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Case Number 419,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT E. VANELLA, on behalf of THE DELAWARE CALL,	§	No. 419, 2025
Appellant,	§	
v.	§	Court Below: Superior Court of the State of Delaware
CHRISTINA DURAN, in her official capacity as FOIA Coordinator for the DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECUIRTY, DELAWARE STATE POLICE,	§	C.A. No. K24A-02-002 JJC
Appellee.	§	

APPELLEE'S ANSWERING BRIEF

STATE OF DELAWARE
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INTRODUCTION

Law enforcement officers swear an oath to serve and protect, not to serve, protect and publicize. As recent events tragically demonstrated exactly one year after the Superior Court issued its Merits Opinion in this administrative appeal, the need to ensure officer safety cannot be overstated. Forcing the state to needlessly disclose personal information about its officers (in particular, but by extension, any public employee) does little to serve the public interest or transparency but rather risks significant harm to ensuring the safety of those who risk their lives daily to keep the public safe. Though publication of demographic data of police officers may, at first blush, seem relatively innocuous, the forced disclosure of such data, coupled with other information, including names, salaries, ranks, and resumes, facilitates the creation of personal databases so that *anyone*—not just Robert Vanella or the Delaware Call—can *track* them. Courts, this Court, should take serious pause and assign appropriate weight to the interests of officer safety when weighed against cries for added transparency and accountability.

FOIA was not passed to invade the privacy and personnel records of state employees. As this Court has acknowledged, FOIA has its limits.[1] FOIA and similar

[1] *Judicial Watch, Inc. v. Unv. of Delaware*, 267 A.3d 996, 1004 (Del. 2021) ("While FOIA aims to ensure that society remain free and democratic through easy access to public records, the statute's assurance of openness and accountability is limited.").

sunshine laws are meant to give the public access to *existing* records on which the government conducts its business. These laws were not enacted to enable those with political agendas to invade the privacy of government workers at the risk of their safety, under the guise of accountability. Needless intrusion into the personal details of each and every state worker, especially those serving positions that are far-too-frequently the subject of violent attacks *does little to advance FOIA's goals.* Appellant obtained the public information to which he was entitled. He should receive no more. The Merits Decision should be affirmed.

Finally, as set forth in detail herein, administrative FOIA appeals were meant to provide a quick and efficient ruling on the compliance with FOIA requests. Such "first looks" were not meant to provide for civil remedies, such as fees and costs to an appellant who asserts success in this process. The Fees Decision should be affirmed.

NATURE AND STAGE OF THE PROCEEDINGS

Appellant Robert Vanella ("Vanella") submitted a Freedom of Information Act ("FOIA")[2] request to the Delaware State Police ("DSP") on October 3, 2023, wherein Vanella requested data on all Delaware police officers, including their names, salaries, ranks, past employers, resumes, demographical information and additional information as specified more fully below.[3] Vanella sought this information about Delaware law enforcement, as he later admitted, so that he could "track" them.[4]

At first, DSP attempted to provide information to Vanella to resolve the FOIA request but eventually denied it when that effort failed. Vanella filed a petition for review with the Attorney General, who, through its Chief Deputy, affirmed DSP's denial. Vanella appealed the Chief Deputy's decision to the Superior Court.[5]

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[2] 29 *Del. C.* Chapter 100.
[3] *See also* A9-11 (actual request).
[4] Superior Court D.I. 12 (Trans. 72906264) at 3.
[5] This was Vanella's procedural choice, not a required next step; after the Chief Deputy issued his determination, Vanella had "the absolute right to file suit" in accordance with § 10005(e) and (b). Had he filed suit rather than appeal the Chief Deputy's determination, the Superior Court could have established its own record for evaluating the merits of DSP's denial, and if successful as a plaintiff in that suit, the statute provides that the court may award attorneys' fees and costs. *See infra*, n.69.

On December 23, 2024, the Superior Court issued an Opinion and Order,[6] affirming in part and reversing in part the Chief's Deputy's decision (the "Merits Decision"). Vanella sought to appeal the Merits Decision, but, because he did so only after previously filing a motion with the Superior Court indicating an intent to seek fees and costs, this Court denied Vanella's appeal as interlocutory. Vanella then filed his motion for fees with the Superior Court, seeking over $100,000 for his partial victory. Following briefing and oral argument, the court denied Vanella's motion (the "Fees Decision").[7]

Vanella now appeals both decisions. He filed his Opening Brief on January 16, 2026, and this is DSP's response.[8]

[6] OB, Attachment 1.
[7] OB, Attachment 2.
[8] Amici filed on January 29, 2026, and February 2, 2026, both the Amici and Appellant fail to appreciate the procedural posture of this case, and in so doing, misconstrue the impact of the Superior Court's holdings. They focus much attention on the Superior Court's merits assessment, ignoring the fact that the Superior Court's merits analysis was necessarily limited to the record created during the administrative appeal to the Chief Deputy. Further, they ask the Court to assign greater weight to interests of the "press," rather than that of Delaware police officers.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly upheld the Chief Deputy's determination that DSP, by its submission of sworn statements, including the Doherty Affidavit, met its burden to justify its denial of access to the records sought in Requests 4 and 6.

2. Denied. The Superior Court properly upheld the Chief Deputy's determination that resumes and demographic information of DSP's troopers are exempt from disclosure; the Superior Court's analysis under 29 *Del. C.* § 10002(o)(1) (personnel files exception) was properly considered and decided on the record presented to the Chief Deputy.

3. Denied. LEOBOR prohibits disclosure of personnel files and DSP has reasonably maintained that demographic data on troopers it considered personnel file data.

4. Denied. The plain language and legislative history of FOIA does not permit an award of fees and costs in FOIA appeals, which are intended to provide a free and efficient mechanism for the public to obtain an expeditious determination of whether a denial was proper.

FACTUAL BACKGROUND

Vanella's October 3, 2023, FOIA request sought:

> 1. **Names** of all law enforcement officers who are actively certified as of the date of this request (or when the request is processed)("certified officers"). This document may take the form of a roster of certified officers.
>
> 2. The current annual **salary** of each certified officer.
>
> 3. The current employing state agency of each certified officer. The current **rank** of each certified officer.
>
> 4. The **past employers** of each certified officer and **job title(s)** associated with each such employment.
>
> 5. **Resumes** of each certified officer.
>
> 6. A **list of all formerly certified officers** and their current status (lapsed, suspended, etc.)[.]
>
> 7. The age, sex, and race of each certified officer [**demographics]**.[9]

DSP responded that it could not produce records for "all law enforcement officers" – it only maintains records for its own officers. Additionally, DSP indicated initially that it may not have the requested information in an existing record, but it pointed out that trooper names and salaries were largely available on

[9] A11 (emphasis added).

an existing public website (OpenTheBooks.com).[10] DSP subsequently denied the FOIA request on November 3, 2023,[11] and Vanella filed a petition for review by the Chief Deputy Attorney General.

