



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

*Petitioners Below-
Appellants,*

v.

THE UNIVERSITY OF DELAWARE,

*Respondent Below-
Appellees.*

)
)
)
) No. 32,2021
)
)

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

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

1. The Superior Court erred by improperly shifting the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c), which provides, in pertinent part, that “[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records.” A-96, A-144.

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

A. The Judicial Watch Request.

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

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

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

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

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

On May 20, 2020, the University’s counsel responded by email denying the Judicial Watch Request, stating, without corroboration or reference to a source, that “[t]here have been no expenditures of public funds regarding or related to the Joseph R. Biden, Jr. senatorial papers.” A-32. The email further stated that “[t]he Joseph R. Biden, Jr. senatorial papers were never addressed in a meeting of the full Board of Trustees. Therefore the University has no public records responsive to your request.” *Id.* The University thus categorically denied the Judicial Watch Request, and there is no indication that the University reviewed any records in connection with its denial.

On May 26, 2020, Judicial Watch filed a petition with the Office of the Attorney General under 29 *Del. C.* § 10005(b) for a determination whether the University violated FOIA by denying the Judicial Watch Request (the “Judicial Watch Petition”). A-27 to A-29.

The Judicial Watch Petition notes with respect to part one of the Judicial Watch Request that “the Biden senatorial records are housed at the University of Delaware library and overseen by University of Delaware staff,” and that because “both archival storage space and the time of professional staff members are things of value, we disagree with the University’s assertion that there have been no expenditures of public funds related to the records.” A-29. The Judicial Watch Petition goes on to note that the records sought pertain to activity by the University

that entails the expenditure of public funds, and because the University did not conduct an adequate search for responsive documents, it has failed to satisfy its obligations under FOIA. *Id.*

On June 5, 2020, the University responded to the Judicial Watch Petition, and admitted that “[t]he State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget.” A-17. The University noted that the “state appropriation makes up about 11% of the University’s operating budget,” and again asserted without corroboration that “[p]ublic funds are not used to support the Joseph R. Biden, Jr. Senatorial Papers.” *Id.* The University did not volunteer any information regarding the actual source of the funds used to support the Biden Senatorial Papers, or include any sources supporting the assertion that public funds are *not* used to support the Biden Senatorial Papers.

On June 25, 2020, the Chief Deputy Attorney General (the “CDAG”) issued the Judicial Watch Opinion, concluding that the University had not violated FOIA when it denied the Judicial Watch Request. Ex. B. The Judicial Watch Opinion is largely based on the University’s uncorroborated representation that “no public funds were used for the senatorial papers and no public funds were paid to Vice President Biden or his campaign.” Ex. B. at 3.

B. The DCNF Request.

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

A. All agreements, including modifications, revisions, or updates, concerning the storage of more than 1,850 boxes of archival records and 415 gigabytes of electronic records from Joe Biden’s senate career from 1973 through 2009.

B. Correspondence including but not limited to email, phone and written communications between staff of the University of Delaware Library and Joe Biden or members of Joe Biden’s senatorial staff, Joe Biden’s vice-presidential staff or Joe Biden’s political campaign staff, or for anyone representing any of those entities between 2010 to the date of this request about Joe Biden’s senate records.

C. Any logs or sign-in sheets recording any individuals who have visited the special-collections department where records from Joe Biden’s senate career are stored between 2010 to the date of this request.

D. All records from Joe Biden’s Senate career that have been submitted to the University of Delaware Library.

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

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

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

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

On May 29, 2020, DCNF filed a petition with the Office of the Attorney General under 29 *Del. C.* § 10005(b) for a determination whether the University violated FOIA by denying the DCNF Request (the “DCNF Petition”). A-55 to A-56. The DCNF’s submission in support of the DCNF Petition notes that the “University of Delaware is a taxpayer-funded entity, having been appropriated \$118.7 million in Delaware state funds in the fiscal year ending June 30, 2019, \$92.4 million of which was allocated into a general unrestricted fund.” A-67. The DCNF’s submission further notes that “Delaware provided a \$3.6 million contingency fund to the University in the 2019 fiscal year exclusively for personnel costs,” and notes that these funds could have been used to pay the salaries of L. Rebecca Johnson Melvin, who serves as the Manuscripts Librarian and Curator for the Biden Senatorial Papers, and Andrea Boyle Tippett, the Director of External Relations for the Office of Communications and Marketing, who manages public relations requests related to the Biden Senatorial Papers. A-67.

