> </ul>	Accepted	0.1MB
67212096	1/5/2022 2:51 PM	File And Serve	N20A-07-001 MMJ	Mary M Johnston,	24	Letter	Letter to counsel, dated January 5,	Accepted	0.1MB

	EST		CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	DE Superior Court-New Castle County			2022. • Linked from (2)		
67293246	2/4/2022 4:40 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	25	Letter	Letter from William E. Manning to the Honorable Mary M. Johnston regarding Affidavit of Jennifer M. Becnel-Guzzo • Linked to (2) • Linked from (1)	Accepted	0.1MB
						Affidavit	Affidavit of Jennifer M. Becnel-Guzzo • Linked from (1)	Accepted	0.2MB
67293295	2/4/2022 4:48 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	26	Opening Brief	University of Delaware's Opening Brief on Remand • Linked to (1) • Linked from (1)	Accepted	0.1MB
						Certificate of Compliance	Certificate of Compliance with typeface and word limits pursuant to rule 107(b) • Linked from (1)	Accepted	0.1MB
						Certificate of Service	Certificate of Service of University of Delaware's Opening Brief on Remand • Linked from (1)	Accepted	0.1MB
67371609	3/7/2022 1:55 PM EST	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	27	Answering Brief	Appellants' Answering Brief on Remand • Linked to (7) • Linked from (1)	Accepted	0.1MB
						Certificate of Compliance	Certificate of Compliance to Appellants' Answering Brief on Remand • Linked from (1)	Accepted	0.1MB
						Certificate of Service	Certificate of Service to Appellants'	Accepted	0.1MB

							Answering Brief on Remand • Linked from (1)		
67375225	3/8/2022 12:12 PM EST	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	28	Letter	Letter to Judge Mary M. Johnston from William E. Green, Jr. enclosing courtesy copies of Appellants' Answering Brief on Remand • Linked to (3)	Accepted	0.1MB
67699352	6/7/2022 11:07 AM EDT	File And Serve	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	29	Memorandum Opinion	Memorandum Opinion, granting respondents leave to submit additional information, under oath, within 45 days of the date of this Opinion. • Linked from (2)	Accepted	0.2MB
67851029	7/22/2022 3:24 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	30	Letter	Letter from William E. Manning to the Honorable Mary M. Johnston regarding supplemental Affidavit of Jennifer Becnel-Guzzo • Linked to (2) • Linked from (1)	Accepted	0.1MB
						Affidavit	Supplemental Affidavit of Jennifer Becnel-Guzzo • Linked from (1)	Accepted	0.2MB
67867164	7/27/2022 6:07 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	31	Response	Appellants' Objection to the University's Supplemented Affidavit • Linked to (3) • Linked from (2)	Accepted	0.1MB
						Certificate of Compliance	Certificate of Compliance to Appellants' Objection to the University's Supplemented Affidavit • Linked from (1)	Accepted	0.1MB

						Certificate of Service	Certificate of Service to Appellants' Objection to the University's Supplemented Affidavit • Linked from (1)	Accepted	0.1MB
67869580	7/28/2022 12:19 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	32	Letter	Letter to Judge Mary M. Johnston from William E. Green, Jr. enclosing courtesy copies of Appellants' Objection to the University's Supplemented Affidavit • Linked to (3)	Accepted	0.1MB
67892666	8/2/2022 4:19 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	33	Letter	Letter from William E. Manning to the Honorable Judge Johnston regarding Appellants' Opposition to the University of Delaware's Supplemental Affidavit. • Linked to (1)	Accepted	0.5MB
67960587	8/23/2022 9:47 AM EDT	File And Serve	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	34	Letter	Letter to counsel regarding Affidavit of Jennifer M. Becnel-Guzzo, Esquire. • Linked from (1)	Accepted	0.1MB
68145693	9/22/2022 1:38 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	35	Response	University of Delaware's Response to Appellants' Objection to the Supplemental Affidavit • Linked to (2)	Accepted	0.1MB
						Certificate of Service	Certificate of Service of University of Delaware's Response to Appellants' Objection to the	Accepted	0.1MB

							Supplemental Affidavit		
68272776	10/19/2022 9:50 AM EDT	File And Serve	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	36	Memorandum Opinion	Memorandum Opinion, decided October 19, 2022. The Court finds that the Supplemented Affidavit demonstrates that the University has met its burden of creating a record from which the Court can determine that the University performed an adequate search for responsive documents. The Court confirms its prior holding that the University's denial of Appellants' requests does not violate FOIA.	Accepted	0.3MB
68303260	10/26/2022 7:40 AM EDT	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	37	Notice of Appeal to Supreme Court	Notice of Appeal to Supreme Court from the Order dated 10-19-22 in the Superior Court by Judge Johnston, in C.A. No. N20A-07-001 MMJ, with designation of no further transcript.	Accepted	0.1MB
					38	Letter	Letter dated 10-26-22 from Senior Court Clerk to Prothonotary, advising that the record is due 11-18-22.	Accepted	0.2MB
68336763	11/2/2022 12:13 PM EDT	File And Serve	N20A-07-001 MMJ CLOSED Judicial Watch, Inc. v. Delaware Department of Justice and University of Delaware	Colleen Redmond, DE Superior Court-New Castle County	39	Letter	LETTER TO APPELLANT COUNSEL ON NOVEMBER 2, 2022 ADVISING THAT THE SUPERIOR COURT APPEAL PREPARATION FEE IS NOW DUE.	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(1).

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

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

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

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

WHEREFORE, Appellants respectfully request that the Court:

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

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

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

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

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

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

Dated: July 2, 2020

**HALLORAN FARKAS + KITTLA LLP**

/s/ William E. Green, Jr.

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](mailto:tk@hfk.law) / [wg@hfk.law](mailto:wg@hfk.law)

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

EFiled: Jul 02 2020 12:34PM EDT  
Transaction ID 65742461  
Case No. N20A-07-001 CEB



# **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](mailto: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.<sup>1</sup>

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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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.”<sup>5</sup> 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.”<sup>6</sup>

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Response.

<sup>6</sup> *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.’”<sup>7</sup> Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”<sup>8</sup> Public funds are defined as “those funds derived from the State or any political subdivision of the State.”<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

## CONCLUSION

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

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<sup>7</sup> 29 Del. C. § 10002(i).

<sup>8</sup> *Id.*

<sup>9</sup> 29 Del. C. § 10002(k).

<sup>10</sup> 29 Del. C. § 10002(i).

<sup>11</sup> 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).

<sup>12</sup> 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

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Dorey L. Cole  
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

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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](mailto: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.<sup>1</sup>

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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> 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.

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Response.

<sup>5</sup> *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.’”<sup>6</sup> Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”<sup>7</sup> Public funds are defined as “those funds derived from the State or any political subdivision of the State.”<sup>8</sup> 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.”<sup>9</sup>

The University’s counsel specifically states that no public funds were used for the senatorial papers,<sup>10</sup> and thus, your first and second requests do not seek public records related to the expenditure of public funds.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> Moreover, the FOIA statute does not designate the University library as a public body nor as discussed above, are the senatorial papers public records.

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<sup>6</sup> 29 Del. C. § 10002(i).

<sup>7</sup> *Id.*

<sup>8</sup> 29 Del. C. § 10002(k).

<sup>9</sup> 29 Del. C. § 10002(i).

<sup>10</sup> *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).

<sup>11</sup> *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.’”).

<sup>12</sup> 29 Del. C. § 10002(l)(12).

<sup>13</sup> 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.

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

C.A. # N20A-07-001 CEB

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

Notary Public Bar ID 5415  
Zoe Pierhops, D.A.G.

(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

**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](mailto:sdunagan@judicialwatch.org) or 814-691-9806.

Sincerely,

Sean Dunagan  
Judicial Watch, Inc.

000003

**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

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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.

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](http://www.udel.edu/generalcounsel)  
[jbg@udel.edu](mailto: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

000007

**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](mailto: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.

000008

**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](mailto:lbergin@udel.edu)

**VIA EMAIL**

Sean Dunagan  
[SDunagan@JUDICIALWATCH.ORG](mailto: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](mailto: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.

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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.
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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

000011

**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](mailto:sdunagan@judicialwatch.org) or 814-691-9806.

Sincerely,

Sean Dunagan  
Judicial Watch, Inc.

000012

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.
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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

000013

**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](mailto: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.

000014



**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](http://www.udel.edu/generalcounsel)  
[jbg@udel.edu](mailto: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 Hulliher Hall, Newark, DE 19716  
University of Delaware  
(302) 831-7367 | (302) 831-3055 (facsimile)  
[www.udel.edu/generalcounsel](http://www.udel.edu/generalcounsel)  
[jbg@udel.edu](mailto:jbg@udel.edu)

On Thu, May 28, 2020 at 2:34 PM OpenGovernment (MailBox Resources) <[OpenGovernment@delaware.gov](mailto: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 Halliwell 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

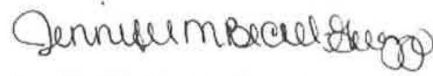
000017

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,

A handwritten signature in dark ink, appearing to read "Jennifer M. Becnel-Guzzo". The signature is fluid and cursive, with the last name being more prominent.

Jennifer M. Becnel-Guzzo

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

000018

**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,

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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

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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](http://www.udel.edu/generalcounsel)  
[jbg@udel.edu](mailto: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

000022



**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](mailto: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.

000023

**Siegel, Kim (DOJ)**

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**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](mailto: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.<sup>1</sup>

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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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.”<sup>5</sup> 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.”<sup>6</sup>

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Response.

<sup>6</sup> *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.’”<sup>7</sup> Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”<sup>8</sup> Public funds are defined as “those funds derived from the State or any political subdivision of the State.”<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

## CONCLUSION

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

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<sup>7</sup> 29 *Del. C.* § 10002(i).

<sup>8</sup> *Id.*

<sup>9</sup> 29 *Del. C.* § 10002(k).

<sup>10</sup> 29 *Del. C.* § 10002(i).

<sup>11</sup> *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).

<sup>12</sup> *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

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Dorey L. Cole  
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

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

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**Siegel, Kim (DOJ)**

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**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 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](mailto: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 Hullihen Hall, Newark, DE 19716

University of Delaware

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

[www.udel.edu/generalcounsel](http://www.udel.edu/generalcounsel)

[jbg@udel.edu](mailto: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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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.

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

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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.*

*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](mailto: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,

--

Andrew Kerr  
Investigative Reporter

1  
000034

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.

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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](http://foia.delaware.gov).