Following the filing of the Petition, DSP attempted to do what FOIA does not require (create records for a requester) by offering to provide Vanella with the requested demographic information on a de-identified basis, but because Vanella indicated he wanted a way to match up that data with other records,[12] DSP elected to defend its position with the Chief Deputy.[13]

DSP's response to the Petition reiterated what DSP previously conveyed to Vanella when it denied his request but also supplemented its response with sworn affidavits. The affidavits included, among other things, anecdotal evidence demonstrating DSP's primary concern that providing too much personally identifying information for its 748 troopers could increase risks to their safety.[14] The response also cited DSP's annual reports containing additional public information[15]

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[10] A15. DSP pointed Vanella to OpenTheBooks.com contains ranks as well as names and salaries. State salaries are also provided publicly at openpayrolls.com/state/Delaware (last visited 2/6/26).
[11] A12-14.
[12] A46
[13] Exhibit 1.
[14] DSP relied on several exceptions to FOIA but primarily relied upon the seldom-used "Safety Exception" in 29 *Del. C.* § 10002(o)(17).
[15] Exhibit 1 at Page 2. DSP's annual reports may be found at https://dsp.delaware.gov/reports/ (last visited 1/22/26).

and Criminal Justice Council ("CJC") reports on officer discipline and certification.[16] DSP enclosed a copy of a CJC report with its response and noted recent legislation requiring public reporting on certification and officer discipline.[17] Although DSP did not create and provide Vanella with detailed spreadsheets containing his desired data, in the interests of transparency and cooperation, DSP's Petition response at least attempted to direct Vanella to available public records containing a portion of the requested information.

On January 11, 2024, the Chief Deputy upheld DSP's FOIA denial in its entirety. The Chief Deputy acknowledged DSP's burden of proof, that DSP submitted sworn statements, and the Chief Deputy's analysis relied upon the Safety Exception. He also acknowledged DSP's efforts to provide Vanella with records and information notwithstanding its FOIA denial and its objection to the petition.[18]

Vanella elected to appeal the Chief Deputy's decision, on the record, to the Superior Court. Arguments before the Superior Court focused on the applicability of the "Safety Exception," found in 29 *Del. C.* § 10002(o)(17), as well as the

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[16] Exhibit 1 at page 2-3. *See also* https://cjc.delaware.gov/required-law-enforcement-disclosures/ (last visited 1/22/26).

[17] *Id.*

[18] The Chief Deputy stressed that the primary objective of DSP is to assess vulnerable areas and respond to criminal activity and that identifying officers, including undercover and intelligence officers could pose a safety risk to "officers and the public safety of the communities in which the officers operate, especially officers working in undercover or intelligence operations." A22-26.

applicability of the "Personnel Files Exception" in § 10002(o)(1), and the Law Enforcement Officers Bill of Rights ("LEOBOR") (applicable to FOIA through § 10002(o)(6)).[19]

Following briefing and argument, the Superior Court's Merits Decision was issued on December 23, 2024. Based on the record presented to the Chief Deputy, and the court's independent legal analysis informed by the parties' briefing, the court reversed the Chief Deputy on some, but not all, of the issues. The Superior Court agreed that DSP could only provide records pertaining to troopers, not all Delaware officers. It also rejected Vanella's narrow interpretation of the Safety Exception (holding that it did not just pertain to terrorist activity).[20] The court disagreed, however, with the Chief Deputy's determination that the Safety Exception pertained to names, salaries and ranks, and it was not persuaded that referring a FOIA requestor, like Vanella, to data on a publicly available website satisfied the mandates of FOIA.[21] The Superior Court upheld the Chief Deputy on the issue of past employers and job titles of each trooper.[22] The Superior Court also held that the

[19] LEOBOR was amended in August, 2023, and Title 11, Chapter 92 is now titled, *Police Officer Due Process, Accountability and Transparency*. For consistency and clarity, Chapter 92 will be referenced as "LEOBOR" in this appeal.
[20] Merits Decision at 17.
[21] *Id.* at 24.
[22] *Id.* In its FOIA denial regarding listing all past employers for current officers, DSP represented through counsel that DSP did not have a database or document containing such information for current employees. A13.

FOIA request for trooper resumes was properly denied under the Personnel Files Exception.[23] There, the court reasoned that disclosure of one's resume impacts an individual's privacy interests differently than would the disclosure of mere names, ranks, and salaries.[24] The court recognized that the "personal privacy interests of law enforcement officers who served undercover duty or in other highly sensitive roles are often heightened in comparison to those of many other public employees."[25]

The Superior Court agreed that Vanella's FOIA request as to formerly certified troopers and their current status was also properly denied.[26] The court noted that when applying appropriate deference, DSP met its burden that it does not possess such records.[27]

Finally, the court upheld the denial of the requested demographic information of individual officers.[28] The court appropriately recognized the sensitive nature of work performed by law enforcement officers. The court noted that "a trooper may need to serve in an undercover capacity and disclosing such information would significantly compromise his or her personal privacy (not to mention his or her safety

[23] Merits Decision at 25.
[24] *Id.*
[25] *Id.* at 26-27.
[26] *Id.* at 27.
[27] *Id.*
[28] *Id.*at 28.

which should be deemed an aspect and goal of one's personal privacy)."[29] The court therefore agreed with DSP's primary position below—that the invasion of privacy and the risk to officer safety increases incrementally with the amount of personal information forced into the public domain.

In its Fees Decision, issued on September 4, 2025, following argument, the Superior Court correctly held that attorneys' fees and costs are not remedies available in administrative appeals of FOIA denials. Because the court agreed with this threshold issue, it did not reach DSP's second argument why he should not be awarded costs and fees: that Vanella failed to show he was "successful."

The Superior Court's Merits Decision, like the Chief Deputy's decision, is supported by the record and employs sound legal reasoning and should therefore be affirmed. The Superior Court's Fees Decision correctly concluded that, as a matter of law, § 10005(d) does not authorize attorneys' fees and costs for an appellant in an on-the-record appeal ("OTRA"), and that decision should, likewise, be affirmed.