On June 11, 2020, the University submitted its response to the DCNF Petition, again admitting that “[t]he State of Delaware provides the University with

approximately \$120 million each year through an appropriation in the state budget.”

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

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

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

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

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

ARGUMENT

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

Questions Presented

Whether the Superior Court improperly shifted the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c), which provides, in relevant part, that “[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records.” 29 *Del. C.* § 10005(c). A-96, A-144.

Standard and Scope of Review

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

Merits of the Argument

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

Although courts routinely rely on the representations of counsel for the propriety of privilege logs and redactions to discovery materials—because the alternative would mean *in camera* review as the default method for resolving privilege log disputes—this practice should not be applied to justify improperly shifting the burden of proof to a FOIA petitioner concerning an inherently factual issue, as the Superior Court has done here. Unsworn representations by counsel are generally *not* sufficient to establish substantive facts in Delaware courts. *See, e.g.*, Superior Court Rule 33(b) (requiring parties to answer interrogatory responses under oath despite signature by Delaware counsel); Superior Court Rule 56(e)-(g) (pertaining to affidavits in support of motions for summary judgment); Court of Chancery Rule 3(aa) (requiring sworn verification by each plaintiff to a complaint);

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

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

The “burden of proof” is:

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

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

⁷ 29 Del. C. § 10005(c).

⁸ 29 Del. C. § 10005(c).

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

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

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

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

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

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

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

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

Question Presented

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

Standard and Scope of Review

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

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

Merits of the Argument

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

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

As discussed above, the Opinion erroneously holds that a custodian of records may satisfy its burden of proof under FOIA via the representations of its counsel. Ex. A at 12. The Opinion states that “Appellants have provided nothing other than unsupported speculation in opposition to University Counsel’s representation,” thereby effectively rewriting FOIA to reallocate the burden of proof to the requester of records. Indeed, Delaware law recognizes that “the plaintiff asserting a freedom of information claim is at a disadvantage because only the public body holding the information can speak confidently regarding the nature of the material and the circumstances of its preparation[.]” *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 781 (Del. Super. 1995). *See also U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (“The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records or have not been improperly withheld.”) (internal quotations omitted); *Del. Op. Att’y Gen. 02-IB30*, 2002 WL 31867904, at *3 (Dec. 2, 2002) (“We determine that the County violated FOIA by not providing you with access to the remaining documents you requested because the County has *failed to meet its burden of proof* that those documents are within the potential litigation or other exemption under FOIA.”) (emphasis added); *O’Neill v. Town of Middletown*, 2007 WL 1114019, at *8 (Del. Ch. Mar. 29, 2007)

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

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

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

that archival storage space and professional staff members' time are things of value that it can be inferred are paid for with public funds. A-29.

Along these lines, a quick review of the University's publicly available financial statements shows that in 2019, the University received more than \$95 million of State appropriations for "general unrestricted operations."⁹ This is consistent with the University's admission that "[t]he State of Delaware provides the University with approximately \$120 million each year through an appropriation in the state budget." A-43. Cash is fungible. It is fair to infer that the University and its library would not be able to accept the Biden Senatorial Papers without the expenditure of public funds. Appellees further fail to mention that the University accepted governmental funds for the support of the Senatorial Papers, in the form of a 2012 grant in the amount of \$30,000 from the National Endowment for the Humanities.¹⁰ While these funds may or may not constitute "public funds" under 29 *Del. C.* § 10002(k) (which denotes solely "those funds derived from the State or any political subdivision of the State"), the terseness of the University's categorical, but

⁹ See A-99 n.3.(citing https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/0/3249/files/2019/12/2019-F_036755C-1A_UnivDelaware_StatementFunds.pdf. (last visited Aug. 22, 2020)).

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

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

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

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

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

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

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

¹² Ex A at 12.

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

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

Questions Presented

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

Standard and Scope of Review

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

Merits of the Argument

The Superior Court crafted an erroneously narrow definition of “public record” to conclude that the records sought by Appellants are exempt from FOIA. *See 29 Del. C.* § 10002(i) (providing in relevant part that “university documents relating to the expenditure of public funds shall be ‘public records,’” and defining the Board of Trustees of the University of Delaware as a “public body” under FOIA). Specifically, the Superior Court ruled that records of any Board meeting at which the Biden Senatorial Papers were discussed would only be subject to FOIA if the entirety of the Board were present. Ex. A at 10.