**Siegel, Kim (DOJ)**

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**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](http://www.udel.edu/generalcounsel)

[jbg@udel.edu](mailto:jbg@udel.edu)



**Siegel, Kim (DOJ)**

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**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](mailto:lbergin@udel.edu)

**VIA EMAIL**

Andrew Kerr  
[akerr@dailycallernewsfoundation.org](mailto: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](mailto: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

**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 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](mailto: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](mailto:akerr@dailycallernewsfoundation.org) or 704-770-5938.*

Best,

--

Andrew Kerr  
Investigative Reporter

1  
000043

**A-73**

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](mailto: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](http://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](http://www.udel.edu/generalcounsel)

[jbg@udel.edu](mailto: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 Hulihan Hall, Newark, DE 19716

University of Delaware

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

[www.udel.edu/generalcounsel](http://www.udel.edu/generalcounsel)

[jbg@udel.edu](mailto:jbg@udel.edu)

On Wed, Jun 3, 2020 at 11:38 AM OpenGovernment (MailBox Resources) <[OpenGovernment@delaware.gov](mailto: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 Halliwell 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

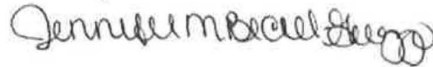
000049

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

**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,

1  
000052

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](mailto: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.

000055

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

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.”<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> 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.

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Response.

<sup>5</sup> *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.’”<sup>6</sup> Second, the “university documents relating to the expenditure of public funds [are] ‘public records.’”<sup>7</sup> Public funds are defined as “those funds derived from the State or any political subdivision of the State.”<sup>8</sup> 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.”<sup>9</sup>

The University’s counsel specifically states that no public funds were used for the senatorial papers,<sup>10</sup> and thus, your first and second requests do not seek public records related to the expenditure of public funds.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> Moreover, the FOIA statute does not designate the University library as a public body nor as discussed above, are the senatorial papers public records.

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<sup>6</sup> 29 *Del. C.* § 10002(i).

<sup>7</sup> *Id.*

<sup>8</sup> 29 *Del. C.* § 10002(k).

<sup>9</sup> 29 *Del. C.* § 10002(i).

<sup>10</sup> 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).

<sup>11</sup> 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.’”).

<sup>12</sup> 29 *Del. C.* § 10002(l)(12).

<sup>13</sup> 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

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Dorey L. Cole  
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

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

000058



**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.

THE UNIVERSITY OF DELAWARE  
and THE DELAWARE DEPARTMENT  
OF JUSTICE,

*Respondents  
Below-Appellees.*

C.A. No. N20A-07-001 CEB

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

**APPELLANTS' OPENING BRIEF IN SUPPORT OF THEIR APPEAL  
FROM ATTORNEY GENERAL OPINIONS 20-IB19 AND 20-IB20**

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Dated: August 28, 2020

## TABLE OF CONTENTS

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

## **TABLE OF AUTHORITIES**

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

## **PRELIMINARY STATEMENT**

This is an appeal by Petitioners Below-Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) (together “Appellants”) of the Attorney General’s June 25, 2020 Opinion No. 20-IB19 (the “Judicial Watch Opinion”) and the Attorney General’s July 1, 2020 Opinion No. 20-IB20 (the “DCNF Opinion,” and together with the Judicial Watch Opinion, the “Opinions”). The Opinions rejected Appellants’ petitions pursuant to 29 *Del. C.* § 10005(e) appealing the denial of Appellants’ April 30, 2020 requests for public documents under Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA,” or the “Act”) by the University of Delaware (the “University” or “Appellee”).

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

## **NATURE AND STAGE OF PROCEEDINGS**

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



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

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

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

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

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

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

## **QUESTIONS PRESENTED**

1. Did the Opinions improperly shift the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c)?
2. Did the Opinions err by concluding that the requested records are not “public records” as defined by 29 *Del. C.* § 10002(l)?
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.”<sup>1</sup>

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<sup>1</sup> 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,<sup>2</sup> 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

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<sup>2</sup> 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.”<sup>3</sup> 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

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<sup>3</sup> See: [https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/0/3249/files/2019/12/2019-F\\_036755C-1A\\_UnivDelaware\\_StatementFunds.pdf](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.<sup>4</sup>

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

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<sup>4</sup> 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

**HALLORAN FARKAS + KITTLA LLP**

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a District of Columbia corporation,  
and THE DAILY CALLER NEWS  
FOUNDATION,

V.

*Respondents Below-Appellees.*

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

**A-112**

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
INTRODUCTION.....	1
COUNTER-STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	4
I. Appellants Urge An Incorrect Interpretation of FOIA.....	4
A. FOIA’s treatment of the University’s documents mirrors the University’s unique status.....	5
B. The Requested Documents Are not “Public Records.” .....	7
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.....	9
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.....	16
IV. Records Identifying Patrons Of A Public Library May Be Withheld Under FOIA § 10002(l)(12).....	17
CONCLUSION .....	18

## TABLE OF AUTHORITIES

### Page

#### Cases

<i>Chem. Ind. Council of Del. v. State Coastal Zone Indus. Control Bd.</i> , 1994 WL 274295 (Del. Ch. 1994).....	14
<i>Del. Bldg. &amp; Const. Trades Council v. University of Delaware</i> , 2016 WL3703113 (Del. Super. 2016) .....	6
<i>Flowers v. Office of the Governor, et. al.</i> , 167 A.3d 530 (Del. Super. 2017) .....	12, 13, 14
<i>Gordenstein v. Univ. of Del.</i> , 381 F. Supp. 718 (D. Del. 1974) .....	6
<i>Guy v. Judicial Nominating Com’n</i> , 659 A.2d 777 (1995).....	13, 14
<i>O’Neill v. Town of Middletown</i> , 2007 WL 1114019 (Del. Ch. 2007).....	14
<i>Parker v. Univ. of Del.</i> , 75 A.2d 225 (Del. Ch. Ct. 1950) .....	6
<i>Stanford v. State Merit Employee Relations Bd.</i> , 44 A.3d 923 (Del. 2012)(“Order” attached as Exhibit B).....	15
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518 (1819) .....	6

#### Statutes

14 Del. C. Ch. 51 .....	passim
29 Del. C. § 10002.....	passim
29 Del. C. § 10003 .....	12, 13
29 Del. C. § 10005.....	1, 3, 12

## Other Authorities

<i>Del. Op. Att’y Gen. 10-IB14</i> 2010 WL 5090031 .....	9
<i>Del. Op. Att’y Gen. 02-IB30,</i> 2002 WL 31867904 .....	11
<i>Del. Op. Att’y Gen. 17-IB59,</i> 2017 WL 6348853 .....	13, 16
Del. R. Evid. 201 .....	7
U. S. Const. art.1 § 10 .....	6

## **NATURE AND STAGE OF THE PROCEEDINGS**

Pursuant to 29 Del. C. § 10005(e),<sup>1</sup> 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.”<sup>2</sup>

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<sup>1</sup> 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,'"<sup>3</sup> 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**

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

<sup>3</sup> 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,”<sup>4</sup> 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.”<sup>5</sup> 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).

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<sup>4</sup> Del. Op. Att’y Gen. 20-IB19, Record at 27.

<sup>5</sup> *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[;]”<sup>6</sup>
- 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[;]”<sup>7</sup>
- “Communications with the University regarding the release of the Senatorial Papers necessarily involve communicating with individuals whose salaries are paid with public funds[;]”<sup>8</sup>

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<sup>6</sup> OB at 13-14.

<sup>7</sup> 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.”<sup>4</sup>

*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.”*<sup>9</sup>

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.<sup>10</sup>

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<sup>8</sup> OB at 14.

<sup>9</sup> OB at 18.

<sup>10</sup> 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;<sup>11</sup>
- 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 ...;”<sup>12</sup>
- except where Constitutional civil rights are implicated,<sup>13</sup> the University is not an “arm or alter ego of the state of Delaware.”<sup>14</sup>

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.<sup>15</sup> The result of those communications was the

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<sup>11</sup> See *Charter* § 5105.

<sup>12</sup> *Charter* § 5109.

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

<sup>14</sup> *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."<sup>16</sup> To avoid doubt, "public funds" were defined as "those funds derived from the State or any political subdivision of the State."<sup>17</sup> 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."<sup>18</sup>**

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

<sup>16</sup> FOIA § 10002(i).

<sup>17</sup> 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.

<sup>18</sup> 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."<sup>19</sup> 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

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<sup>19</sup> 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].”<sup>20</sup> 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.”<sup>21</sup> 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,”<sup>22</sup> 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.**

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

<sup>21</sup> *Id.*

<sup>22</sup> 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.<sup>23</sup>

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."<sup>24</sup>

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

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

<sup>24</sup> AG Opinions, *Record* at 27 and 57.

<sup>25</sup> 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.<sup>26</sup> 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].”<sup>27</sup>

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.

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<sup>26</sup> FOIA, § 10002(l)(9).

<sup>27</sup> 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.”<sup>28</sup> 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

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<sup>28</sup> *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.”<sup>29</sup>

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.<sup>30</sup>

None of the cases cited by Appellants say to the contrary. Appellants cite<sup>31</sup> *Guy v. Judicial Nominating Com’n*,<sup>32</sup> 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.”<sup>33</sup> 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

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<sup>29</sup> *Id.* at 548.

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

<sup>31</sup> OB at 11-12.

<sup>32</sup> 659 A.2d 777 (1995)

<sup>33</sup> *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 cite<sup>34</sup> to two other cases regarding the duty of the public body in response to a FOIA request.<sup>35</sup> 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.*,<sup>36</sup> the Delaware Supreme Court affirmed this Court's denial of an appeal from the Merit Employee Relations Board

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<sup>34</sup> OB at 9-10.

<sup>35</sup> *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).

<sup>36</sup> 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.’”<sup>37</sup> 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

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<sup>37</sup> Exhibit B, Order at ¶ 7.

submissions made to it.” Del. Lawyers’ R. Prof’l Conduct 3.9 cmt. 1.<sup>38</sup>

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

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<sup>38</sup> 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[.]”<sup>39</sup> Appellants do not contend that the University’s library is not public,<sup>40</sup> yet they ignore this provision in their OB. Because its application is clear, nothing further need be said.

### CONCLUSION<sup>41</sup>

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

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<sup>39</sup> FOIA § 10002(l)(12).

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

<sup>41</sup> 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.