[29] *Id.*

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY UPHELD THE CHIEF DEPUTY'S DETERMINATION THAT DSP MET ITS BURDEN REGARDING PAST EMPLOYERS/JOB TITLES AND A LIST OF FORMER TROOPERS AND CERTIFICATION STATUS.

A. QUESTION PRESENTED

Did the Superior Court properly uphold the Chief Deputy's finding that DSP met its burden of proof in denying Vanella's request for past employers and job titles and a list of former troopers?

B. STANDARD OF REVIEW

This Court's standard of review "mirrors that of the Superior Court. Where there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of the agency."[30] "On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error."[31] "Absent an abuse of discretion, the decision of the agency must be affirmed." [32]

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[30] *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).
[31] *Id*.
[32] *Id.*

C. MERITS OF ARGUMENT

Vanella frames his first argument around a purported error in the Superior Court's reading of the Doherty Affidavit, asserting that "DSP failed to meet [its] burden" to prove that it does not have responsive records "despite the Superior Court's holding to the contrary."[33] As noted, DSP asserted in its FOIA response that it did not have an existing record listing past employers and job titles of its current troopers.[34] In responding to Vanella's administrative appeal, DSP submitted to the Chief Deputy two affidavits in support of its factual assertions. The Doherty Affidavit addressed what DSP Human Resources ("HR") possessed; that it did not possess information regarding non-DSP Delaware officers; that its systems containing names, assignments, and pedigree information is highly confidential, personnel records; that HR does not typically possess resumes; that it does not maintain a roster of all former troopers with requested pedigree information (and their current status); and, that it considers pedigree information to be personally identifiable information, the disclosure of which could jeopardize officer safety.[35] DSP submitted a second affidavit from its Public Information Officer that addressed

[33] OB at 14.
[34] A13.
[35] A17.

DSP's concern regarding officer safety,[36] concerns Vanella later mocked in briefing.[37]

Thus, DSP did what FOIA case law requires—it supported its FOIA denial with multiple sworn statements. Those affidavits addressed the pressing privacy interests and concerns regarding officer safety and, while not explicitly addressing the discrete issue regarding past employers (with job titles), the import of those affidavits and the arguments made to the Chief Deputy and the Superior Court support the assertion in the FOIA denial that DSP does not maintain an existing record listing past employers and job titles for its 748 troopers.

DSP does not maintain a spreadsheet or other existing record listing prior employers and job titles of all its troopers and therefore cannot produce what it does not have.[38] DSP likewise represented, through counsel, that it did not have a list of

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[36] A20-21.

[37] Superior Court D.I. 12 (Trans. 72906264) at 11 ("An errant social media post, a threatening call, or a person outside of a building with a dog are not the sorts of concerns that led the Delaware legislature to pass this 9/11 era legislation.").

[38] To be clear, like most employers, information regarding the prior employers of some individual troopers likely exists in applications or HR records for at least some troopers with prior employment. Responsive *information* on some level likely exists within those records. However, as with demographic data, any responsive information would be derived from personnel records and would therefore be exempt under § 10002(o)(1). But if the Court concludes that such information would not be exempt under § 10002(o)(1), DSP would have to canvas application packets and other HR records for 748 troopers to determine if responsive information exists. DSP would therefore have to first require payment for this enormous undertaking.

all formerly certified officers and their current certification status. These are factual assertions supported by sworn statements; Vanella argues in this appeal that such assertions were factually inaccurate but offers no meaningful legal argument as to why the Chief Deputy (or the Superior Court) erred in finding DSP's affidavits were sufficient to meet its burden to justify denial of access to DSP's records. Mere disagreement with the factual findings is not enough. Vanella's demand for reconsideration of these facts at this stage in the proceeding requires a showing that the Chief Deputy's factual determinations (upheld by the Superior Court) are not supported by substantial evidence. Vanella has failed to do so.

Vanella's argument on appeal, that DSP failed in its duty to assist him by providing a partial response is myopic and overlooks the administrative record. The emails included in Vanella's Appendix themselves belie this argument—they show that DSP attempted a compromise for the entirety of Vanella's FOIA request. Because that effort failed in the broader sense, DSP saw no use in negotiating finer points, including providing a limited list of former troopers. So, to argue that DSP failed in its duty to assist Vanella with identifying aspects of its FOIA request to which it had no objection ignores the record and the context of what Vanella was seeking and how DSP attempted to provide it. Regardless, Vanella has not

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See 29 *Del. C.* § 10003(m) (authorizing a public body to assess administrative fees for requests that require more than one hour of staff time to process).

demonstrated how the Chief Deputy (or the Superior Court) erred in assessing the administrative record on this aspect of his FOIA request.

II. THE SUPERIOR COURT CORRECTLY UPHELD THE CHIEF DEPUTY'S DETERMINATION REGARDING RESUMES AND DEMOGRAPHICS.

A. QUESTION PRESENTED

Did the Superior Court properly uphold the Chief Deputy's determination as to resumes and trooper demographics?

B. STANDARD OF REVIEW

Again, this Court's standard of review "mirrors that of the Superior Court."[39] In an OTRA of an agency decision, the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error, and absent an abuse of discretion, the decision of the agency must be affirmed.[40] In other words, it is a *de novo* review of the Chief Deputy's determination.

C. MERITS OF ARGUMENT

The Superior Court correctly upheld the Chief Deputy's ruling that resumes and demographics are excepted from FOIA. The Chief Deputy did not separately evaluate the Personnel File Exception, but DSP asserted the exception in its petition response, and the Superior Court evaluated it based on the record presented to the Chief Deputy, properly concluding that the exception applies.

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[39] *Stolz* at 1208.
[40] *Id.*

In introducing his argument on this issue, Vanella asserts that the "parties agreed that the definition of 'personnel file' is 'a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions.'"[41] However, DSP did not agree to that definition as part of this proceeding; the Merits Opinion observed that "FOIA does not define what a 'personnel file' is, [and] [t]o fill that gap, the Department of Justice adopted the [] definition through an AG Opinion … Delaware Call also relied on that definition so the Court will do the same."[42] No such definition or agreement appears in the record presented to the Chief Deputy. Thus, Vanella's reliance on that definition, or any purported agreement by DSP that the definition applies in this proceeding, is improper in this OTRA of the Chief Deputy's determination.

