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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUDICIAL WATCH, INC., a District of Columbia corporation, and THE DAILY CALLER NEWS FOUNDATION, *Petitioners Below-Appellants*, v. THE UNIVERSITY OF DELAWARE, *Respondent Below-Appellee*.	No. 402,2022 On Appeal from C.A. No. N20A-07-001 MMJ in the Superior Court of the State of Delaware

APPELLANTS' OPENING BRIEF

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Dated: December 13, 2022

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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.[1]

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")[2] along with a supporting brief.[3] On March 7, 2022, Appellants filed an "Answering Brief on

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

[2] A-184.

[3] 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."[4]

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.[5]

On July 22, 2022, the University filed the Supplemented Affidavit of Jennifer M. Becnel-Guzzo, Esquire, University FOIA Coordinator (the "Supplemented Affidavit").[6] Appellants again highlighted the University's failures in their July 27, 2022 objection filed with the Court,[7] to which the University's counsel responded on September 22, 2022.[8]

On October 19, 2022, the Superior Court issued a memorandum opinion (the "Opinion"),[9] that erroneously holds that the University, on its second bite at the

[4] A-199; A-212.

[5] 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").

[6] A-222.

[7] A-227.

[8] A-243.

[9] 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.[10]

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,"[11] and remanded for further proceedings. This Court further stated that "[o]n remand, the Superior Court shall

[10] *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 999-1001 (Del. 2021).

[11] *Id.* at 1012.

determine whether the University has satisfied its burden of proof based on competent evidence in accordance with this ruling."[12] "[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."[13]

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.[14] 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.[15] This Court defined the records sought in the requests as the "Communication Records"[16] and the "Agreement."[17]

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

[12] *Id.* at 1013.

[13] *Id.* at 1012.

[14] *Id.* at 1000.

[15] *Id.*

[16] *Id.*

[17] *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.[18] 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."[19] Although both of the Requests were made on April 30, 2020,[20] the University's inquiries—as set forth in the Supplemented Affidavit—took place between May 2019 and January 2020.[21] Thus, the University's latest inquiry took place more than four months before the Requests were made by Judicial Watch and DCNF.

[18] *Compare* A-184 to A-186, ¶¶ 1-4 *with* A-122 to A-224 at ¶¶ 1-4.

[19] A-225 at ¶ 8.

[20] A-20; A-25.

[21] 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.[22] 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.[23] 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.[24] 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

[22] *Id.* at ¶ 5.

[23] *Id.*

[24] *Id.*

and curation of the Biden Senatorial Papers are paid with State funds.[25] However, the FOIA Coordinator freely admits that ***no documents were consulted or reviewed*** in connection with this inquiry.[26] Although the Supplemented Affidavit states that the FOIA Coordinator inquired into the salaries of personnel involved in the "custody and curation"[27] 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.[28] Again, ***no documents were consulted or reviewed*** in connection with this inquiry.[29] 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

[25] *Id.* at ¶ 9.

[26] *Id.* at ¶ 12.

[27] *Id.* at ¶ 9.

[28] *Id.* at ¶ 10.

[29] *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.[30] No documents other than the Agreement were reviewed in connection with the Supplemented Affidavit.[31]

Despite the Supplemented Affidavit's glaring infirmities—all of which were pointed out by Appellants[32]—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.

[30] *Id.* at ¶ 12.

[31] *Id.*

[32] *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.[33]

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.[34]

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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[33] 267 A.3d at 1012-13.

[34] *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.[35] 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.[36] 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

[35] A-225 to A-226 at ¶¶ 5-10 (relying on "communications" between May 2019 and January 2020 with three University personnel).

[36] 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.[37]

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.[38] 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

[37] A-225 at ¶ 5 ("The particular communications on which I relied in responding to Petitioners' later FOIA requests occurred in January 2020.").

[38] 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[39] and asserted that the University has "several other sources of revenue,"[40] 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.[41] 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

[39] *See* A-248.

[40] A-249.

[41] A-226 at ¶ 12 ("The specific responses to the inquiries to which I refer above did not include documents.").

undertaking" related to Mr. Biden.[42] 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.[43] 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.

[42] A-224 at ¶ 5.

[43] 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.[44] 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.

[44] *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,[45] 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.").

[45] 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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