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September 28, 2020

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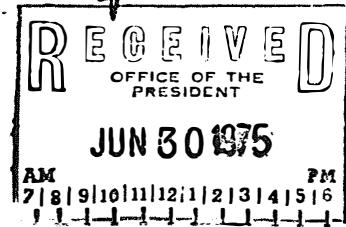
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Transaction ID 65970801  
Case No. N20A-07-001 MMJ



# EXHIBIT A



SENATE  
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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. Jonkier  
Speaker

JDI:mah

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

EFiled: Sep 28 2020 04:18PM EDT  
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Case No. N20A-07-001 MMJ



# 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.<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup>

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.’”<sup>7</sup> Substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>8</sup> This Court reviews questions of law, including claimed constitutional violations and the interpretation of statutes and regulations, *de novo*.<sup>9</sup> 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.”<sup>10</sup>

[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*,<sup>11</sup> 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.<sup>12</sup>

\*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.<sup>13</sup> 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].”<sup>14</sup> Stanford received that procedural protection, which is intended to ensure “that [affected parties] are given a meaningful opportunity to present their case.”<sup>15</sup> 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.<sup>16</sup> Stanford relies on *Trader v. Caulk*,<sup>17</sup> 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.”<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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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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.

THE UNIVERSITY OF DELAWARE  
and THE DELAWARE DEPARTMENT  
OF JUSTICE,

*Respondents  
Below-Appellees.*

C.A. No. N20A-07-001 MMJ

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

**APPELLANTS' REPLY BRIEF IN SUPPORT OF THEIR APPEAL  
FROM ATTORNEY GENERAL OPINIONS 20-IB19 AND 20-IB20**

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Dated: October 8, 2020

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT .....	1
SUMMARY OF THE ARGUMENTS.....	2
LEGAL ARGUMENT .....	2
I.    THE OPINIONS IMPROPERLY SHIFT THE BURDEN OF PROOF TO APPELLANTS IN VIOLATION OF 29 <i>DEL. C.</i> § 10005(C) .....	2
II.   THE OPINIONS ERRONEOUSLY CONCLUDE THAT THE REQUESTED RECORDS ARE NOT “PUBLIC RECORDS” AS DEFINED BY 29 <i>DEL. C.</i> § 10002(l) and 29 <i>DEL. C.</i> § 10002(i) .....	7
III.  THE COURT SHOULD AWARD APPELLANTS THEIR ATTORNEYS’ FEES AND COSTS UNDER 29 <i>DEL. C.</i> § 10005(d) .....	13
CONCLUSION .....	14

## **TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Flowers v. Office of the Governor</i> , 167 A.2d 530 (Del. Super. 2017) .....	7
<i>Gannett Co., Inc. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.</i> , 840 A.2d 1232 (Del. 2003).....	13
<i>Guy v. Judicial Nominating Comm’n</i> , 659 A.2d 777 (Del. Super. Ct. 1995) .....	3
<i>Hoover v. State</i> , 958 A.2d 816 (Del. 2008).....	5, 7
<i>U.S. Dept. of Justice v. Tax Analysts</i> , 492 U.S. 136 (1989) .....	3
 <b><u>Statutes and Rules</u></b>	
29 Del. C. § 10001.....	1, 12
29 Del. C. § 10002.....	<i>passim</i>
29 Del. C. § 10005.....	<i>passim</i>
 <b><u>Secondary Sources</u></b>	
37A AM. JUR. 2d Freedom of Information Acts § 514 (1994) .....	3
<i>Black’s Law Dictionary</i> 80 (2d Pocket ed. 2001).....	3, 8

## PRELIMINARY STATEMENT

Appellee University of Delaware's Answering Brief relies exclusively on the University's<sup>1</sup> "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,

---

<sup>1</sup> 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 (6<sup>th</sup> 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.<sup>2</sup> 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.”<sup>3</sup>

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<sup>2</sup> *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).

<sup>3</sup> Andrea Boyle Tippet, *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(l) 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,<sup>4</sup> and seeks to limit the usual

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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).

<sup>4</sup> 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 (6<sup>th</sup> 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(l)(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.<sup>5</sup>

#### **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

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<sup>5</sup> “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

**HALLORAN FARKAS + KITTLA LLP**

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

C.A. No. N20A-07-001 MMJ

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

DELAWARE DEPARTMENT OF  
JUSTICE and UNIVERSITY OF  
DELAWARE,

)
)
)

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

## OPINION

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

# A-161

## **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 Delaware<sup>1</sup> (the “Opinions”). Appellants seek a number of documents donated to the University of Delaware (the “University”) by then-Senator Joseph Biden.<sup>2</sup> 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.”<sup>3</sup> The Papers will be available to the public after “they have been properly processed and archived.”<sup>4</sup>

### ***Judicial Watch’s FOIA Request***

On April 30, 2020, Judicial Watch submitted a request under Delaware’s Freedom of Information Act (“FOIA”)<sup>5</sup> 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

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

<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> *Id.*

<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> 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."<sup>8</sup> Subsequently, on May 26, 2020, Judicial Watch filed a petition with the Office of the Attorney General pursuant to 29 *Del. C.* § 10005(b).<sup>9</sup> The petition sought a determination of whether the University's denial of Judicial Watch's request constituted a violation of FOIA.<sup>10</sup>

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<sup>6</sup> Appellants' Opening Brief in Support of their Appeal from Attorney General Opinions 20-IB19 and 20-IB20 ("OB"), at 4.

<sup>7</sup> Certified Record at 000006.

<sup>8</sup> *Id.*

<sup>9</sup> OB at 5.

<sup>10</sup> *Id.*

On June 25, 2020, the Attorney General issued an opinion concluding that the University had not violated FOIA.<sup>11</sup> 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.'"<sup>12</sup> 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."<sup>13</sup> 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.<sup>14</sup>

### ***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.

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<sup>11</sup> 2020 WL 4013788, at \*1.

<sup>12</sup> 29 *Del. C.* § 10002(i).

<sup>13</sup> *Id.*

<sup>14</sup> 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.<sup>15</sup>

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

On July 1, 2020, the Attorney General issued an opinion concluding that the University had not acted in violation of FOIA.<sup>19</sup> 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)

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<sup>15</sup> OB at 6-7.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 2020 WL 4013789, at \*1.

DCNF's attempt to access "all records from Joe Biden's Senate career" is inappropriate.<sup>20</sup> 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."<sup>21</sup>

### ***Appellants Challenge the Attorney General's Opinions***

Appellants have combined their individual FOIA requests to file one consolidated appeal of the Opinions.<sup>22</sup> On July 2, 2020, Appellants filed a Notice of Appeal seeking reversal of the Opinions.<sup>23</sup> On July 22, 2020, the Delaware Department of Justice ("DDOJ") filed the Certification of Record.<sup>24</sup> 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.<sup>25</sup> On July 31, 2020, the University's general counsel accepted service.<sup>26</sup> On August 11, 2020,

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 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.

<sup>23</sup> OB at 1.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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

On August 28, 2020, Appellants filed their Opening Brief.<sup>28</sup> 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.”<sup>29</sup> As this appeal concerns issues of statutory interpretation, the parties’ arguments are reviewed *de novo*.<sup>30</sup>

### **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

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<sup>27</sup> *Id.*

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

<sup>29</sup> 29 Del. C. § 10005(b).

<sup>30</sup> 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.<sup>31</sup>

### *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

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<sup>31</sup> 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]." <sup>32</sup> 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. <sup>33</sup>

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. <sup>34</sup> 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. <sup>35</sup>

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<sup>32</sup> 29 Del. C. § 10001.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at § 10002(i).

<sup>35</sup> *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."<sup>36</sup> 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.

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<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup>

***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.”<sup>39</sup> 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

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<sup>37</sup> 29 Del. C. § 10002.

<sup>38</sup> 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.

<sup>39</sup> 29 Del. C. § 10005(c).

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

Every lawyer licensed in Delaware is bound by a duty of candor.<sup>41</sup> “Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.”<sup>42</sup> A Delaware attorney who makes a false statement in the course of legal representation is subject to discipline by the Delaware Supreme Court.<sup>43</sup> 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.<sup>44</sup> 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

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<sup>40</sup> OB at 9-13.

<sup>41</sup> Del. Principles Professionalism for Lawyers A(1).

<sup>42</sup> *Id.*

<sup>43</sup> DLRPC 3.3.

<sup>44</sup> 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.”<sup>45</sup> 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.”<sup>46</sup> 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

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<sup>45</sup> OB at 18-19.

<sup>46</sup> <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."<sup>47</sup> However, under 29 *Del. C.* § 10002(l)(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(l)(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

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<sup>47</sup> 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.**

A handwritten signature in blue ink, appearing to read "Mary M. Johnston", is written over a horizontal line.

The Honorable Mary M. Johnston



January 6, 2021

E-FILE

The Honorable Mary M. Johnston  
Superior Court 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,

We have Your Honor's January 4, 2021 decision in this matter. Footnote 38 directs the University's counsel to review the gift agreement in question and determine whether it "discusses the University using public funds to support the Papers." To that end, we enclose the January 6, 2021 letter to the Court from Jennifer Becnel Guzzo, Esq., the University's Deputy General Counsel.

Should Your Honor have any questions, please advise.

Respectfully,

*/s/William E. Manning*

Encl.

William E. Manning (#697)



Office of General Counsel

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



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

University of Delaware  
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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

**SAUL EWING  
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**EFiled: Dec 27 2021 12:40PM EST  
Transaction ID 67194424  
Case No. N20A-07-001 MMJ**



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December 27, 2021

E-FILE

The Honorable Mary M. Johnston  
Superior Court of Delaware  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, DE 19801

**Re: *Judicial Watch, Inc., et al. v. University of Delaware*  
C.A. No. N20A-07-001**

Your Honor,

On December 22, 2021, the Supreme Court entered its mandate, disposing of Plaintiffs' appeal by affirming Your Honor's interpretation of the relevant FOIA provision while finding that "[b]ecause the University's factual assertions to the Deputy Attorney General and the Superior Court were not made under oath and do not describe the efforts undertaken to identify responsive documents, they are not sufficient to meet FOIA's burden of proof." *Judicial Watch, Inc. et. al. v. University of Delaware*, C. A. No. 32, 2021, at 30-31 (Del. Dec. 6, 2021). Thus, the case has been remanded to Your Honor to "determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling. The Superior Court is granted leave

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DELAWARE FLORIDA ILLINOIS MARYLAND MASSACHUSETTS MINNESOTA NEW JERSEY NEW YORK PENNSYLVANIA WASHINGTON, DC

A DELAWARE LIMITED LIABILITY PARTNERSHIP

39425713.2 12/27/2021



to accept additional evidence or submissions as it deems necessary and appropriate.” *Id.* at 31.