With respect to resumes, Vanella asserts that disclosure of trooper resumes does not constitute an invasion of privacy. To reach that conclusion, he asserts that "other states look to their own common law tort claims surrounding invasion of privacy"[43] and that "disclosure of resumes does not constitute the common law invasion of privacy tort in Delaware."[44] His subsequent analysis ultimately

[41] OB at 19 (citing the Merits Opinion at 20).
[42] Merits Opinion at 20 (citations and footnote omitted).
[43] OB at 19.
[44] *Id.* at 20.

concludes that "an individualized analysis should be done to determine whether a resume contains information that could invade personal privacy,"[45] but he apparently fails to appreciate that, while not individualized on a per-trooper basis, the Superior Court did conduct an individualized analysis of trooper resumes – as a class of employees with unique safety and privacy concerns. While Vanella may disagree with the conclusion that disclosure of trooper resumes violates their personal privacy, he fails to demonstrate how the Superior Court erred in reaching the conclusion.

Vanella originally requested resumes from all Delaware state troopers (actually, all Delaware officers). Because, as DSP made known to Vanella years ago, DSP does not, as a matter of course, require a resume when an individual seeks employment as a trooper, DSP reasonably included in its FOIA response that any resumes that it *may* have would be appropriately included in the personnel files of the troopers[46] and would therefore be exempt pursuant to 29 *Del. C.* § 10002(o)(1). Vanella's argument that this contention is improper was properly rejected.

As he did below, Vanella cites *Grimaldi v. New Castle Cty.*,[47] where the plaintiff sought, among other things, the resume of a county risk manager the

[45] *Id.* at 21.
[46] A17.
[47] 2016 WL 4411329 (Del. Super. Ct. Aug. 18, 2016).

plaintiff alleged was inappropriately awarded her position based upon a relationship with the then-County Executive. The Court denied in part a Rule 12(b)(6) motion, holding, as to the FOIA claim, that disclosure of the risk manager's resume would not constitute an invasion of personal privacy.

Here, the Superior Court correctly held that *Grimaldi* did not dictate a brightline rule for the disclosure of all resumes and that it relied on authority "that itself did not address the disclosure of resumes."[48] The court reasoned that disclosure of a resume "impacts an individual's privacy interests differently than would the disclosure of mere names, ranks, and salaries."[49] The court noted, *by way of example only*, personally identifying information, such as home addresses, personal email and phone numbers. In a footnote deserving greater attention, the court elaborated that the disclosure of information in a resume would subject troopers to "an increased risk of personal harassment in their personal capacity." The court noted, *with tragic clairvoyance*, that it is "well recognized that members of the public may carry grievances against officers for perceived transgressions" and that "granting the public access to an officer's personally identifying information within a resume would no doubt invade an officer's right to privacy."[50] The court

[48] Merits Decision at 13.
[49] *Id.*
[50] *Id.*

observed: "One important aspect of privacy in this [setting] is an officer's interest in his or her safety."[51] Judge Clark's emphasis on officer safety was no hyperbole or exaggeration as tragic events demonstrated exactly one year later.

The only judicial decision in Delaware addressing whether a resume was subject to FOIA is *Grimaldi*,[52] where the Superior Court was addressing, in the context of a lawsuit involving multiple claims, whether New Castle County met its burden of demonstrating that the County's Risk Manager had a sufficient privacy interest in her resume. As the Superior Court held, *Grimaldi* does not support a requirement that DSP must disclose any resume held for 748 troopers. The court correctly observed that privacy interests of law enforcement officers in Delaware are qualitatively different than that of a single risk manager at the center of a lawsuit involving claims directly pertaining to her hiring.

AG Opinion 18-IB34 further demonstrates that subsection (o)(1) applies to DSP resumes. That decision required the production of the resume of the Deputy Commissioner for the Department of Insurance where the decision observed that her employment and education history was already posted publicly. The Superior Court

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[51] *Id.*

[52] Vanella embellishes the breadth of the authority in Delaware on the issue, stating at least twice that the Superior Court and the AG have "routinely" held that the "public interest in knowing the resume of a successful job applicant for a public job exceeds" the right to privacy. OB 21; *see also* OB 22.

here was faced with no such record. Much to the contrary, the instant record stands in stark contrast. Vanella seeks resumes, theoretically, of 748 state employees. Unlike *Grimaldi* and the AG opinions, there are no claims against DSP relating to inappropriate hiring. There are no claims that troopers have placed their professional backgrounds online. Accordingly, the court below did not err, on this record, in upholding the Chief Deputy's affirmance of DSP's denial for all trooper resumes.

Vanella also argues that the court erred when it noted that FOIA does not contain an "explicit segregability requirement."[53] Vanella argues that this observation ignores the fact that documents can be redacted to remove non-public information. DSP does not disagree with this general assertion. However, Vanella's criticism of the Superior Court's reference to the lack of a segregability requirement in FOIA is taken out of context. The court made that observation immediately after discussing the "impact" that disclosure of one's resume typically has, particularly on law enforcement officers, who reasonably are more incentivized to maintain privacy, especially now given recent events occurring locally and nationally.[54]

[53] OB at 21-22.

[54] As noted below, there has also been a disturbing uptick in assaults on law enforcement officers nationwide. *See* https://www.police1.com/officer-safety/fbi-reports-assaults-on-leos-in-the-us-reached-a-10-year-high-in-2023 (last visited 2/6/26).

The Court can and should notice what is common sense: that resumes, typically drafted for employers, not worldwide broadcast on the internet, include, in a page or two, the entirety of someone's educational and professional career. Applicants often include personal interests, like coaching, volunteer work, and hobbies to distinguish themselves from competition. It is ludicrous to suggest that job seekers waive privacy interests in providing resumes to a potential employer in the hopes of landing a job. Applicants would be appalled—and would likely sue—if an employer posted a submitted resume on a website, even with redactions.

Production of every resume of Delaware police officers rightfully gave the court below serious pause, as doing so has given other courts.[55] Wholesale production of trooper resumes entails significantly different considerations than the single resumes of public officials at issue in the decisions Vanella relies upon.[56] The

[55] *See, e.g.*, *Gonzalez v. United States Citizenship & Immigr. Servs.*, 475 F. Supp. 3d 334 (S.D.N.Y. 2020) (government properly withheld sensitive information of federal officers since the disclosure could reasonably be expected to endanger their safety); *D.C. v. Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm.*, 75 A.3d 259 (D.C. 2013) (identifying information of officers who sent emails to chief regarding internal affairs were not subject to disclosure because officers had cognizable privacy interests in the information and there was little public interest in forcing their names to be revealed); *cf. Del. Op. Att'y Gen.* 17-IB53 (2017) (DOC applicant did not have the right under FOIA to view the pre-employment background check, interviews, and statements with previous employers or employees, or the report of the investigator who did not select them for employment because such information was classified as "investigatory files").

