

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KRISTINA KELLY,)
)
 Appellant,)
)
 v.) C.A. No. N25A-08-006 DJB
)
 DELAWARE DEPARTMENT)
 OF JUSTICE,)
)
 Appellee.)
)

Date Submitted: February 27, 2026
Date Decided: May 29, 2026

**Memorandum Opinion On Review Pursuant to 29 Del. C. § 10005 -
DENIED**

*Andrew Bernstein, Esquire, American Civil Liberties Union of Delaware,
Wilmington, Delaware, on behalf of Appellant.*

*Patricia Davis, Esquire (argued), Stacey Bonvetti, Esquire, Delaware Department
of Justice, Appellee.*

BRENNAN, J.

Appellant Kristina Kelly (hereinafter “Kelly” or “Appellant”) filed this civil action appealing the denial of her request for disclosure of certain public records made pursuant to pursuant to 29 *Del C.* § 10001, et seq., Delaware’s Freedom of Information Act (hereinafter “FOIA”). Kelly’s request was directed to the Delaware Department of Justice (hereinafter “DDOJ” or “Appellee”) and sought information regarding any communication which mentions her name, and the name of another, in connection to a Town Hall that was being hosted by the American Civil Liberties Union of Delaware (hereinafter “ACLU-DE”) and the Attorney General Kathleen Jennings. Based upon prior interactions between the DDOJ and Kelly, and comments overheard at the townhall by others, Kelly suspected there might have been discussion between the named parties in her request regarding Kelly’s attendance at the Town Hall. As a result, Kelly sent a FOIA request to the DDOJ for public records regarding same.

The DDOJ sits in the unique position where it is statutorily tasked with reviewing denials of FOIA requests to State agencies pursuant to 29 *Del. C.* § 10005(b). Under Section 10005, a person denied access can appeal to the Chief Deputy of the DDOJ for review, upon which time the burden is placed on the denying State agency to show a FOIA exception exists. Section 10005 was amended in 2010 to provide review and permit the DDOJ decline representation to a state agency it feels wrongfully denied access to public records under Delaware’s FOIA laws.

Further, in this scenario, the DDOJ was given the option of filing suit against the denying agency.

Section 10005(b) is silent, however, as to the procedure applicable to the scenario – as we are faced with here – where the DDOJ is the denying agency. The DDOJ has interpreted this section as providing review of a denial in Superior Court, thus triggering the burden to provide an Affidavit in support of the denial at the appellate state. Kelly interprets this Section as requiring an affidavit or sworn statement at the time of the denial. Kelly seeks costs and the release of the requested information in her appeal. In response to Kelly’s appeal, the DDOJ provided an Affidavit attesting to the fact that the requested material does not exist. Therefore, any ultimate challenge to the review of the denial is moot. However, Kelly challenges whether the DDOJ can meet its burden for denial, arguing the Court should not consider the late filed Affidavit.

In a matter of first impression, the Court grants permissible leeway that has traditionally been afforded to an agency when interpreting a statute that is unclear or silent to an issue. The DDOJ’s interpretation was reasonable, thus costs or other sanctions are not warranted. While it does not seem that best practices were necessarily employed in the handling of this FOIA request, that does not equate to an award of costs or sanctions as Kelly is ultimately unsuccessful in her appeal. Therefore, for the reasons fully stated below, Kelly’s appeal is **DENIED**.

I. Facts and Procedural History

In 2021, Kelly was involved in a series of protests surrounding the death of Lymond Moses and the subsequent DDOJ investigation into the police-involved shooting. The DDOJ ultimately sought an injunction against Kelly, due to her protests outside the personal residence of a DDOJ employee and streaming her protests on the Facebook live feature of her social media accounts, which at times, involved the employee's parents and children in her protest attempts. The DDOJ's suit was brought in the Court of Chancery, who denied a request for a temporary restraining order, but granted expedited review of the case.¹ Ultimately, the parties resolved that litigation by Stipulation and the case was voluntarily dismissed by the DOJ.²

On June 3, 2025, the ACLU-DE hosted a townhall event with the Attorney General.³ Prior to this event, Kelly created a series of posts on her personal Facebook account regarding her intentions to attend the Townhall and ask the Attorney General questions.⁴ Kelly ultimately did not attend the Townhall,⁵ but was told from unknown sources that members of the Wilmington Police Department

¹ *Kelly v. Delaware Department of Justice*, N25A-08-006 DJB, Docket Item (hereinafter "D.I.") 1, Ex. 3.