The University proposes to make the requisite showing in the form of an affidavit filed on a date convenient to the Court. Further, we propose that the affidavit be accompanied by a short brief demonstrating that 1) the University’s submission meets the requirement just announced by the Supreme Court and 2) this Court should, again, deny Plaintiffs’ fee request.<sup>1</sup>

Counsel for the parties conferred last week to see if they shared a common view about the appropriate proceedings on remand. No agreement was reached and counsel for the Plaintiffs will separately advise the Court of their position. Counsel are available to discuss the matter at the Court’s convenience.

Respectfully,

A handwritten signature in blue ink, appearing to read 'W. Manning', with a stylized flourish at the end.

William E. Manning (#697)  
Counsel for the University of Delaware

---

<sup>1</sup> Regarding Plaintiffs’ application for attorney fees, the Supreme Court noted that “[a]ppellants have not yet succeeded in their claims that the University committed a FOIA violation. As such, Appellants are not yet entitled to fees.” *Id.* at 33. However, in light of the remand, the Court granted leave to reconsider Plaintiffs’ fee request “to the extent [this Court] deems necessary.” *Id.*



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December 29, 2021

**By File & ServeXpress**

The Honorable Mary M. Johnston  
Superior Court of Delaware  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware 19801

**Re: *Judicial Watch, Inc., et al. v. University of Delaware,***  
**C.A. No. N20A-07-001.**

Dear Judge Johnston:

I write on behalf of appellants Judicial Watch, Inc. and the Daily Caller News Foundation in response to the University of Delaware's December 27, 2021 letter to the Court. The Supreme Court held that the University failed to carry its burden of proof to justify its denial of appellants' FOIA requests, remanded to Your Honor to "determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling," and granted the Superior Court "leave to accept additional evidence or submissions as it deems necessary and appropriate." *Judicial Watch, Inc. et al. v. University of Delaware*, C.A. No. 32,2021, at 30-31 (Dec. 6, 2021). In light of the remand, the Supreme Court also



held that the Superior Court could reconsider appellants' fee request as successful FOIA plaintiffs. *Id.* at 33.

The University has proposed that submission of an affidavit accompanied by a short brief will satisfy its burden of proof under FOIA. Until they have the opportunity to review such filings, Appellants have no way of knowing whether the University's submission will constitute the "competent evidence" required to carry its burden. *Id.* at 31. Based on how the case has proceeded to date and representations by the University's counsel, Appellants do not anticipate the University will carry its burden, and, therefore, reserve their rights to argue whether a more thorough inquiry is necessary to establish the requisite factual record.

Counsel are available at the Court's convenience if Your Honor has questions or concerns.

Respectfully submitted,

*/s/ William E. Green, Jr.*

William E. Green, Jr. (No. 4864)  
Halloran Farkas + Kittila LLP

*Counsel for Judicial Watch, Inc. and the  
Daily Caller News Foundation*

cc: William E. Manning, Esq. (via File & ServeXpress)  
James D. Taylor, Esq. (via File & ServeXpress)  
Theodore A. Kittila, Esq.



**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**MARY M. JOHNSTON**  
**JUDGE**

**LEONARD L. WILLIAMS JUSTICE CENTER  
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January 5, 2022

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***Re: Judicial Watch, Inc. v. Delaware Department of Justice, et al.***  
**Civil Action No. N20A-07-001 MMJ**

Dear Counsel:

I write in response to your letters dated December 27 and 28, 2021.

The University of Delaware may proceed, as proposed in its letter, to submit an affidavit within 30 days. Any response by Judicial Watch, Inc. shall be filed within 30 days thereafter.

SO ORDERED.

Sincerely,

A handwritten signature in blue ink, reading "Mary M. Johnston", is written over a horizontal line.

The Honorable Mary M. Johnston

MMJ/jyf



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February 4, 2022

E-FILE

The Honorable Mary M. Johnston  
Superior Court of Delaware  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, DE 19801

**Re: *Judicial Watch, Inc., et al. v. University of Delaware***  
**C.A. No. N20A-07-001**

Your Honor,

In accordance with Your Honor's letter of January 5, 2022, we enclose the Affidavit of Jennifer M. Becnel-Guzzo, Esquire, the University's FOIA coordinator and Deputy General counsel.

Respectfully,

/s/ *William E. Manning*

William E. Manning (#697)  
Counsel for the University of Delaware

Cc. Theodore A. Kittilia, Esquire  
William E. Green, Jr., Esquire  
Patricia A. Davis, Esquire

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

V.

*Respondents Below-Appellees.*

C.A. No. N20A-07-001 MMJ

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

[illegible]

1. Under the University's Access to Public Records Under the Delaware Freedom of Information Act ("FOIA") Policy (Legacy Policy 3-30), I am designated, *ex officio*, as the University's FOIA Coordinator, with responsibility for managing the University's responses and assistance to those who request

information under FOIA. I have served as the University's FOIA Coordinator for approximately six years. I am also Associate Vice President and Deputy General Counsel at the University and have served in that capacity for approximately six years.

2. Typically, the State of Delaware appropriates approximately \$120 million to the University in the annual budget legislation. That appropriation makes up approximately 11% of the University's annual budget. This means that many activities and programs of the University are not supported with State funds. I have responded to dozens of FOIA requests over the years and am generally familiar with how the University spends its State funds.

3. Because 29 *Del. C.* § 10002(l) provides that only those "[U]niversity documents related to the expenditure of public funds<sup>1</sup> shall be 'public records'" for purposes of the University's compliance with FOIA, my inquiries frequently begin, and often end, with this question: "have State funds been expended by the University on the activity or program that is the subject of a particular FOIA request?"

4. In addition, when appropriate, I contact the Office of the Vice President and University Secretary to inquire whether matters about which we receive FOIA requests were discussed at meetings of the full Board of Trustees. I have also

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<sup>1</sup> "Public funds' are those funds derived from the State or any political subdivision of the State." 29 *Del. C.* § 10002(n).

reviewed the Board of Trustee meeting materials posted publicly to determine if any of those materials are responsive to FOIA requests.

5. In recent years, I have responded to numerous FOIA requests having to do with the University's relationship to Joseph R. Biden, Jr. Thus, on several occasions I have inquired of University personnel, including the University's budget office and the University's library, whether State funds have been spent on a variety of matters or undertakings related to Mr. Biden. In no case have I found that State funds were spent by the University on any such matter or undertaking.

6. In addition, I have inquired whether the Biden Senate Papers were ever discussed at meetings of the full Board of Trustees and have confirmed no such discussions occurred.

7. After receiving FOIA requests for the Biden Senate Papers, including the FOIA requests at the center of this case, I inquired whether the University paid any consideration, State funded or otherwise, to Mr. Biden for the Senate Papers. It did not.

8. I also inquired whether the salaries of any University personnel involved in the custody and curation of the Senate Papers are paid with State funds. They are not.

9. I reviewed the gift agreement between the University and Mr. Biden relating to the Senate Papers to determine if State funds were mentioned. They are


not. I re-confirmed this finding to the Court at its request. *See* D.I. No. 18, Jan. 6, 2021 Ltr. To Judge Johnston.

10. Finally, I inquired whether state funds have been spent on the University's email system over which email communications between University personnel and any representative of Mr. Biden might have been exchanged. They were not.

11. Based on the foregoing, I determined that no State funds were spent by the University in any way that related to Mr. Biden or the Senate Papers. This is the same determination I reported to both the Department of Justice and this Court earlier in this case. *See* D.I. 1, Certified Record at 000017-18; 21; 31; 38; 47; 49-50. For these reasons, I believe the University appropriately denied the Petitioners' FOIA Requests.

  
Jennifer M. Becnel-Guzzo, Esq.

SWORN TO AND SUBSCRIBED before me this 3<sup>rd</sup> day of February, 2022.

  
Notary Public

JAMES D. TAYLOR, JR.  
Attorney at Law  
Notary Public, State of Delaware  
My Commission Has No Expiration Date  
29 Del.C. § 4323(a)(3)

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

V.

*Respondents Below-Appellees.*

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

**A-188**



## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
STATEMENT OF FACTS.....	2
A.    The Remaining FOIA Requests. ....	2
B.    In Order To Determine Whether Requested Documents “Relate To The Expenditure Of Public Funds,” The University Must Often Look Elsewhere; The Requested Documents Themselves May Not Say. ....	3
ARGUMENT .....	4
I.    THE UNIVERSITY HAS MET ITS BURDEN, AS ARTICULATED IN THE SUPREME COURT OPINION. ....	4
II.   PETITIONERS HAVE YET TO SAY THAT THEY SEEK ONLY THAT WHICH FOIA REQUIRES.....	6
III.  PETITIONERS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS’ FEES. ....	7
CONCLUSION .....	8

## **TABLE OF AUTHORITIES**

### **Page(s)**

#### **Cases**

<i>Judicial Watch, Inc. et. al. v. University of Delaware,</i> C. A. No. 32, 2021 (Del. Dec. 6, 2021).....	1, 3, 6
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#### **STATUTES**

29 <i>Del. C.</i> §10002(l) .....	1
29 <i>Del. C.</i> § 10005(d) .....	7

## NATURE AND STAGE OF THE PROCEEDINGS

On December 6, 2021, the Delaware Supreme Court disposed of Petitioners’ appeal, agreeing with this Court that the phrase “[u]niversity documents relating to the expenditure of public funds shall be ‘public records’”<sup>1</sup> means that the content of the “*document* itself” must “give an account of” any such expenditure.<sup>2</sup> Thus, the flawed interpretation offered by Judicial Watch, Inc. and the Daily Caller News Foundation (“Petitioners”) was squarely rejected. The Supreme Court also agreed that the University had not been improperly excused from its burden to justify its FOIA responses.

Finally, the Supreme Court articulated a new requirement for all FOIA respondents: that their FOIA response include a “state[ment] under oath, [of] the efforts taken to determine whether there are responsive records and the results of those efforts.”<sup>3</sup> Thus, the matter has been remanded to this Court, with leave to “accept additional evidence or submissions as it deems necessary and appropriate.”<sup>4</sup>

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<sup>1</sup> 29 Del. C. §10002(l).

<sup>2</sup> *Supreme Court Opinion* at 16 (emphasis in original).

<sup>3</sup> *Judicial Watch, Inc. et. al. v. University of Delaware*, C. A. No. 32, 2021, at 30 (Del. Dec. 6, 2021)( “*Supreme Court Opinion* at \_\_\_”).

<sup>4</sup> *Id.* at 31.