[56] *See, e.g.*, *Reyes v. Freeberry*, 2005 WL 3560724 (D. Del. Dec. 29, 2005) (upholding protective order restricting parties from making public any "personnel

court correctly held that trooper resumes were not public records under § 10002(o)(1).

With respect to demographics, Vanella argues that demographic information is not part of a personnel file, and if it is, releasing the information with an anonymous number does not constitute an invasion of personal privacy.[57]

Preliminarily, Vanella's claim that demographic information is not part of the personnel file is facially a factual challenge that is improper in this OTRA. The record below demonstrates that DSP considers demographic information of individual troopers to be data derived from troopers' personnel files. On appeal, Vanella argues that demographics cannot, as a matter of law, be considered "data derived from personnel files" because demographics cannot be used in making personnel decisions, but that argument is a red herring and flies in the face of common sense.

DSP recognizes that it cannot claim that a public record is non-public by plopping it in a personnel file. Thus, a settlement agreement cannot escape public scrutiny simply by placing it into a protected file. That makes imminent sense. *A fortiori,* however, data or records that employers typically and traditionally consider

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information" because there is a strong public policy favoring the confidentiality of police personnel records in LEOBOR).

[57] OB at 24.

to be personal to the employee and rightfully maintained, therefore, in a personnel file should not *lose* that status merely because that same data cannot be legally relied upon to make employment decisions. For instance, personnel files typically contain original job applications and leave requests. Simply because an employer could not base an employment decision on information derived from those records should not cause those records to lose their status as personnel file records.

Recognizing that his argument proves too much, Vanella argues in the alternative that the Superior Court erred because Vanella had offered to seek only deidentified data regarding each trooper. He states he was "willing to accept demographic information via a randomly generated unique ID number that would mask trooper names."[58] He goes so far as to assert that his request essentially sought two lists: one with names, salaries and ranks, and then another list with demographics and unique identifier numbers.[59] One problem with this assertion is that it is not supported by the record.

DSP explored the option of providing deidentified data to resolve the entirety of Vanella's FOIA petition.[60] However, Vanella's response was not to explain, as he does in a footnote in his brief,[61] that DSP could provide two lists. Rather, though

[58] OB 25.
[59] *Id.* at 25, note 7.
[60] A46.
[61] OB at 25, note 7.

he indicated he was willing to accept a list of troopers with "unique ID or position numbers," he also made clear that he wanted to "match the record to other records."[62] Thus, Vanella's response led DSP to believe, reasonably, that, despite attempting to anonymize the demographics, Vanella was still interested in linking the data received with trooper identities. DSP's interpretation of Vanella's proposal was later confirmed when Vanella later admitted that he was interested in tracking troopers.[63]

By failing to adhere to the actual record below, Vanella likewise fails to demonstrate how the Superior Court's analysis on the issue constitutes legal error. Vanella's FOIA request was for all trooper names and identifying information. That was the request that was denied and that denial is what the Chief Deputy and Superior Court examined in their reviews on appeal. The court correctly upheld the denial based on the determination that trooper demographics, particularly in the

[62] *Id.*

[63] Superior Court D.I. 12 (Trans. 72906264) at 3. As noted below, no Delaware professional is "tracked" more than police officers. As a result of the 2023 amendments to LEOBOR and to the organic statute for what is now the Police Officer Standards and Training ("POST") Commission, Delaware police departments are required to establish accountability committees and submit to the CJC for public posting "detailed narratives" of investigations conducted in five areas of police misconduct, two of which do not require substantiation. POST must also publish summaries of decisions on officer certification. None of the other 61 professions regulated by Title 24 require this level of public scrutiny.

context of troopers serving or possibly serving in undercover and intelligence roles, are protected under the Personnel Files Exception to FOIA.[64]

Vanella's argument about his willingness to accept anonymous ID numbers also ignores the basic premise of FOIA that it does not require the creation of records. FOIA's stated purpose is that "public business be performed in an open and public manner" so that the public can assess the performance of public officials and "monitor the decisions that are made by such officials in formulating and executing public policy."[65] FOIA facilitates this accounting by requiring meetings to be in public and allowing the public to inspect records that agencies possess and use to conduct business. Necessarily, FOIA's clear purpose is not served by requiring agencies to devote scarce resources to generate data and records upon request.[66]

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[64] *See also Del. Op. Att'y Gen.* 94-I019 (Mar. 7, 1994) (upholding FOIA denial seeking date of birth information in bulk); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, (Iowa 1999) (upholding denial of requests for firefighter gender, address and birth date information, noting "public employees 'deal with people who don't necessarily have the same boundaries as the people sitting in this courtroom.'").

[65] 29 *Del. C.* § 10001.

[66] *See, e.g.*, *Del. Op. Att'y Gen.* 16-IB08, 2016 WL 2619614, at *2 (Mar. 18, 2016) (FOIA does not require the creation of records that do not exist); *Del. Op. Att'y Gen*. 06-IB17, 2006 WL 2630107, at *4 (Aug. 21, 2006) ("There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records in a particular medium in order to provide greater public access to the records.") (quoting *State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 559 (Ohio 1992)).

Accordingly, Vanella cannot show that the court erred by arguing that it failed to account for his willingness to accept deidentified data.

III. LEOBOR IS FURTHER SUPPORT OF DSP'S FOIA DENIAL.

A. QUESTION PRESENTED

Did the Superior Court properly decline to evaluate LEOBOR's application to the disputed FOIA requests?

B. STANDARD OF REVIEW

DSP refers to, and incorporates herein, the standard of review discussed above. In addition, the Superior Court declined to address DSP's assertion to the case that certain information sought in Vanella's FOIA requests is, independent of FOIA's Personnel File Exception, exempt from disclosure pursuant to LEOBOR (applicable to FOIA through § 10002(o)(6)). The Superior Court found that other exemptions apply to the specific FOIA requests to which the LEOBOR argument applies, so evaluation of the issue was not necessary. However, because DSP argued the exemption to the Chief Deputy, and the Chief Deputy's decision does not expressly analyze the issue, the Court may properly consider its applicability as part of its *de novo* review of the agency decision.