² *Id.* at Ex. 4.

³ D.I. 1., ¶ 18.

⁴ *Id.* at ¶ 19.

⁵ *Id.* at ¶ 20.

were overheard discussing that were only at the event to prevent any disruption by Kelly.⁶ On her representation, this formed Kelly's basis to submit her FOIA request to the DDOJ on June 5, 2025, believing that there were prior communications concerning her between the DDOJ and the Wilmington Police Department.⁷

Kelly's request was in written form and was directed to the DDOJ, which sought:

...all communications electronic or otherwise from May 27th, 2025, till [sic] June 5th, 2025 [sic] from DOJ, Kathleen Jennings or any other State agents to the Wilmington Police Department and/or the Carney administration that include the names Kristina Kelly and/or Keandra McDole and/or in reference to the ACLU townhall held June 3rd, 2025.⁸

On June 25, 2025, the DDOJ denied the request in a letter to Kelly, which stated:

To the extent the DOJ might have these records they would be attorney-client privileged communications, attorney work product materials, or records pertaining to pending or potential litigation that are not "public records" within the meaning of Delaware's Freedom of Information Act, 29 *Del. C.* § 10001-10008. Any such records are considered exempt from FOIA as records specifically exempted from public disclosure by statute or common law" [sic] pursuant to 29 *Del. C.* § 10002(o)(6), "records pertaining to pending or potential litigation" pursuant to 29 *Del. C.* § 10002(o)(9), "investigatory files compiled for civil or criminal law-enforcement purposes" pursuant to 29 *Del. C.* § 10002(o)(3) or "criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy" pursuant to 29 *Del. C.* § 10002(o)(4).⁹

The DDOJ went on further to state:

⁶ *Id.* at ¶ 22.

⁷ *Id.* at ¶ 17.

⁸ *Id.* at ¶ 23, Ex. 1 at 1.

⁹ *Id.* at ¶ 24, Ex. 1 at 1.

The DOJ has fully evaluated this matter, and this response is deemed a final determination of your records request by the Chief Deputy Attorney General or his designee. Your administrative remedy to petition the Chief Deputy Attorney General pursuant to 29 *Del. C.* § 10005(b) is therefore exhausted as of the date on this letter. As time limitations apply, you may wish to review your rights and obligations under the Delaware Freedom of Information Act statute at 29 *Del. C.* §§ 10001-10008 and other relevant authority promptly with your legal counsel, if you have chosen to retain counsel....This request is now considered closed.¹⁰

Kelly timely appealed this denial to the Superior Court pursuant to 29 *Del. C.* § 10005(b).¹¹ In her opening brief, filed on October 23, 2025, Kelly maintained her position that the DDOJ failed to provide an adequate explanation as to how the communication records sought fall under the FOIA exemptions and sought disclosure of the requested material and sanctions.¹² Accordingly, Kelly requests the Court: (1) declare that Appellee's failure to disclose the requested records violates 29 *Del. C.* § 10003 and is unlawful; (2) Order Appellee to make the requested records available to Appellant; (3) award Appellant attorneys' fees and costs pursuant to § 10005(d); and (4) grant all other appropriate relief as the Court deems just and proper.¹³

¹⁰ *Id.*

¹¹ D.I. 1.

¹² D.I. 7.

¹³ D.I. 1, 7.