On January 5, 2022, the Court directed the University to file an affidavit within 30 days. This brief accompanies the affidavit of the University’s FOIA Coordinator<sup>5</sup> which, as directed by the Supreme Court, describes the “efforts taken to determine whether there are responsive records and the results of those efforts.”

### **STATEMENT OF FACTS**

#### **A. The Remaining FOIA Requests.**

During their appeal, Petitioners abandoned their demand to inspect library log-in sheets, as well as the Senate Papers themselves<sup>6</sup> Thus, the following demands remain:

- a. As summarized by Petitioners, the Judicial Watch Request “solely seeks communications *about* the proposed release of the [Senate Papers], and any communications between the University on the one hand, and President Biden, or any individual acting on his behalf, on the other.”<sup>7</sup>
- b. “The DCNF Request ... seeks the agreement governing President Biden’s donation of the [Senate Papers] ..., [and] communications between University staff and anyone representing President Biden[.]”<sup>8</sup>

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<sup>5</sup> February 3, 2022 Affidavit of Jennifer Becnel-Guzzo, Esq. (the “*FOIA Coordinator Affidavit*”).

<sup>6</sup> Appellants’ Op. Br. at 9 n. 6.

<sup>7</sup> *Id.* at 6 (emphasis in original).

<sup>8</sup> *Id.* at 9.

**B. In Order To Determine Whether Requested Documents “Relate To The Expenditure Of Public Funds,” The University Must Often Look Elsewhere; The Requested Documents Themselves May Not Say.**

The *FOIA Coordinator Affidavit* underscores a critical fact, peculiar only to Delaware’s two universities under FOIA (as opposed to State agencies and other public bodies, such as municipalities, school boards etc.). Because FOIA limits the information that must be disclosed by the two universities, their response to many FOIA requests begins not with the inspection of the requested documents themselves, but rather by inquiring with knowledgeable staff whether State funds were spent on the activities or undertakings discussed in the requested documents. For example, the University frequently receives FOIA demands for the inspection of employment agreements and related communications between it and its coaches, executives, or other personnel. But, while those agreements are certain to contain the financial terms of such employment, they rarely, if ever, specify the source of funds to be used. Indeed, that is typically a matter of indifference to the employee and, therefore, there is no need to include that information in the contract itself or in communications surrounding that contract. Put differently, there may be nothing in the document itself that gives an accounting of how (or indeed, if) the University spent public funds.

And so, when the University receives a FOIA request to inspect its records, it must often prepare to respond by inquiring with its financial staff whether State

funds have been expended on the activities or undertakings discussed in the requested records. Returning to our example, if a coach's salary is not paid with State funds, then the University is free to decline to produce either the contract or communications about it.

So it was in this case. The University confirmed, based on the inquiries described in the *FOIA Coordinator Affidavit*, that it did not spend State funds either to obtain or preserve the Senate Papers. Because none of the requested communications or other records could possibly contain information about State funded expenditures that never took place, the University properly declined the requests.

## **ARGUMENT**

### **I. THE UNIVERSITY HAS MET ITS BURDEN, AS ARTICULATED IN THE SUPREME COURT OPINION.**

The accompanying affidavit describes with particularity how the University's FOIA Coordinator determined that no State funds were spent by the University on the Senate Papers. After inquiring with knowledgeable sources, and drawing on inquiries she made regarding a host of earlier FOIA requests regarding the University's relationship with then-Vice President Biden, the FOIA Coordinator concluded that (i) the University paid nothing in return for the Senate Papers or any

other action of Vice President Biden;<sup>9</sup> (ii) the salaries of those responsible for curating the Senate Papers were not paid with State funds;<sup>10</sup> and (iii) the system over which emails were exchanged between University personnel and Biden representatives was not installed or maintained with State funds.<sup>11</sup> That being the case, it follows that no document *could* exist which informs the reader about the expenditure of State funds on the University’s custody and review of the Senate Papers.<sup>12</sup>

Beyond the question of whether the University has “public records” – *i.e.* “documents relating to the expenditure of [State] funds” – the FOIA Coordinator also inquired whether the Senate Papers were ever discussed at meetings of the full Board of Trustees. While the Supreme Court disposed of the issue by observing that records of such discussions, as well as any topics discussed in executive session, are

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<sup>9</sup> *FOIA Coordinator Affidavit* at ¶ 7.

<sup>10</sup> *Id.* at ¶ 8.

<sup>11</sup> *Id.* at ¶ 10.

<sup>12</sup> During the initial proceedings before this Court, the FOIA Coordinator re-read, at this Court’s request, the agreement between then-Vice President Biden and the University, confirming that it said nothing about the expenditure of State funds. For the sake of completeness, that representation is repeated under oath in her affidavit. *Id.* at ¶ 9.

publicly available,<sup>13</sup> the FOIA Coordinator’s affidavit confirms that no such discussions took place.<sup>14</sup>

With its submission, the University has “state[d], under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”<sup>15</sup> The *FOIA Coordinator Affidavit* “create[s] a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.”<sup>16</sup> By gathering facts that compel the conclusion that no responsive documents could exist, the record is undisputable.

## **II. PETITIONERS HAVE YET TO SAY THAT THEY SEEK ONLY THAT WHICH FOIA REQUIRES.**

During the Superior and Supreme Court proceedings, the Petitioners stuck to their flawed interpretation of FOIA. In responding to the view that ultimately prevailed – *i.e.* that FOIA only gives them access to records, the *contents* of which can inform them about the University’s expenditure of State funds – Petitioners have never said “that is all we seek.” We look forward to their response on remand to see if their requests have now morphed into something different than originally intended.

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<sup>13</sup> *Supreme Court Opinion* at 19-20.

<sup>14</sup> *FOIA Coordinator Affidavit* at ¶ 6.

<sup>15</sup> *Supreme Court Opinion* at 30.

<sup>16</sup> *Supreme Court Opinion* at 32.



### III. PETITIONERS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

In remanding the matter, the Supreme Court made it clear that “[a]ppellants have not yet succeeded in their claims that the University committed a FOIA violation.”<sup>17</sup> Thus, there is no room for Petitioners to argue that the mere fact of a remand rendered them “successful plaintiff[s]” under FOIA.<sup>18</sup> Nothing short of demonstrating that “the University committed a FOIA violation” will do and, as explained above, the Petitioners have not done that.

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<sup>17</sup> *Id.* at 33.

<sup>18</sup> *Id.*, quoting from 29 *Del. C.* § 10005(d).

## **CONCLUSION**

For the reasons stated above, the University respectfully requests that this Court accept the *FOIA Coordinator Affidavit*, confirm that the University has satisfied its burden, and deny the Petitions with prejudice.

### **SAUL EWING ARNSTEIN & LEHR LLP**

/s/ William E. Manning

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JUDICIAL WATCH, INC., a District of  
Columbia corporation, and THE DAILY  
CALLER NEWS FOUNDATION,  
*Petitioners Below-  
Appellants,*  
v.  
THE UNIVERSITY OF DELAWARE  
and THE DELAWARE DEPARTMENT  
OF JUSTICE,  
*Respondents  
Below-Appellees.*

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*Counsel for Appellants Judicial Watch,  
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Foundation*

Dated: March 7, 2021

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT .....	1
NATURE AND STAGE OF THE PROCEEDINGS .....	1
QUESTIONS PRESENTED .....	3
STATEMENT OF FACTS.....	3
LEGAL ARGUMENT .....	8
I.    THE UNIVERSITY HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER 29 <i>DEL. C.</i> § 10005(C).....	8
II.   THE COURT SHOULD AWARD APPELLANTS THEIR ATTORNEYS' FEES AND COSTS UNDER 29 <i>Del. C.</i> § 10005(d) ...	11
CONCLUSION .....	11

## **TABLE OF AUTHORITIES**

### **Cases**

### **Page(s)**

<i>Judicial Watch, Inc., et al. v. University of Delaware,</i> C.A. No. 32, 2021 (Del. Dec. 6, 2021) .....	<i>passim</i>
<i>Judicial Watch, Inc. v. Delaware Dep't of Justice,</i> 2021 WL 22550 (Del. Sup. Jan. 4, 2021).....	3

### **Statutes and Rules**

<i>29 Del. C. § 10005(c)</i> .....	<i>passim</i>
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## **PRELIMINARY STATEMENT**

This matter is on remand from an appeal by Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) (together “Judicial Watch” or “Appellants”) of the Court’s January 4, 2021 Opinion affirming 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”), which 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”).

## **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,”<sup>1</sup> 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

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<sup>1</sup> *Judicial Watch, Inc. et. al. v. University of Delaware*, C. A. No. 32, 2021, at 31 (Del. Dec. 6, 2021) (hereinafter, “Supreme Court Opinion at \_\_\_”).

accordance with this ruling.”<sup>2</sup> “[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.”<sup>3</sup>

On December 22, 2021, the Supreme Court Mandate was entered on the Superior Court docket. Thereafter, the parties conferred with respect to the appropriate proceedings on remand, but no agreement was reached.

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

This is Appellants’ Answering Brief on Remand.

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<sup>2</sup> *Id.* at 31.

<sup>3</sup> *Id.* at 30.

## **QUESTIONS PRESENTED**

1. Does the 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.<sup>4</sup> On remand, the Judicial Watch Request 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.<sup>5</sup> The DCNF Request seeks the agreement governing President Biden's donation of the Biden Senatorial Papers to the University, and any communication between University staff and anyone representing President Biden.<sup>6</sup> The Delaware Supreme Court defined these requests as the "Communications Records"<sup>7</sup> and the "Agreement."<sup>8</sup>

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<sup>4</sup> See, e.g., *Judicial Watch, Inc. v. Delaware Dep't of Justice*, 2021 WL 22550, at \*1-3 (Del. Sup. Jan. 4, 2021).

<sup>5</sup> Appellants' Opening Brief, at 6 (Trans. ID 66445632).

<sup>6</sup> *Id.* at 9.

<sup>7</sup> Supreme Court Opinion, at 5.

<sup>8</sup> *Id.* at 1.



On February 4, the University filed the Affidavit, which purports to satisfy the University's burden of proof to justify its denial of access to the requested records under 29 *Del. C.* § 10005(c). The Affidavit, however, is written in passive voice and includes no specific information that will help the Court determine whether the University has satisfied its burden. Moreover, the assertions of fact provided in the Affidavit appear to be largely based on out-of-court statements by unidentified third-parties, which have been offered to prove the truth of the matter asserted therein.

