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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF

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Appellants[1] respectfully submit this Reply Brief in support of their appeal. For the reasons stated herein as well as in the previously-submitted Opening Brief, the appeal should be granted and the decision of the Superior Court should be overturned.

PRELIMINARY STATEMENT

Appellants Judicial Watch and DCNF are seeking access to four categories of documents:

- "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…" (Opening Br. at 6);
- "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" (*id.*);
- "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" (*id.* at 9); and
- "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" (*id.*).

[1] Capitalized terms not otherwise herein defined shall have the meanings ascribed to them in the Appellants' Opening Brief (the "Opening Brief").

Appellants have not challenged the Superior Court's rulings denying access to the Biden Senatorial Papers themselves or logs/sign-in sheets for individuals visiting the Biden Senatorial Papers. *See* Opening Br. at n.6.

Despite this substantial narrowing of the records sought, the University's Answering Brief ("Ans. Br.") suggests that the 1,850 boxes of archival records making up the Biden Senatorial Papers are still at issue in this appeal. *See* Ans. Br. at 8-9 (discussing 1,850 boxes of records and arguing that "the position urged by Appellants … would also require that a lengthy archival process be compressed into FOIA time periods"). *See also id.* at 20 ("A great deal of time would have been required if it had been necessary to conduct a full-blown evidentiary hearing regarding the contents of 1,850 boxes of documents (most of which have yet to be curated)."). The University's red herring must be ignored. The documents sought by Appellants fit squarely within the confines of FOIA.

Appellee's Answering Brief presents a new legal argument in the guise of a factual argument that has not been considered by any tribunal in the proceedings below. Specifically, the University asserts that the University's Associate General Counsel, Ms. Becnel-Guzzo, is not merely an advocate, but a University employee and the officer statutorily bound to speak for the University. While neither the Attorney General Opinions nor the Superior Court's decision considered or relied on this point, the point actually amplifies the problematic nature of one of the key

issues underlying the appeal: by having an attorney serve as the FOIA officer, the University enjoyed the benefit of the doubt and Appellants were left with no way to challenge the conclusions made by the University concerning the requested documents. In short, Appellants were told that they would have to take the University's word that the documents were not subject to FOIA.

The University also relies heavily on its unique "privately-governed status" to advocate for an interpretation of the Delaware Freedom of Information Act, 29 *Del. C.* § 10001, *et seq*., that would prevent the public from having any access to documents regarding the University's custody of the Biden Senatorial Papers. At its core, Appellee's argument is that FOIA was written to accommodate the University's "privately-governed status," and the University is thus effectively written outside of, and stands above, the law.[2] But this is not accurate: FOIA still applies to the University, and applies specifically in this context. Indeed, according to Appellee, 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. Thus, while the University's argument essentially boils down to "move

[2] Ans. Br. 7, 13.

along," FOIA dictates otherwise. 29 *Del. C.* § 10001, FOIA's Declaration of Policy, succinctly states:

> 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. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.

For the reasons stated herein, Appellants respectfully request that this Honorable Court reverse the decision of the Superior Court with respect to the issues as narrowed by this appeal.

LEGAL 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.

The General Assembly unambiguously 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).

In making its factual determination that none of the requested records constitute "public records" under FOIA, the Superior Court relied solely on the representations of the University's counsel, and 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. Ex. A at 12.

Again, as previously noted, the Superior Court's holding blurs the distinction between advocate and client. If counsel's representations are adequate to shift a burden of proof, a FOIA petitioner loses his or her ability to challenge the denial of access. The University asserts that the University's Deputy General Counsel is "more than 'the University's counsel,'" and that she is also an officer of the University, and serves as its designated FOIA Coordinator. Ans. Br. 8. On this newly asserted basis, the University appears to imply that Ms. Becnel-Guzzo's

representations should be afforded additional weight because of her dual role as both advocate and party. *See* Ans. Br. 8, 18, 23.

To the contrary, this new factual assertion muddies rather than clarifies the analysis, as neither the Attorney General's Office nor the Superior Court relied on Ms. Becnel-Guzzo's status as the University's FOIA Coordinator, but rather relied on her duty of candor as a Delaware attorney to give her representations their "proper weight." Ex. A at p. 12. First, if the Superior Court had been appropriately briefed on the issue that Ms. Becnel-Guzzo's assertion was made as the "FOIA Coordinator," and not as University counsel, then the Court may not have given the deference that it did to her representations. However, it is unclear whether the Superior Court was aware in what capacity Ms. Becnel-Guzzo was appearing. This failure to adequately apprise the Superior Court of Ms. Becnel-Guzzo's role prevented the Superior Court from determining the function that Ms. Becnel-Guzzo predominantly performed. Stated another way, was Ms. Becnel-Guzzo applying law to a set of facts or simply reporting about a set of facts, namely the content of the Gift Agreement and how the University is managing the Biden Senatorial Papers? This alone justifies remand to allow the Superior Court an opportunity to make such a determination.