C. MERITS OF ARGUMENT

Section 9200(d)(1) makes clear that personnel files of Delaware police officers are confidential. The reasons stated above as to Section 10002(o)(1) apply *a fortiori* to Section 9200(d)(1).

DSP addresses Vanella's first assertion, which he barely makes. Vanella states (regarding § 10002(o)(1)), "demographic information is not part of an officer's 'personnel file,' so LEOBOR does not bar the release of that information."[67] Of course Vanella's argument regarding § 10002(o)(1) does not come close to addressing the applicability of LEOBOR because § 10002(o)(1) requires that the disclosure be from a personnel file *and* that its disclosure would constitute an invasion of personal privacy. LEOBOR more simply bars disclosure of personnel files. Section 9200(d)(1) does not also require a violation of personal privacy. Thus, Vanella's argument regarding the Personnel File Exception in FOIA has no applicability to his argument regarding 11 *Del. C.* § 9200(d)(1)'s bar to disclosing officer files.

With Vanella's initial argument addressed, he is left arguing that § 9200(d)(1) is inapplicable because FOIA requests are not "civil proceedings." Vanella's argument, relying on *Black's Law Dictionary*[68] and the Superior Court's decision in *McCool*, is contrary to the golden rule of statutory interpretation: that courts read statutes to avoid a patent absurdity.[69] Vanella's argument, if accepted, would allow *anyone* in Delaware to request personnel files of police officers, through FOIA, but

[67] OB at 28.
[68] *Id.* at 29.
[69] *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 343 (Del. 2012).

would deny relevant requests for those files in civil litigation (other than of the type expressly referenced in § 9200(d)), even where such files might be highly relevant. It would be absurd that someone like Vanella could obtain records that might be unavailable to a plaintiff requiring those records to pursue a civil action.[70]

An additional absurdity would result in a determination that a FOIA request is not a civil proceeding for purposes of LEOBOR. Vanella concedes that this proceeding (and the one below) is a civil proceeding,[71] but just not his initial FOIA request. Thus, according to Vanella, § 9200(d)(1) would have no applicability to the FOIA request, but *it would* in an appellate review, where, as here, a civil court orders production of records.

The timing of LEOBOR and FOIA's passage further shows that the General Assembly intended that Section 9200(d)(1) apply to FOIA requests. FOIA, with its exception for personnel files, was passed in 1976.[72] LEOBOR was passed nearly ten years later in 1985.[73] This timing shows that the General Assembly intended to provide elevated protections to personnel files of police officers.

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[70] Vanella's position would also mean that pre-suit arbitrations, Equal Employment Opportunity proceedings, and other administrative proceedings in Delaware (*e.g.* licensing proceedings under Title 24) would not qualify as "civil proceedings." It would be absurd to allow production in those administrative matters, but not in lawsuits.
[71] OB at 29.
[72] *See* 60 Del. Laws c. 641 (128th General Assembly).
[73] *See* 65 Del. Laws c. 12 (133rd General Assembly).

Section 9200(d)(1)'s inclusion of the word "any" and "proceedings" also indicate an intention to broadly apply the statute's reach. If the General Assembly intended § 9200(d)(1) to be applied narrowly, it would not have used the word "any"[74] and would likely have specified "litigation" or "lawsuits" rather than "proceedings."

Vanella's reliance on *State v. MacColl*, 2022 WL 238897 (Del. Super. July 1, 2022) is as misplaced as it was below. *MacColl* did not involve a FOIA request. MacColl, a former Wilmington officer, was charged with making false statements during an internal affairs interview. He sought to have the indictment dismissed, arguing among other things that LEOBOR precluded the state's use of the internal affairs transcript, possession of which the State had already. Vanella's attempt to use *MacColl* for the proposition that LEOBOR has no application to FOIA requests made to government bodies in the first instance should be rejected.

Vanella's reliance on the AG Opinions is also misplaced.[75] Those decisions do not address the issue of whether § 9200(d)(1) has applicability to FOIA requests. For instance, *Del. Op. Att'y Gen.* 17-IB19 (July 12, 2017) held only that it did not

[74] *See Salzberg v. Sciabacucchi*, 277 A.3d 102, 117 (Del. 2020) (noting that courts "must give meaning to every word in the statute."). In arguing that fees should be allowed in OTRA (Vanella's final argument on appeal), Vanella essentially agrees with this point. *See* OB at 35 (referring to the use of the term "any" in § 10005(d) and arguing that its plain mean is "one or some indiscriminately of whatever kind.").
[75] OB at 30.

apply because the Wilmington Fire Marshall's office is not an entity listed as an agency covered by LEOBOR under § 9200(b). *Del. Op. Att'y Gen.* 17-IB19 (July 12, 2017) addressed names and salaries of Wilmington Police Department officers, not personnel records.

At bottom, LEOBOR further supports the conclusion that officer resumes and demographics deserve unique protection and are therefore exempt under FOIA.

IV. THE SUPERIOR COURT CORRECTLY HELD THAT FEES AND COSTS ARE LIMITED TO SUCCESSFUL PLAINTIFFS IN LAWSUITS, NOT ROUTINE FOIA APPEALS.

A. QUESTION PRESENTED

Did the Superior Court properly hold in its Fees Decision that fees and costs are not authorized for administrative appeals of FOIA requests?

B. STANDARD 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." [76]

C. MERITS OF ARGUMENT

The Superior Court's well-reasoned and thorough Fees Decision should be affirmed. Vanella asserts that the Superior Court's holding that § 10005(d) is ambiguous regarding whether an appellant, rather than a plaintiff, may recover attorneys' fees "would lead to an absurd result, contradicting the very purpose of FOIA and the role of courts in resolving disputes."[77] However, the plain language of FOIA does not support fees for an OTRA. Moreover, even if the language is deemed ambiguous, the legislative history demonstrates that fees were not intended

[76] *Gannett Co., Inc. v. Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, 840 A.2d 1232, 1240 (Del. 2003).
[77] OB at 32.

to be available in an OTRA. And, immunity principles further support the conclusion that fees are not available for an OTRA of a FOIA denial.

1. The Plain Language of FOIA does not Support Fees for an OTRA.

The plain language of § 10005(d) does not support an award of attorney's fees for a FOIA appeal to this Court. Section 10005 starts off contemplating lawsuits. Subsection (a) addresses Court of Chancery actions voiding public meeting violations. "Suit" must be filed within 6 months of the illegal action. Subsection (b) requires "suits" within 60 days of the denial of public records. It addresses "venue." It then provides for an alternative course, to present a petition to the Attorney General, with a permissive right of appeal to the Court.[78] Subsection (c) places the burden with the custodian for any "action" brought under this section.