The first two paragraphs of the Affidavit describe the FOIA Coordinator's role at the University, her familiarity with responding to FOIA requests, and her background knowledge regarding how the University spends State funds.<sup>9</sup> The Affidavit then states that in responding to a FOIA request, the University's first question is whether State funds have "been expended by the University on the activity or program that is the subject of a particular FOIA request[.]"<sup>10</sup> From there, the Affidavit describes in general terms what the FOIA Coordinator does in response to a FOIA request: "when appropriate" the Office of the Vice President and University Secretary are contacted, or Board of Trustees meeting materials are reviewed.<sup>11</sup>

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<sup>9</sup> Affidavit at ¶¶ 1- 2 (Trans. ID 67293246).

<sup>10</sup> *Id.* ¶ 3.

<sup>11</sup> *Id.* ¶ 4.

Beginning with the fifth paragraph, the Affidavit describes, again in general terms, the results of FOIA requests—other than the ones at issue in this case—regarding the University’s relationship to Joseph R. Biden, Jr.<sup>12</sup> The University personnel contacted by the FOIA Coordinator are not identified.

The sixth paragraph states, without reference to a timeframe, that the FOIA Coordinator had “inquired whether the Biden Senate Papers were ever discussed at meetings of the full Board of Trustees and have confirmed no such discussions occurred.”<sup>13</sup> As phrased, it is unclear when this inquiry was made, whether this inquiry was made in response to the requests at issue in this case, whether the inquiry was made to an individual, and if so, who that individual was and their role at the University, or alternatively, whether the inquiry was conducted simply by a review of materials of Board of Trustees meetings.<sup>14</sup>

The remainder of the Affidavit is similarly opaque. Beginning with the seventh paragraph, the Affidavit states: “[a]fter receiving FOIA requests for the Biden Senate Papers, including the FOIA requests at the center of this case, I inquired whether the University paid any consideration, State funded or otherwise,

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<sup>12</sup> *Id.* at ¶ 5.

<sup>13</sup> *Id.* at ¶ 6.

<sup>14</sup> *Id.*

to Mr. Biden for the Senate Papers. It did not.”<sup>15</sup> Again, the Affidavit does not state when these inquiries were made, to whom the inquiries were directed, and the role of that person (or persons) at the University.

In this vein, the eighth paragraph states that the FOIA Coordinator “inquired whether the salaries of any University personnel involved in the custody and curation of the Senate Papers are paid with State funds. They are not.”<sup>16</sup> The Affidavit does not state when this inquiry was made, to whom it was directed, or the role of that person (or persons) at the University. Although the Affidavit states that the FOIA Coordinator inquired into the salaries of personnel involved in the “custody and curation”<sup>17</sup> of the Senate Papers, it does state whether or not State funds are used in the storage, housing, and upkeep of the Senate Papers, or whether such inquiry was made.

Paragraph nine is similarly opaque. Although the FOIA Coordinator reviewed the Agreement, and states that “no State funds were mentioned,” there is no statement as to whether the Agreement identifies the source of the funds used for the University’s upkeep of the Senate Papers.

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<sup>15</sup> *Id.* at ¶ 7.

<sup>16</sup> *Id.* at ¶ 8.

<sup>17</sup> *Id.*

Paragraph ten is similarly ambiguous, stating simply that “I inquired whether state funds have been spent on the University’s email system over which email communications between University personnel and any representative of Mr. Biden might have been exchanged. They were not.”<sup>18</sup> Here again, the Affidavit is 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 Mr. Biden.

From this, paragraph eleven of the Affidavit concludes that “no State funds were spent by the University in any way related to Mr. Biden or the Senate Papers,”<sup>19</sup> and therefore the University’s rejection of Appellants’ FOIA requests was appropriate. There is no mention of whether the University may use State funds in the future related to the Senate Papers.

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<sup>18</sup> *Id.* ¶ 10.

<sup>19</sup> *Id.* ¶ 11.

## 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.<sup>20</sup>

The University has not met this burden. As a threshold issue, the only potentially responsive document the University reviewed is the Agreement.<sup>21</sup> The University reviewed no other potentially responsive documents. Despite clear guidance from the Delaware Supreme Court, the University decided that it was not obligated to review *any* Communication Records for responsive documents, on the

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<sup>20</sup> Supreme Court Opinion at 32.

<sup>21</sup> Affidavit at ¶ 9.

premises that (a) the University has never spent State funds on any “matters or undertakings related to Mr. Biden”<sup>22</sup> to include the Senate Papers,<sup>23</sup> and (b) no State funds were spent on the University’s email system.<sup>24</sup> 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 Affidavit is also notable for what it does not include. Although the University purports to have inquired with “knowledgeable sources,”<sup>25</sup> the Affidavit does not identify those sources with any specificity. There is no mention of inquiries directed to specific individuals or any such individuals’ functions at the University. There is no mention of inquiries into the sources of the funds used for the storage, housing, and upkeep of the Senatorial Papers or the sources of the funds to pay for the salaries of personnel responsible for such actions. There is also no mention of

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<sup>22</sup> *Id.* at ¶ 5.

<sup>23</sup> *Id.* at ¶ 7.

<sup>24</sup> *Id.* at ¶ 10.

<sup>25</sup> Op. Br. at 3.

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 Mr. Biden's representatives.

Apart from oblique references to a review of Board of Trustees meeting minutes and the Agreement itself, it is unclear from the face of the Affidavit if the inquiries described therein consisted of a review of University records, one or more conversations with University staff, or some combination thereof, or when those reviews or conversations took place. The only source specifically identified in the Affidavit is the Agreement, which the FOIA Coordinator reviewed to determine if it mentions State funds.<sup>26</sup> In sum, there is inadequate information in the Affidavit to assess the veracity of the sources on which it relies.

Because of the Affidavit's deficiencies, the University has failed to satisfy its burden of proof. Appellants should be permitted discovery—to include a deposition of a representative of the University—in order to create a fact record upon which this Court can determine whether the University performed an adequate search for responsive documents, consistent with the Delaware Supreme Court's ruling.

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<sup>26</sup> Affidavit at ¶ 9.

## **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 as explained above, the University has not carried its burden on remand. 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: March 7, 2022

**HALLORAN FARKAS + KITTLA LLP**

/s/ William E. Green, Jr.

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



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Petitioners Below,  
Appellants

v.

UNIVERSITY OF DELAWARE,

Respondent Below,  
Appellee.

C.A. No. N20A-07-001 MMJ

Submitted: March 7, 2022

Decided: June 7, 2022

On Remand from the December 6, 2021 Opinion  
of the Supreme Court of the State of Delaware

**MEMORANDUM OPINION**

Theodore A. Kittila, Esquire, William E. Green, Jr., Esquire, HALLORAN FARKAS  
+ KITTILA LLP, Wilmington, Delaware; *for Appellants Judicial Watch, Inc. and  
The Daily Caller News Foundation.*

William E. Manning, Esquire, James D. Taylor, Jr., Esquire, Marisa R. DeFeo,  
Esquire, SAUL EWING ARNSTEIN & LEHR LLP, Wilmington, Delaware; *for  
Appellee University of Delaware.*

**JOHNSTON, J.**

## Supreme Court Decision

Judicial Watch, Inc. and The Daily Caller News Foundation (collectively “Appellants”) submitted requests under the Delaware Freedom of Information Act (“FOIA”), 29 *Del. C.* §§ 19991-10007, to access the Biden Senatorial Papers donated to the University of Delaware. The University denied the requests. Appellants filed petitions with the Office of the Attorney General of the State of Delaware challenging the denial. The Attorney General’s Office issued opinions concluding that the records requested by Appellants are not subject to FOIA. Appellants appealed these opinions to the Superior Court. This Court affirmed the opinions.<sup>1</sup> Appellants appealed the Superior Court’s ruling to the Supreme Court.

By Opinion dated December 6, 2021, the Delaware Supreme Court made the following findings.<sup>2</sup>

Thus, we hold that unless it is clear on the face of the request that the demanded records are not subject to FOIA, to 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. Because the University’s factual assertions to the Deputy Attorney General and the Superior Court were not made under oath and do not describe the efforts taken to identify responsive documents, they are not sufficient to meet FOIA’s burden of proof. On remand, the Superior Court shall determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling. The Superior Court is granted leave to accept

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<sup>1</sup> *Judicial Watch, Inc. v. Del. Dep’t. of Justice*, 2021 WL 22550 (Del. Super.).

<sup>2</sup> *Judicial Watch, Inc v. University of Delaware*, 267 A.3d 996 (Del. 2021).

additional evidence or submissions as it deems necessary and appropriate.

\* \* \*

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. Conversely, where it is clear on the face of a request that the demanded records are not subject to FOIA, the public body does not need to search the requested documents for responsive records. Nothing herein should be read to suggest that the University must search the Biden Senatorial Papers for responsive documents. The Superior Court held that the Biden Senatorial Papers are facially excluded from FOIA, and Appellants have not appealed that ruling.

\* \* \*

For the reasons provided above, the Court AFFIRMS in part and REVERSES and REMANDS in part the Superior Court's judgment. On remand, the Superior Court shall reconsider whether the University satisfied its burden of proof, consistent with this opinion. The court may accept any additional evidence or submissions it deems necessary to determine whether the University has violated FOIA in accordance with this ruling.

## **ANALYSIS ON REMAND**

The University of Delaware filed an Opening Brief on Remand, accompanied by the Affidavit of Jennifer M. Becnel-Guzzo, Esq., University FOIA Coordinator. Appellant filed an Answering Brief, challenging the sufficiency of the Affidavit in several respects. The University did not request permission to file a reply, or otherwise respond, to the Answering Brief.

The Affidavit begins by describing the procedures the affiant generally follows in response to a FOIA request. Specifically with regard to requests involving Joseph R. Biden, Jr., the Affidavit states:

5. In recent years, I have responded to numerous FOIA requests having to do with the University's relationship to Joseph R. Biden, Jr. Thus, on several occasions I have inquired of University personnel, including the University's budget office and the University's library, whether State funds have been spent on a variety of matters or undertakings related to Mr. Biden. In no case have I found that State funds were spent by the University on any such matter or undertaking.
6. In addition, I have inquired whether the Biden Senate Papers were ever discussed at meetings of the full Board of Trustees and have confirmed no such discussions occurred.
7. After receiving FOIA requests for the Biden Senate Papers, including the FOIA requests at the center of this case, I inquired whether the University paid any consideration, State funded or otherwise, to Mr. Biden for the Senate Papers. It did not.