The DDOJ filed its letter Response and corresponding Affidavit on November 12, 2025.¹⁴ Kelly filed her Reply Brief on November 25, 2025.¹⁵ Oral argument was heard before the Court on February 27, 2025.¹⁶ This matter is now ripe for decision.

II. STANDARD OF REVIEW

Under 29 *Del. C.* § 10005(b) “[a]ny citizen denied access to public records as provided in this chapter may bring suit within 60 days of such denial.”¹⁷ Section 10005(c) further provides “in any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records.”¹⁸ An appeal from the DDOJ’s Chief Deputy’s decision to the Superior Court is “on the record.”¹⁹ The Court undertakes *de novo* review of any issues of statutory interpretation, which are questions of law and not fact.²⁰

III. ANALYSIS

The Delaware General Assembly enacted the FOIA statute to “further the accountability of government to the citizens of this State” by helping to ensure that,

¹⁴ D.I. 8, Affidavit of FOIA Coordinator (hereinafter “Truitt Affidavit”).

¹⁵ D.I. 9.

¹⁶ D.I. 14.

¹⁷ 29 *Del. C.* § 10005(b).

¹⁸ 29 *Del. C.* § 10005(c).

¹⁹ *Flowers v. Office of the Governor*, 167 A.3d 530, 541 (Del. Super. 2017), citing 29 *Del. C.* § 10005(b), (e).

²⁰ *Flowers*, 167 A.3d at 541.

“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.”²¹ In this vein, FOIA requires all “public records” as defined by 29 *Del. C.* § 10002(1), be disclosed upon a proper request.

A “public record” is defined as:

information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.²²

However, this access to records is not unfettered.²³ Not all public records are subject to disclosure under FOIA. FOIA specifically exempts nineteen (19) different categories of records from disclosure.²⁴ The FOIA Statute requires the requested agency to review each request and determine, from its face, if the requesting party has established a valid request under FOIA.²⁵ If not, there is no further record required to be provided in response by the agency. However, if the agency

²¹ 29 *Del. C.* § 10001.

²² *Ryle v. Delaware Dep't of Just.*, 2020 WL 5230736, at *1 (Del. Sept. 1, 2020).

²³ *Board of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. Ct. 2002).

²⁴ 29 *Del. C.* § 10002(o)(1)-(19).

²⁵ *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1010 (Del. 2021) (citing 29 *Del. C.* § 10005(c)).

determines a disclosure exception is triggered, the agency must articulate the reason for denial.²⁶

Section 10005 of Title 29 provides the framework for challenges to the denial of FOIA requests. A party has sixty (60) days from any denial to “bring suit” in a “court of competent jurisdiction.”²⁷ However, upon receiving a denial of the requested records, a citizen may challenge the agency’s stated reason by seeking review by the Chief Deputy Attorney General with the DDOJ.²⁸ An appeal of an adverse decision may be presented on the record to the Superior Court within 60 days of Attorney General’s decision:

...Notwithstanding the foregoing, a person denied access to public records by an administrative office or officer, a department head, commission, or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title must within 60 days of denial, present a petition and all supporting documentation to the Chief Deputy as described in subsection (e) of this section. Thereafter, the petitioner or public body the Attorney General is otherwise obligated to represent may appeal an adverse decision on the record to the Superior Court within 60 days of the Attorney General's decision.²⁹

Section 10005(e) delineates the process for petitioning the DDOJ for review and is detailed and informative in the situation where a citizen is challenging the

²⁶ 29 Del. C. § 10003(h). *See also Flowers*, 167 A.3d at 542.

²⁷ 29 Del. C. § 10005 (b).