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

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

A. Records Sought by the Judicial Watch Request.

If public funds are used to finance the University’s storage, management, and curation of the Senatorial Papers, then the records sought by the Judicial Watch Request relate to the expenditure of public funds and are therefore “public records” under FOIA. *See 29 Del. C. §§ 10002(i) & (l).* The first category of documents sought by the Judicial Watch Request are records regarding the proposed release of the Biden Senatorial Papers. The second category of documents sought by the Judicial Watch Request are records of communications between any representative of the University and any representative of President Biden. If public funds support the Biden Senatorial Papers, both of these categories of documents relate to the University’s expenditure of public funds to support the Biden Senatorial Papers. Separately, because the Biden Senatorial Papers are voluminous and historically important, it is likely, if not certain, that such high-profile gift would be discussed by and among the Trustees.

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

Senatorial Papers necessarily involve communicating with individuals whose salaries are paid with public funds. Notably, the University states that “the Biden Papers were not discussed during meetings of our *full* Board of Trustees[.]” A-43. The University should not be permitted to circumvent FOIA by hiding its decision-making with respect to matters of public interest behind executive sessions or delegation to a subset of the Board of Trustees. *See 29 Del. C. §§ 10002(i)* (“each meeting of the full Board of Trustees of either institution shall be a ‘meeting’” subject to FOIA).

B. Records Sought by the DCNF Request.¹³

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

1. The Gift Agreement.

The DCNF Request first seeks “[a]ll agreements, including modifications, revisions, or updates, concerning the storage of more than 1,850 boxes of archival records and 415 gigabytes of electronic records from Joe Biden’s senate career from

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

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

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

The second category of documents sought by the DCNF Request is communications and correspondence “between staff of the University of Delaware Library and Joe Biden or members of Joe Biden’s senatorial staff, Joe Biden’s vice-presidential staff or Joe Biden’s political campaign staff, or for anyone representing any of those entities between 2010 to the date of this request about Joe Biden’s senate records.” Again, because the University is admittedly publicly-funded, correspondence with President Biden’s representatives about the Biden Senatorial Papers pertains to the University’s expenditure of public funds. Records of such correspondence and communications are thus public records and should be ordered to be produced.

Alternatively, even if the Biden Senatorial Papers are not supported with public funds, communications with the University regarding the Biden Senatorial

Papers necessarily involve the expenditure of public funds to pay the salaries of University staff. And to the extent the University delegated its decision-making with respect to the Biden Senatorial Papers to a subset of its full Board of Trustees to evade its obligations under FOIA, such circumvention of the law should not be validated. *See* Section III.A., *supra*.

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

Question Presented

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

Standard and Scope of Review

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

Merits of the Argument

There is no indication that the University undertook any search for records responsive to the Requests. A-43 to A-44, A-75 to A-76. Rather, the University determined categorically that no responsive public records exist based on the unsupported assertions that public funds are not expended to support the Biden Senatorial Papers, and that the Biden Senatorial Papers were never discussed at a meeting of the full Board. *See, e.g.*, A-76 (“[t]he Biden papers and documents related to those papers, including the gift agreement and correspondence regarding the papers, are not public records under FOIA. That is the end of the inquiry.”). The University’s response to the Requests, and the Opinion’s erroneous validation of the

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

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

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

Questions Presented

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

Standard and Scope of Review

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

Merits of the Argument

FOIA expressly provides that “[t]he court may award attorney fees and costs to a successful plaintiff of any action brought under this section.” 29 *Del. C.* § 10005(d). The Superior Court should have corrected the errors of law discussed above, rather than affirming the Attorney General Opinions, and awarded Appellants’ their attorneys’ fees as successful plaintiffs in this action. *See, e.g., Gannett Co., Inc. v. Board of Managers of the Del. Criminal Justice Information System*, 840 A.2d 1232, 1234 (Del. 2003) (affirming award of partial attorneys’ fees to successful FOIA plaintiff).

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

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

¹⁴ Ex A at 11.

¹⁵ Ex A at 12.

CONCLUSION

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

Dated: March 23, 2021

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