Moreover, if it is the case that Ms. Becnel-Guzzo was not acting as an attorney, but as a fact witness, Appellants should have had the opportunity to take

her deposition or otherwise inquire as to the factual basis of her representations. *See, e.g.*, *Landmark Legal Foundation v. E.P.A.*, 959 F. Supp. 2d 175, 184 (D.D.C. 2013) (ordering limited discovery in federal FOIA case); *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 2006 WL 1518964 (D.D.C. June 1, 2006) (granting discovery in federal FOIA); *Arabo v. Michigan Gaming Control Bd.*, 872 N.W.2d 223, 241-42 (Mich. Ct. App. 2015) (finding abuse of discretion for trial court to preclude deposition of FOIA Coordinator under Michigan FOIA statute). Instead, because Ms. Becnel-Guzzo wears both hats—as FOIA Coordinator and as a Delaware lawyer—the University simply raised her role as a Delaware lawyer to end any and all questioning. That does nothing to "further the accountability of government to the citizens of this State," as FOIA's policy declares. 29 *Del. C.* § 10001. Quite the contrary, such inability to challenge and vet the decisions made raises the specter that certain activity is beyond the ability of the citizens to "observe" and "monitor." *Id.*

Separately, while there is trust between bench and bar in Delaware, that trust cannot allow lawyers' representations to displace actual confrontation and live testimony of a witness. Confrontation includes examination and cross examination. As this Court held in *Gannon v. State*, "The general preference for live testimony is attributable to the importance of cross-examination, which has been characterized as

'the greatest legal engine ever invented for the discovery of truth.'" 704 A.2d 272, 275 (Del. 1998) (quoting *California v. Green,* 399 U.S. 149, 158 (1970)).

Contrary to the University's insinuation, Appellants do not impugn Ms. Becnel-Guzzo's professional integrity by inquiring into the factual basis for her representations. 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); *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).

Even if the Attorney General's practice of relying on the representations of counsel is appropriate in some circumstances, 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. 24. There is no indication that the University made a substantive inquiry into the source of the funds that support the Biden Senatorial Papers. Indeed, the University appears to assert 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. 11-12.

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. The Court should reverse.

II. THE UNIVERSITY DID NOT CARRY ITS BURDEN TO JUSTIFY THE DENIAL OF ACCESS TO RECORDS.

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 an unsupported, and thus erroneous, factual finding that no public funds are used to support the Biden Senatorial Papers.

For the first time in these proceedings, the University has raised an argument based on the *Chevron* doctrine to argue that the Superior Court properly deferred to the Attorney General's fact-finding process. Ans. Br. 21-22 (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 844 (1984) for the proposition that courts accord considerable weight to an executive department's construction of a statutory scheme it is entrusted to administer). This argument was not raised below by the parties or the Superior Court, and is not properly asserted on appeal. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review[.]").

In support of its misplaced *Chevron* argument, the University cites *Stanford v. State Merit Employee Relations Board*, 44 A.3d 923 (TABLE) (Del. 2012), wherein this Court upheld the State Merit Employee Relations Board's fact-finding process, which included a pre-termination hearing, a post-termination hearing, and an appeal to the MERB, each of which included the presentation of live testimony.

This fact-finding process is much more thorough than the process before the Attorney General, which involved only an exchange of letters.

With respect to the process before the Attorney General, it is worth noting that the Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations[3] provide, in relevant part, that "[t]he parties are encouraged to provide affidavits of individuals with relevant knowledge with their submissions." *Id.* at p. 3. Contrary to the Attorney General's guidance, the University did not include a supporting affidavit. Nor did the University identify the source of the information on which its statement was based, or even include language that the representation was based on a diligent inquiry. The University's counsel simply stated that "[t]here have been no expenditures of public funds regarding or related to" the requested records. A-32. 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 admits that "[t]he State of Delaware provides the University with approximately $120 million each year through an appropriation in the state budget." A-43. Because cash is fungible, it is necessary to infer that state

[3] Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations, at H.3. (*available at*: https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf (last visited April 27, 2021)).

appropriations have provided the University and its library the ability to accept the Biden Senatorial Papers. For the support of the Biden Senatorial Papers, the University accepted a federal grant from the National Endowment for the Humanities for the support of the Biden Senatorial Papers in 2012.[4] Although the National Endowment for the Humanities grant 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 University's categorical—but unverifiable—denial that no public funds have been expended related to the housing of **1,850 boxes** raises considerable doubt. Considering that 1,850 standard file boxes would take up over 3,885 cubic feet of storage space,[5] the notion that the University could simply "make a little room" to store the Biden Senatorial Papers is not plausible. No publicly available information corroborates counsel's representation that no public funds are used to support the University's hosting of the Biden Senatorial Papers; rather, all sources suggest otherwise.