²⁸ *Id.*

²⁹ *Id.*

denial of a FOIA request from a State agency other than the DDOJ. Section 10005(e)

reads:

Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur. The petition shall set forth briefly the nature of the alleged violation. Upon receiving a petition, the Attorney General shall promptly determine whether the petition is against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title. Every petition against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title shall be referred to the Chief Deputy Attorney General who shall, within 20 days of receiving the petition, render a written determination to the petitioner and the public body involved declaring whether a violation has occurred or is about to occur. If the Chief Deputy finds that a violation of this chapter has occurred or is about to occur, the Attorney General shall not represent the public body in any appeal filed pursuant to this chapter for such violation if the public body the Attorney General is otherwise obligated to represent fails to comply with the Chief Deputy's determination. Regardless of the finding of the Chief Deputy, the petitioner or the public body may appeal the matter on the record to Superior Court. In every other case, the Attorney General shall, within 10 days, notify in writing the custodian of records or public body involved. Within 20 days of receiving the petition, the Attorney General shall make a written determination of whether a violation has occurred or is about to occur, and shall provide the citizen and any custodian of records or public body involved with a copy of the determination. If the Attorney General finds that a violation of this chapter has occurred or is about occur, the citizen may: (1) File suit as set forth in this chapter; or (2) request in writing that the Attorney General file suit on the citizen's behalf. If such request is made, the Attorney General may file suit, and shall within 15 days notify the citizen of the decision to file suit, unless the custodian of records or public body has agreed to comply with this chapter. The citizen shall have the absolute right to file suit regardless of the determination of the

Attorney General, and may move to intervene as a party in any suit filed by the Attorney General.³⁰

This section is silent, however, as to the review process when the DDOJ is the denying agency.

A. THE DDOJ’S BURDEN UNDER 29 DEL. C. § 10005.

Kelly contends that the DDOJ has failed to meet its burden of proof under 29 *Del. C.* § 10005(c) as it failed to “provide a sworn record to this Court with a factual basis for its denial.”³¹ As noted, the DDOJ only created its “record” upon responding to Kelly’s appeal by attaching an Affidavit of the DDOJ FOIA coordinator (hereinafter “the Affidavit”), which stated the factual basis for the denial of Kelly’s request. The Affidavit swears to the search of the requested platforms and to the fact that there are no records that exist that are responsive to Kelly’s FOIA request.

Kelly argues this Affidavit was required at the time of the initial denial pursuant to 29 *Del. C.* 10005(b) and should not now be considered by the Court. Accordingly, Kelly argues the DDOJ cannot satisfy its burden of proof under Section 10005(c). The DDOJ responds that their obligation to create a record via Affidavit under Section 10005 was not triggered upon its initial denial, but upon Kelly’s appeal to Superior Court, as that is the first option for meaningful review due to the DDOJ being the requested agency. Both parties cite to the Delaware Supreme Court’s

³⁰ 29 *Del. C.* § 10005(e).

³¹ D.I. 7 at 7.

decision in *Judicial Watch, Inc. v. University of Delaware*, in support of their respective positions, but for different reasons.

In *Judicial Watch, Inc. v. Univ. of Delaware*, the Delaware Supreme Court determined that, “unless it is clear on the face of the request that the demanded records are not subject to FOIA, satisfaction of Section 10005(c)’s burden of proof requires a statement made under oath.”³² This requirement ensures “the meetings and records of governmental entities are available to the public” and “further[s] the accountability of government to the citizens of this State.”³³ The Court further reasoned that, “if a public body is to deny citizens an opportunity to ‘observe the performance of public officials and to monitor the decisions that are made by such officials,’ the public body must satisfy its burden of proof under FOIA in a manner that tracks the seriousness of the statute's purpose and policy.”³⁴ The Court ultimately held that “[s]tatements made under oath, such as through a sworn affidavit, accomplish that goal; they bear earmarks of reliability and instill a measure of seriousness in the affiant by subjecting the affiant to the risk of penalty of perjury.”³⁵

³² *Jud. Watch, Inc.*, 267 A.3d at 1010.

³³ *Jud. Watch, Inc.*, 267 A.3d at 1011.

³⁴ *Id.* (citing 29 *Del. C.* § 10001).

³⁵ *Id.* (citing 11 *Del. C.* § 1221).