[78] The Superior Court's Fees Decision observes that a citizen who requests records from a governmental subdivision has the option to file a lawsuit or pursue the "petition and appeal route" (Fees Decision at 14), but a citizen alleging a FOIA violation against a State-entity "must avail herself of the petition and appeal route, at least initially." *Id*. DSP did not cross-appeal the Superior Court's decision on this issue; however, in light of this Court's de novo review, DSP asserts that the plain language of § 10005 only compels a citizen alleging a FOIA violation against a State-entity to pursue a petition to the Attorney General, not the appeal. *See* § 10005 (e): "Regardless of the finding of the Chief Deputy, the petitioner or public body *may* appeal the matter on the record to Superior Court" (emphasis supplied) and "The citizen shall have the absolute right to file suit regardless of the determination of the Attorney General…." In short, a citizen alleging a FOIA violation against a State-entity must petition the Chief Deputy for review, but once the Chief Deputy issues a determination, the citizen may choose an expedited OTRA to the Superior Court for review of the Chief Deputy's determination or may file suit and pursue appropriate legal remedies.

Section 10005(d), amended by SB 103, placed teeth in FOIA's enforcement provisions found in Section 10005. But it did so in terms familiar to actual litigation. Remedies include injunctions, declaratory relief, writs, and other "appropriate relief." And then, critically, it allows for fees and costs, but only to successful *plaintiffs*. It also authorizes fees and costs for *defendants* where the action was frivolous or brought to harass. Because § 10005(d) contemplated both appeals (involving only petitioners and respondents) *and* lawsuits, § 10005(d)'s references to "plaintiff" and "defendant" indicate clearly that fees are appropriate only where such *parties* are successful in the context of litigation, not AG appeals.

When "interpreting a statute, each part or section of that statute should be read considering every other part or section to produce a harmonious whole; the import of any word or phrase is to be gleaned from the context and statutes in *pari materia*."[79] Section 10005(d)'s references to "remedies," including injunctions, mandamus, declaratory judgement and other "appropriate relief," shows further that fees and costs are only for lawsuits.

In addition to honoring its plain language, construing § 10005(d) to limit fee awards to lawsuits also avoids an unreasonable or absurd result.[80] In lawsuits, a trial

[79] *Fantasia Rest. & Lounge, Inc. v. New Castle Cnty. Bd. of Adjustment*, 735 A.2d 424, 431 (Del. Super. 1998), *aff'd*, 734 A.2d 641 (Del. 1999) (cleaned up).
[80] Statutes are to be read by giving language its "reasonable and suitable meaning while avoiding a patent absurdity." *Doroshow, Pasquale, Krawitz & Ghaya v.*

court could address a request for fees and make any necessary factual findings. Its decision would then be subject to judicial review. If § 10005(d) were interpreted to allow for fees in AG appeals, there would be no such mechanism; instead, as Vanella urges here, the Superior Court, acting in its appellate role reviewing administrative decisions would also be tasked with making factual findings regarding the reasonableness of the fee motion. The plain language reading urged by DSP avoids this unreasonable result—an appellate body also making factual findings *de novo*.

2. Legislative History Shows Fees are not Available for an OTRA.

The legislative history of SB 103 resolves any lingering ambiguity on this issue. The House Debates of SB 103[81] centered mostly on two issues: a proposed amendment that would have added a bad faith requirement for allowing fees, and an unrelated amendment pertaining to open meetings. Both proposed amendments were eventually stricken. However, prior to those debates, a co-sponsor of the bill discussed SB 103's intent and his comments are paraphrased here, except where directly quoted.

Nanticoke Mem. Hosp., Inc., 36 A.3d 336, 343 (Del. 2012) (internal quotation omitted).

[81] DSP provided the court below with audio recordings of all the House and Senate Debates for SB 103. The House Debates consist of five audio files, and there are two audio files of Senate Debates.

Rep. DiPinto stated that SB 103 was a bill to provide enforcement provisions for FOIA. The objective of the bill was to promote prompt resolution of alleged FOIA violations by reference to the Attorney General for an opinion, and "giving him a 30-day period to render an opinion." This allows for a "prompt resolution." Critically, Rep. DiPinto continued, if the government "persists in violating" FOIA, or is perceived as doing so, citizens "can file a lawsuit," either with the assistance of the Attorney General or on their own. He noted that, if they take the "latter course," meaning a suit on their own behalf, "this bill gives provision for the plaintiffs to request payment of costs and fees from the defendant in the event the suit is successful." Rep. DiPinto went on, noting a concern some had about allowing for fees, but he stated that the *court's* decision to award fees and costs is discretionary. There was further discussion about frivolous suits and allowing for fees and costs to a successful "defendant" for harassment.[82]

Further discussions in the House Debates also support DSP's position. *See*, *e.g.*, House Debate 2 at approximately 10:30 (discussing actions taken in court); House Debate 3 at approximately 10:00 (debating meaning of a house amendment requiring bad faith that was ultimately struck, but in the context of judges awarding

[82] This discussion occurs in the first audio recording of the House Debates between approximately 1:18 and 5:00 minutes. Exhibit 2 is an audio file. Audio files cannot be uploaded to the Court's filing system. A copy will be delivered to the Court.

fees to plaintiffs). The Synopsis of SB 103 also provides that the "bill authorizes awards of attorneys fees and costs in Freedom of Information Act ***suits***." (Emphasis added). The totality of SB 103's legislative history fully supports its plain language: that fees and costs are only available to *successful plaintiffs in lawsuits.*

3. Immunity Principles Further Support a Conclusion that Fees are not Available for an OTRA.

Third, "[i]n Delaware, litigants typically pay their own attorneys' fees."[83] And the State is generally immune from claims for attorney's fees.[84] Indeed, "most courts throughout the country hold that the award of costs against the state is barred by sovereign immunity."[85] Where fees are available in *litigation* over FOIA issues, this Court has held that the trial court has considerable discretion in whether to award fees and costs to a successful defendant or plaintiff.[86] In *suits*, "FOIA authorizes but does not require an award of attorneys' fees and costs to the successful plaintiff…. Since the award is discretionary, the court can utilize the circumstances of the case in fashioning an appropriate award."[87]