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[4] *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)).

[5] *See, e.g.*, https://www.uline.com/Product/Detail/S-6524/Storage-File-Boxes/Bankers-Box-24-x-15-x-10-1-4 (last visited May 5, 2021) (describing dimensions of Bankers Box® as 24x15x10.25 inches). With each box having a volume of approximately 2.1 cubic feet, 1,850 of these would take up a minimum of 3,885 cubic feet of space.

The University's failure to carry its burden of proof is underscored by the Superior Court's post-decision directive regarding the Gift Agreement. *See* Ex. A. at 11 n.38. The Superior Court ordered the University to review the Gift Agreement and report whether the Gift Agreement discusses the University's use of public funds to support the Biden Senatorial Papers. Ex. A at 11 n.38. The Superior Court's order demonstrates that there was previously no factual basis 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. 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, and is, incumbent upon the University to make a showing that no public funds are used for the Biden Senatorial Papers. The University has not made that showing, and this Court should therefore reverse.

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

The Superior Court crafted an erroneously narrow definition of "public records" to conclude that the records sought by Appellants are exempt from FOIA. 29 *Del. C.* § 10002(i) states that "university documents relating to the expenditure of public funds shall be 'public records,'" and defines the Board of Trustees of the University of Delaware as a "public body" under FOIA. The Superior Court erred.

A. Records of Any Meeting of the Board of Trustees During Which the Proposed Release of the Senatorial Papers Was Discussed.

First, 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 entire Board were present. Ex. A at 10. Although the University waives away as "pure supposition" Appellants' argument that a gift as high profile and historically valuable as the Biden Senatorial Papers was likely discussed by the Trustees,[6] the University asks Appellants and this Court to take its word on a representation that it has not made—specifically, that the Trustees did *not* discuss the gift of the Senatorial Papers. The only representation we have is that "the Biden Papers were not discussed during meetings of our *full* Board of Trustees[.]" A-43 (emphasis added). There is no representation that Trustees did not discuss the Biden Senatorial Papers

[6] Ans. Br. at 29-30.

outside of a full Board meeting. Was it discussed in a meeting with a quorum? Was it discussed in a meeting of a designated committee? If not, then how did the University determine to take what is a substantial gift without the Board of Trustees being involved?

To the degree that less than the full Board made a decision, the University should not be permitted to avoid disclosing its decision-making with respect to matters of public interest behind executive sessions or by delegating to a subset of the Board of Trustees. In short, if the decision was made by a subset or executive session, then there must have been some approval by the full Board to allow the subset to act to accept this substantial gift. This delegation of authority would need to be disclosed.

B. Records About the University's Custody of the Senatorial Papers.

Because the University did not carry its burden to prove that no public funds are used to finance the University's storage, management, and curation of the Biden Senatorial Papers, it should be deemed admitted that the records sought relate to the expenditure of public funds and are therefore "public records" under FOIA. *See* 29 *Del. C*. §§ 10002(i) & (l).

Again, the remaining categories of documents at issue are: records regarding

the proposed release of the Biden Senatorial Papers;[7] communications between any representative of the University and any representative of President Biden; and the Gift Agreement.[8] 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 Court should reverse and order the requested records to be produced.[9]

[7] Opening Br. 6.

[8] *Id.* at 9.

[9] Again, the University seems to overlook that for purposes of this appeal Appellants have dropped the request for the Biden Senatorial Papers themselves. *See* Ans. Br. at pp. 1, 8.

IV. THE SUPERIOR COURT ERRED BY NOT AWARDING 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). 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 (a) that 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"[10] 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),[11] 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 Superior Court should be reversed.

[10] Ex A at 11.

[11] Ex A at 12.

CONCLUSION

For all the reasons stated herein as well as in the Opening Brief, Petitioners Below-Appellants Judicial Watch, Inc. and the Daily Caller News Foundation respectfully request that this Honorable Court reverse the decision of the Superior Court in accordance with the arguments outlined in this appeal.

Dated: May 7, 2021

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