The *Judicial Watch* Court provided established that “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” in order to meet the burden established by 29 *Del. C.* § 10005(c). An agency must state under oath “the efforts taken to determine whether there are responsive records and the results of those efforts.”³⁶ The DDOJ has not argued that Kelly’s request was clear on its face that it fell outside the scope of FOIA, therefore the burden is appropriately placed upon it to justify the denial.

B. THE AFFIDAVIT ULTIMATELY SUBMITTED WILL SUFFICE TO SATISFY THE DDOJ’S BURDEN IN DENYING THE FOIA REQUEST.

Kelly argues that no other records or evidence beyond the certified record containing the original FOIA request and subsequent denial may be considered by this Court in deciding this matter; therefore Kelly requests the Court disregard the Affidavit filed by the DDOJ in the Superior Court proceedings.³⁷ Alternatively, Kelly argues that even if the Court may properly consider the DDOJ’s letter and Affidavit filed on November 12, 2025, the DDOJ has failed to meet their burden because the Affidavit “is insufficient, in both the search it described and the search it failed to detail.”³⁸

³⁶ *Jud. Watch, Inc.*, 267 A.3d at 1011 (citing 11 *Del. C.* § 1221).

³⁷ D.I. 9

³⁸ *Id.*

The Supreme Court of Delaware in *Judicial Watch* was presented with a matter of first impression and aptly afforded grace in the DDOJ's interpretation of the FOIA statute. The Court provided the University an opportunity to submit an Affidavit to support its position in order to create a proper record upon which the Superior Court could consider as part of the plaintiff's FOIA denial challenge. That grace is warranted here. Section 10005 has been previously amended in an attempt to bring clarity to a different scenario inadvertently created by the FOIA act; an inequity brought about by the DDOJ reviewing a decision of an agency that they are required to represent. In *Flowers v. Office of the Governor*, the Superior Court commented:

In order to remedy this situation, the 2010 amendment enlists the Chief Deputy Attorney General ("Chief Deputy") to determine if a state public body has violated FOIA. If the Chief Deputy determines that there was a violation, the Attorney General may not represent that body if it fails to correct that violation. The amendment permits either party to appeal the Chief Deputy's decision to the Superior Court on the record. While the amendment does address the perceived inequity, it also presents a number of interpretive issues. Some of those issues are addressed here. Others necessarily must await future litigation.³⁹

It appears as if this case is part of the future litigation anticipated in *Flowers*. Because Delaware's FOIA is silent as to when the DDOJ's duty is triggered to create a record for subsequent review when it is the denying agency, it was reasonable for

³⁹ *Flowers*, 167 A.3d at 531.

the DDOJ to interpret its obligation as being triggered when review is sought in Superior Court.⁴⁰

This is a unique scenario. In most instances, FOIA requests are made to governing bodies and if denied, any challenge of that denial will be to the Chief Deputy Attorney General for a review and decision on the matter, prior to any further potential appeal to Superior Court.⁴¹ Here, to the extent the FOIA request was made to the DDOJ, it would result in a situation where the DDOJ was both the requested agency as well as the reviewing party. Due to this dichotomy, the DDOJ interprets 29 *Del. C.* § 10005(b) as only requiring an Affidavit when the denial is appealed to the Superior Court. When questioned about this practice at argument, and whether it would be the best practice to simply provide an Affidavit for each denial the DDOJ provides, the DDOJ recounted the plethora of frivolous, inartfully worded and disingenuous FOIA requests it receives regularly, and cited a lack of resources to comply with such an interpretation. Therefore, the DDOJ has developed this

⁴⁰ It is notable, however, that the language provided to Kelly in the DDOJ's letter leaves the situation somewhat murky. The DDOJ does alert Kelly to her appellate rights but additionally cites that the review of the Chief Deputy is deemed final, which could cause foreseeable confusion regarding whether the record below was deemed complete at that time.