8. I also inquired whether the salaries of any University personnel involved in the custody and curation of the Senate Papers are paid with State funds. They are not.
9. I reviewed the gift agreement between the University and Mr. Biden relating to the Senate Papers to determine if State funds were mentioned. They are not. I have re-confirmed this finding to the Court at its request. *See* D.I. No. 18, Jan. 6, 2021 Ltr. To Judge Johnston.
10. Finally, I inquired whether state funds have been spent on the University's email system over which email communications between University personnel and any representative of Mr. Biden might have been exchanged. They were not.
11. Based on the foregoing, I determined that no State funds were spent by the University in any way that related to Mr. Biden or the Senate Papers. This is the same determination I reported to both the Department of Justice and this Court earlier in this case. *See* D.I. 1, Certified Record at 000017-18; 21; 31; 38; 47; 49-50. For these reasons, I believe the University appropriately denied the Petitioners' FOIA Requests.

The Affidavit states that inquiries were made, but does not say when, to whom, or what documents were reviewed (with the exception of the "gift agreement").

The Supreme Court held: "Requiring facts submitted under oath, such as through an affidavit, to justify the denial of records is consistent with [Section 10005(c)'s] scheme." The Supreme Court concluded that "unless it is clear on the face of the request that the demanded records are not subject to FOIA, satisfaction of Section 10005(c)'s burden of proof requires a statement made under oath...such as through a

sworn affidavit....” The Court finds that the statement under oath requirement has been met.

However, the remand mandates that the inquiry does not end with the University’s filing of an Affidavit swearing to information previously provided. The Supreme Court directed reconsideration of whether the University satisfied its burden of proof.

Because the University’s factual assertions to the Deputy Attorney General and the Superior Court were not made under oath and do not describe the efforts taken to identify responsive documents, they are not sufficient to meet FOIA’s burden of proof. On remand, the Superior Court shall determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling. The Superior Court is granted leave to accept additional evidence or submissions as it deems necessary and appropriate.

\* \* \*

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.

The Supreme Court specifically did not “suggest that the University must search the Biden Senatorial Papers for responsive documents [because the] Superior Court held that the Biden Senatorial Papers are facially excluded from FOIA, and Appellants have not appealed that ruling.”

The Court finds that the generalized statements in the Affidavit do not meet “the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.” The University of Delaware must articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University’s email system for communications between University personnel and Biden representatives; when such inquiries were made; and what, if any, documents (other than the gift agreement) were reviewed.

**THEREFORE,** Respondents are granted leave to submit additional information, under oath, within 45 days of the date of this Memorandum Opinion.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
**The Honorable Mary M. Johnston**





July 22, 2022

E-FILE

The Honorable Mary M. Johnston  
Superior Court of Delaware  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, DE 19801

**Re: *Judicial Watch, Inc., et al. v. University of Delaware***  
**C.A. No. N20A-07-001**

Your Honor,

As directed by Your Honor's June 7 Memorandum Opinion, we have today filed Ms. Becnel-Guzzo's Supplemented Affidavit. We are available at the Court's convenience should anything further be required.

Respectfully,

A handwritten signature in blue ink, appearing to read "W E Manning".

William E. Manning (#697)  
*Counsel for the University of Delaware*

Cc. Theodore A. Kittila, Esquire  
William E. Green, Jr., Esquire

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information under FOIA. I have served as the University's FOIA Coordinator for approximately six years. I am also Associate Vice President and Deputy General Counsel at the University and have served in that capacity for approximately six years.

2. Typically, the State of Delaware appropriates approximately \$120 million to the University in the annual budget legislation. That appropriation makes up approximately 11% of the University's annual budget. This means that many activities and programs of the University are not supported with State funds. I have responded to dozens of FOIA requests over the years and am generally familiar with how the University spends its State funds.

3. Because 29 *Del. C.* § 10002(l) provides that only those "[U]niversity documents related to the expenditure of public funds<sup>1</sup> shall be 'public records'" for purposes of the University's compliance with FOIA, my inquiries to the University's Budget Office, which tracks the University's expenditures of public funds, frequently begin, and often end, with this question: "have State funds been expended by the University on the activity or program that is the subject of a particular FOIA request?"

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<sup>1</sup> "Public funds' are those funds derived from the State or any political subdivision of the State." 29 *Del. C.* § 10002(n).

4. In addition, when appropriate, I contact the Office of the Vice President and University Secretary to inquire whether matters about which we receive FOIA requests were discussed at meetings of the full Board of Trustees. I have also reviewed the Board of Trustee meeting materials posted publicly to determine if any of those materials are responsive to FOIA requests.

5. In recent years, I have responded to numerous FOIA requests having to do with the University's relationship to Joseph R. Biden, Jr. Indeed, there were earlier FOIA requests regarding the Biden Senate Papers. Thus, on several occasions I inquired of University personnel, including the University's Budget Director, Lionel Gilibert, and the University's Vice Provost of Libraries and Museums, Trevor Dawes, whether State funds have been spent on a variety of matters or undertakings related to Mr. Biden, including the Biden Senate Papers. The particular communications on which I relied in responding to Petitioners' later FOIA requests occurred in January 2020. In no case have I found that State funds were spent by the University on any such matter or undertaking.

6. Similarly, in reporting that the Biden Senate Papers were not the subject of any discussions held in meetings of the full Board of Trustees, I relied on communications with the University's Associate University Secretary, Brent Schrader first held in July 2019.

7. In May 2019, after receiving a request for documents related to any payments that might have been made to Mr. Biden, I inquired of Mr. Gilibert, the University's Budget Director, whether the University had made any payments with State funds to Mr. Biden. Mr. Gilibert confirmed the University had not made such payments to Mr. Biden.

8. In May 2019, shortly after receiving earlier inquiries for access to the Biden Senate Papers, I inquired of Mr. Gilibert, the University's Budget Director, and Vice Provost Dawes, whether the University paid any consideration, State funded or otherwise, to Mr. Biden for the Senate Papers. I confirmed it did not.

9. In January 2020, after receiving additional requests for access to the Biden Senatorial papers, I inquired of Mr. Gilibert, the University's Budget Director, and Vice Provost Dawes whether the salaries of any University personnel involved in the custody and curation of the Senate Papers are paid with State funds. I confirmed those salaries are not paid with State funds.

10. I inquired of Mr. Gilibert, the University's Budget Director, in January 2020 whether State funds have been spent on the University's email system over which email communications between University personnel and any representative of Mr. Biden might have been exchanged. I confirmed they were not.

11. I have, on several occasions before and after receipt of the FOIA requests from Petitioners, reviewed the gift agreement between the University and

Mr. Biden relating to the Senate Papers and determined that State funds are not mentioned in the agreement.

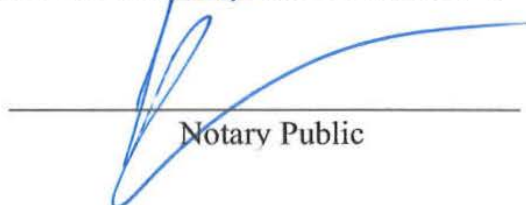
12. In the Court's June 7, 2022 Memorandum Opinion, the Court directed that, in addition to the identities of those with whom I communicated in order to gather information and dates on which those communications occurred, I identify documents that I reviewed. The specific responses to the inquiries to which I refer above did not include documents. However, the University's auditors annually produce, and make available to the public, a Statement of State of Delaware Funds Received and Expended, which I frequently review in considering FOIA requests. The responses to my inquiries described above are consistent with that annual report on the University's receipt and expenditure of State funds.

13. Based on the foregoing, I determined that no State funds were spent by the University in any way that related to Mr. Biden or the Senate Papers.

  
Jennifer M. Becnel-Guzzo, Esq.

SWORN TO AND SUBSCRIBED before me this 22<sup>nd</sup> day of July, 2022.

JAMES D. TAYLOR, JR.  
Attorney at Law  
Notary Public, State of Delaware  
My Commission Has No Expiration Date  
29 Del.C. § 4323(a)(3)

  
Notary Public



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

*Petitioners Below-  
Appellants,*

v.

THE UNIVERSITY OF DELAWARE  
and THE DELAWARE DEPARTMENT  
OF JUSTICE,

*Respondents  
Below-Appellees.*

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) Appeal from Attorney General  
) Opinion No. 20-IB19 and Opinion  
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**APPELLANTS' OBJECTION TO  
THE UNIVERSITY'S SUPPLEMENTED AFFIDAVIT**

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

Dated: July 27, 2022

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
NATURE AND STAGE OF THE PROCEEDINGS .....	2
QUESTIONS PRESENTED.....	4
STATEMENT OF FACTS .....	4
LEGAL ARGUMENT .....	8
I.    THE UNIVERSITY HAS FAILED TO MEET ITS BURDEN OF PROOF UNDER 29 <i>DEL. C.</i> § 10005(C).....	8
II.   THE COURT SHOULD AWARD APPELLANTS THEIR ATTORNEYS' FEES AND COSTS UNDER 29 <i>Del. C.</i> § 10005(d) ....	11
CONCLUSION .....	12



## **TABLE OF AUTHORITIES**

### **Cases**

### **Page(s)**

<i>Judicial Watch, Inc., et al. v. University of Delaware,</i> 267 A.3d 996 (Del. Dec. 6, 2021) .....	2, 8
<i>Judicial Watch, Inc. v. Delaware Dep’t of Justice,</i> 2021 WL 22550 (Del. Sup. Jan. 4, 2021) .....	4
<i>Judicial Watch v. University of Delaware,</i> 2022 WL 2037923 (Del. Sup. June 7, 2022) .....	3, 4

### **Statutes and Rules**

29 Del. C. § 10005(c) .....	<i>passim</i>
29 Del. C. § 10005(d) .....	<i>passim</i>

## **PRELIMINARY STATEMENT**

Appellants Judicial Watch, Inc. (“Judicial Watch”) and the Daily Caller News Foundation (“DCNF”) (together “Judicial Watch” or “Appellants”) hereby submit this objection 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,”<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup>

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.

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

<sup>2</sup> *Id.* at 31 (emphasis added).

<sup>3</sup> *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.<sup>4</sup>

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.<sup>5</sup>

<sup>4</sup> 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.

<sup>5</sup> 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.*<sup>6</sup>

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.<sup>7</sup> Instead, the FOIA Coordinator avers that on “several occasions” she inquired of University personnel whether State funds were spent on the Biden Senate Papers.<sup>8</sup> 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.<sup>9</sup> 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.

<sup>6</sup> Supplemented Affidavit at ¶¶ 7-10.

<sup>7</sup> *Id.* at ¶ 5.