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[83] *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 697 (Del. 2024).
[84] *Wilmington Medical Center, Inc, v. Severns*, 433 A.2d 1047 (Del.1981), *overruled in part on other grounds, Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund,* 68 A.3d 665 (Del.2013).
[85] *Roofers, Inc. v. Delaware Dep't of Lab.*, 2014 WL 1228911, at *2 (Del. Super. Mar. 25, 2014), *aff'd*, 2014 WL 7010733 (Del. Nov. 24, 2014).
[86] *Bd. of Managers of the Delaware Criminal Justice Inf. Sys. v. Gannett Co.*, 2003 WL 1579170, at *3 (Del. Super. Jan 17, 2004).
[87] *Id.*

The well-established principle that the sovereign cannot be sued without its consent extends to the matter of costs, with the result that, "absent a statute indicating its consent thereto, a state litigant may not be subjected to costs of suit for which a private litigant would be liable."[88] Although the state may waive sovereign immunity through express and clear statutory language,[89] waivers of immunity are to be construed narrowly.[90] Lastly, a statute must clearly require fee shifting, as the American Rule requires that parties bear their own costs and fees in litigation.[91] Considering these principles, the plain language of FOIA, and its legislative history, it is clear that the Superior Court's Fees Decision that attorneys' fees are not available for FOIA appeals was correctly decided.

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[88] *Roofers, Inc. v. Delaware Dep't of Lab.*, 2014 WL 1228911, at *2 (Del. Super. Mar. 25, 2014), *aff'd*, 2014 WL 7010733 (Del. Nov. 24, 2014).

[89] *See Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004) (the "General Assembly, however, can waive sovereign immunity by an Act that **clearly evidences an intention to do so**.") (emphasis added).

[90] *Tomei v. Sharp*, 902 A.2d 757, 761–62 (Del. Super. 2006), *aff'd*, 918 A.2d 1171 (Del. 2007) ("Any waiver is to be strictly applied and extends only to the terms of the statute."). *Martin ex rel. of Est. of Martin v. State*, 2001 WL 112100, at *4 (Del. Super. Jan. 17, 2001) ("Moreover, **waiver statutes are to be strictly construed** and limited to the terms of that particular mandate.") (emphasis added). Just last week, the Supreme Court reiterated that "sovereign immunity waivers" are to be construed "narrowly, with any ambiguities resolved in favor of the sovereign." *United States v. Miller*, 604 U.S. 518, 519 (2025) .

[91] *See In re Delaware Pub. Sch. Litig.*, 312 A.3d 703, 721 (Del. 2024) (emphasizing "exceptions to the American Rule are construed narrowly, and [that] Delaware courts have been very cautious in granting exceptions to this rule.") (cleaned up).

4. Vanella Fails to Show the Superior Court Committed Error.

Vanella advances several arguments in seeking reversal of the Fees Decision. First, Vanella claims that the Court's decision in *Judicial Watch I* essentially decided the issue when it recognized that the Chief Deputy can determine whether a public body has met its burden.[92] He states that a "cabined reading" of "'any action'" that only includes FOIA disputes originating in court has been rejected by the Court.[93] Vanella relies upon the statutory interpretation cannon of "consistent usage," arguing because § 10005(c) applies to the Chief Deputy decisions and court actions, it follows that subsection (d) must also apply to both. Vanella's argument is simply too strained.

As argued above, § 10005(d) clearly states that a "court may award fees and costs to a successful plaintiff." Vanella can call himself a plaintiff all he wants, but there was never a lawsuit and he was not a plaintiff. His argument simply flies in the face of the plain language of subsection (d). *Judicial Watch I* did not address this issue and neither it nor Vanella's statutory cannon argument support a finding that contradicts the statute's plain language. Vanella's argument likewise ignores the legislative history that places the argument beyond debate.

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[92] OB at 34.
[93] *Id.*

In a footnote, Vanella notes that no statute in Delaware "completely cuts off" fees "simply because a party pursued an administrative remedy before going to Superior Court."[94] But this observation supports the Fees Decision, if it is even relevant. Section 715 of Title 19 is a clear example of the General Assembly expressly making fees available to a prevailing party *in a lawsuit*. That such claims have to be exhausted prior to *filing suit* only supports DSP's position. Vanella was fully capable of pursuing his cause as a lawsuit following the Chief Deputy's decision. He chose instead the more expedited procedure of obtaining a Superior Court OTRA of the Chief Deputy's determination.

Vanella next claims that a Superior Court decision in an OTRA would be an advisory opinion. This is not so. A Superior Court decision ruling that an agency violated FOIA in denying a records request addresses an actual controversy—whether the documents are subject to FOIA and must be produced. Should the agency choose to be obstinate in the face of such a judicial determination, a *plaintiff* then suing that agency would no doubt have a good claim for attorneys' fees. But the decision from the Superior Court would be anything but advisory.[95]

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[94] OB at note 10.

[95] An advisory opinion would result if, for example, an agency conceded and produced records during the course of the appeal, but one of the parties insisted on not dismissing the appeal so they can obtain decision. Further, Vanella later says that actions against state entities could "never be brought as lawsuits." OB at 37. This assertion is without any basis in the statute. As argued above, after an expedited

For the above reasons and those set forth in the Fees Decision, this Court should affirm the Superior Court.

quick look from the Attorney General, Vanella and anyone in his position have the right to initiate a suit. 29 *Del. C.* § 10005(b) (allowing for suit and requiring only an appeal to the Attorney General with a *permissive—not mandatory—*appeal to the Superior Court).

CONCLUSION

At all levels of government, transparency and accountability are critical for a functioning democracy. That is true for all branches of government and for all executive agencies, not just police departments and their officers. But FOIA does—and rightfully should—have its limits. Those limits can be fairly debated, but there should be no debate where disclosure of records does little to facilitate the observation and examination of the performance of our institutions, but does much to intrude upon and erode the personal privacy of individuals simply trying to do their jobs while not putting their safety and privacy, and that of their families, at unnecessary risk.

FOIA appeals facilitate an efficient and cost-free mechanism for any Delaware citizen to receive an expeditious review of a FOIA denial. Inserting a claim for fees and costs into that system is not warranted by the plain language of the statute, its legislative history, or the purpose behind the administrative appeal process.

For the above reasons, and those advanced in extensive briefing below, DSP respectfully urges this Court to affirm the Merits Decision and the Fees Decision of the Superior Court in this administrative appeal.

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