<sup>8</sup> *Id.*

<sup>9</sup> *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.<sup>10</sup> However, as the FOIA Coordinator freely admits, no documents were consulted or reviewed in connection with this inquiry.<sup>11</sup> Although the Supplemented Affidavit states that the FOIA Coordinator inquired into the salaries of personnel involved in the "custody and curation"<sup>12</sup> 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.<sup>13</sup> Again, no documents were consulted or reviewed in connection with this inquiry.<sup>14</sup> Here again, the Affidavit is

<sup>10</sup> *Id.* at ¶ 9.

<sup>11</sup> *Id.* at ¶ 12.

<sup>12</sup> *Id.* at ¶ 9.

<sup>13</sup> *Id.* at ¶ 10.

<sup>14</sup> *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.<sup>15</sup> Apparently, no documents other than the Gift Agreement were reviewed in connection with the Supplemented Affidavit.<sup>16</sup>

<sup>15</sup> *Id.* at ¶ 12.

<sup>16</sup> *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.<sup>17</sup>

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

<sup>17</sup> *Supreme Court Op.*, 267 A.3d at 1012-13.

based on hearsay.<sup>18</sup> 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.<sup>19</sup> 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

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

<sup>19</sup> *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.<sup>20</sup> 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.<sup>21</sup> 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,

<sup>20</sup> *Id.* at ¶ 12.

<sup>21</sup> *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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JUDICIAL WATCH, INC.,  
a District of Columbia corporation,  
and THE DAILY CALLER NEWS  
FOUNDATION,

V.

*Respondents Below-Appellees.*

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

**A-243**

## **ARGUMENT**

On July 27, 2022, Judicial Watch, Inc. and The Daily Caller News Foundation (together, the “Appellants”) filed (without invitation or leave) an Objection to the University’s July 22 Supplemented Affidavit (the “Supplemented Affidavit”). The Court granted the University leave to respond to that Objection, and for the reasons explained below, the University respectfully submits that it has met its burden and Appellants are entitled to neither documents nor fees.

### **I. The University Has Done That Which The Court Required.**

This Court, in its June 7 Opinion, was precise in its instructions:

The University of Delaware must articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University’s email system for communication between University personnel and Biden representatives; when such inquiries were made; and what, if any, documents (other than the gift agreement) were reviewed.<sup>1</sup>

In her Supplemented Affidavit, the University’s FOIA Coordinator met each of these requirements, swearing under oath that:

- In January 2020 she learned from Mr. Gilibert, the University’s Budget Director, and Dr. Trevor Dawes, the Vice Provost of Libraries and Museums,

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<sup>1</sup> *Judicial Watch, Inc. et. al. v. Delaware Dep’t of Justice et. al.*, C. A. No. N20A-07-001 MMJ; Memorandum Opinion at 7 (Super. Ct. June 7, 2022) (“June 7 Opinion at \_”).



that no State funds were spent by the University on any matter or undertaking related to Mr. Biden, including the Biden Senate Papers. *See*, Supplemented Affidavit at ¶ 5.

- In May 2019 she learned from Budget Director Gilibert and Vice Provost Dawes that no payments were made to Mr. Biden with State funds, whether in consideration for the Biden Senatorial Papers or otherwise. *See*, Supplemented Affidavit at ¶¶ 7, 8.
- In January 2020 she learned from the same gentlemen that no salaries of any personnel involved in the custody and curation of the Senate Papers were paid with State funds. *See*, Supplemented Affidavit at ¶ 9.
- In January 2020 she learned from Budget Director Gilibert that no State funds have been spent on the University's email system. *See*, Supplemented Affidavit at ¶ 10.
- Finally, in response to the Court's last requirement ("what, if any, documents were reviewed"), the FOIA Coordinator explained that she received no documents from either gentlemen. In other words, they each had personal knowledge that no State funds were spent on the enumerated items – hardly surprising of a Budget Director or Vice Provost for Libraries. She points out, however, that her review of the University's annual audit report, which was

available at all times to the Appellants (and the public), was consistent with that information. *See*, Supplemented Affidavit at ¶12.

Given that each of the requirements listed by the Court in its June 7 Opinion have been met, this matter should now be at an end.

With its Supplemented Affidavit, the University met its burden to demonstrate that there were no documents, including Communication Records, the contents of which discuss the University’s expenditure of State funds. It did so *not* by inspecting each document, but rather by proving the negative – *i.e.* that the University spent no State funds on anything related to the Senate Papers and, therefore, it followed that there could be no document including information about expenditures that never took place. As the Court held in its January 4, 2021 Opinion, “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 the Papers themselves.”<sup>2</sup>

Under the Supreme Court’s ruling in this case, a document does not become a “public record” under FOIA simply because the librarian having custody of the document was paid with State funds. However, if a document discusses the expenditure of State funds on the librarian’s salary, then its contents “relate to the

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<sup>2</sup> *Judicial Watch, Inc. et. al. v. Delaware Dep’t of Justice et. al.*, C. A. No. N20A-07-001 MMJ; Opinion at 13-14 (Super. Ct. Jan. 4, 2021)

expenditure of State funds” and it would be a “public record” under FOIA. For that reason, the University had to imagine instances in which State funds might have been spent in its custody and curation of the Senate Papers and determine whether, in fact, any of those instances were factually present. Had the Budget Director, for example, advised the FOIA Coordinator that State funds were, in fact, used to fund librarian salaries, the University would have been required to look for documents accounting for how the University expended those State funds. But where of course it is known (and stated under oath) that no public funds were used to pay the librarian salaries, it is pointless to look for documents that do not and could not exist.

With the University’s method of inquiry in mind, the Court, in its June 7 Opinion, required that the University’s FOIA Coordinator identify the officials with whom she consulted in proving the negative, when those communications occurred and whether any documents were used in those communications. The Supplemented Affidavit does precisely that and the University has met its burden.

## **II. Appellants’ Objections Should be Rejected.**

Despite the undisputable fact that the University has met each of the Court’s requirements, Appellants offer complaints that are either irrelevant, incorrect, or legally unsound in an effort to keep this case alive. For the following reasons, they should be rejected.

**A. The Timeliness Of The University's Fact Gathering.** In bold and italicized typeface, the Appellants profess shock that the facts included in the Supplemented Affidavit were gathered prior to their FOIA demands.<sup>3</sup> They do not, however, explain why that renders the Supplemented Affidavit unreliable. They offer no reason why facts gathered in response to earlier FOIA requests concerning the Biden Papers would be untrue four months later. For example, if one learned in January 2020 that relevant library salaries were not paid with State funds, nothing occurred between then and April 2020 (it remained the same school year, same semester, same fiscal year, and the same State budget) that might have changed that fact. The same is true of the funding supporting the University's email system. And, if it was learned in May 2019 that the University had paid nothing to Mr. Biden for his Senate Papers, then that fact would remain true in April 2020.

**B. The Appellants Challenge The University's Veracity, Pretending To Be Ignorant Of Its Sources Of Revenue.** It simply can't be true, say Appellants, 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."<sup>4</sup> If Appellants had simply

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<sup>3</sup> See, Appellants' Objection to the University's Supplemented Affidavit at pp. 5, 9 ("Objection at \_\_\_").

<sup>4</sup> Objection at 9.

examined information easily found on the University’s website, they would have realized that the absence of State funding does not ineluctably prove that items were paid for with “private donations.”<sup>5</sup> The University has several other sources of revenue; indeed, tuition and fees make up nearly 40% of the University’s revenue – several times the portion provided by the State.<sup>6</sup> In short, nothing about the Supplemented Affidavit “strains credulity,”<sup>7</sup> and there is no basis for the insulting claim that “the University is hiding something.”<sup>8</sup>

**C. Appellants’ Untimely Complaint About Hearsay Should be Ignored.**

Appellants’ claim of hearsay arises for the first time in their self-authorized Objection. It does not appear in any of Appellants’ earlier submissions, including their post-remand brief. They ignore the fact that both this Court and the Supreme Court have concluded that the University can meet its burden with a sworn affidavit from the FOIA Coordinator that describes the measures taken by the University and the sources for the information reported. In other words, even if such an affidavit might be regarded as hearsay in other contexts, this Supplemented Affidavit has

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<sup>5</sup> *Id.*

<sup>6</sup> See, <https://www.udel.edu/about/facts-figures/financial-profile/>

<sup>7</sup> Objection at 9.

<sup>8</sup> Objection at 10.

already been anticipated by both courts, each of whom have described what it must include to be accepted as reliable. This is consistent with prior Attorney General Opinions stating that “a public body may meet its burden by producing an affidavit signed by counsel attesting the records have been reviewed...”<sup>9</sup> *Del. Op. Att’y Gen.* 21-IB15 (July 2, 2021); *see also Flowers v. Office of the Governor*, 167 A.3d 530, 549 (Del. Super. 2017). It is far too late for a hearsay objection.

Moreover, on a more general level, even if the rules for litigation applied to the Attorney General’s review of a FOIA refusal (they do not), Appellants ignore rules which provide for a corporation to give oral or written responses through designated persons who “shall testify as to matters known or reasonably available to the organization.”<sup>10</sup> That is precisely the case here.

### **III. Appellants Are Not Entitled To Fees.**

As the University said in its post-remand brief, “in remanding the matter, the Supreme Court made it clear that ‘[a]ppellants have not yet succeeded in their claims

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<sup>9</sup> *See also Del. Op. Att’y Gen.* 19-IB60 (Oct. 2019) (holding that there was no FOIA violation and accepting representations from the Delaware Department of Natural Resources and Environmental Control in the form of a sworn affidavit); *Del. Op. Att’y Gen.* 20-IB30 (Dec. 7, 2020) (holding that the County of New Castle County Division of Police properly denied a request for a copy of an arrest warrant through an affidavit of its FOIA Coordinator asserting that it did not have the requested records).

<sup>10</sup> Del. Super. Ct. R. P. 30(b)(6) and 31.

that the University committed a FOIA violation’.”<sup>11</sup> Nothing has changed. No responsive documents exist, and Appellants, having had their interpretation of FOIA rejected by both courts and having abandoned their request for the Senate Papers themselves, will continue to “re-plow old ground” until the case is over. It is now time to close the case.

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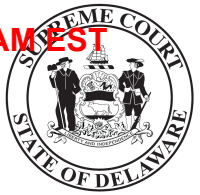
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*Counsel for Appellee University of Delaware*

Dated: September 22, 2022

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<sup>11</sup> UD’s February 4, 2022 Brief on Remand at 7, citing to Supreme Court Opinion at 33.



**CERTIFICATE OF SERVICE**

I, William E. Green, Jr. (DE Bar No. 4864), certify that on December 13, 2022, 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:

**By File&ServeXpress**

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