⁴¹ 29 *Del. C.* § 10005(b).

interpretation of §10005(b) to balance the conservation of resources with the public policy of disclosing permissible public information.⁴²

The facts of the *Judicial Watch, Inc. v. University of Delaware*⁴³ surrounded a FOIA request to the University of Delaware for records related to the donation of then-Vice President Biden of his Senatorial Papers to the University. When the University denied the request, citing exceptions pursuant to 29 *Del. C.* § 10002, Judicial Watch, pursuant to Section 10005(b), challenged the denial to the DDOJ. The DDOJ affirmed the denial in an opinion, which was ultimately appealed to the Supreme Court of Delaware, in part, on the basis that the DDOJ based its opinion on uncorroborated statements and therefore, did not have a sufficient record before it to conclude the denial was legally appropriate.

The case was remanded back to the Superior Court to permit the University an opportunity to “create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.”⁴⁴ The DDOJ’s reliance on Attorney General Opinion 25-IB06, citing *Judicial Watch*,

⁴² By way of example, the DDOJ cited to occasions where it receives various requests for criminal background information of paramours of the requesting citizen’s loved ones. Whether or not such a scenario constitutes one that is clear on its face that it is not subject to disclosure was not challenged.

⁴³ 267 A.3d 996 (Del. 2021), *see also Judicial Watch v. University of Delaware*, 2022 WL 10788530 (Del. Super. Ct. 2022).

⁴⁴ *Judicial Watch, Inc.*, 267 A.3d at 1013.

while non-binding,⁴⁵ provides an example of consistency in the DDOJ’s approach to these requests.⁴⁶ While the Attorney General Opinion 25-IB05 involves a sufficiently challenge to a FOIA denial, as an affidavit was not provided, albeit with a request made to a state agency other than the DDOJ. The DDOJ opinion, issued when Chief Deputy review was sought, interprets *Judicial Watch* to not require a supporting affidavit or sworn statement until a denial is challenged. That is consistent with the DDOJ’s position here. The consistency of the DDOJ in its interpretation of FOIA requirements assures the Court that its position here is not selectively applied to Kelly, given the background presented to the Court.

Consequently, under the direction of *Judicial Watch*, it is appropriate for the Court to now consider the Affidavit of the DDOJ, given this unique issue. The Affidavit outlines the steps taken by the DDOJ in connection with Kelly’s FOIA request.⁴⁷ Specifically, the Affidavit swears to that fact that “[the affiant] personally reviewed the June 5, 2025, records request from Kristina Kelly,” and that the affiant “[was] not aware of any capability to search ‘all communications electronic or otherwise from the DOJ or ‘any other state agency.’”⁴⁸ The Affidavit describes the

⁴⁵ *Vanella on Behalf of Delaware Call*, 2024 WL 5201305, at *13.

⁴⁶ <https://attorneygeneral.delaware.gov/2025/01/21/25-ib06-1-21-25-foia-opinion-letter-to-randall-chase-re-delaware-general-assembly-division-of-legislative-services/>

⁴⁷ D.I. 8, Affidavit.

⁴⁸ *Id.*

steps taken to search the Attorney General's email account to determine whether there were any communications concerning the townhall mentioning Kelly.⁴⁹ The Affidavit went a step further and described the only email concerning the townhall in question that was recovered, which did not mention Kelly.⁵⁰

Until there is either legislative clarification as to whether the DDOJ may be permitted to provide this Affidavit upon appeal, or unless the Delaware Supreme Court upon review determines otherwise, the DDOJ's approach, and rationale behind it, is reasonable. When the DDOJ is itself the denying agency, the record can be created upon challenge a challenge to the DDOJ determination. Meaningful review is afforded in Superior Court, and if successful, an Appellant may be afforded costs.

Therefore, the DDOJ has satisfied its burden of proof justifying its denial, and any challenge to the reasons for denial is now moot, as sworn evidence has been provided that the DDOJ is not in possession of any responsive records requested by Kelly.⁵¹ The Affidavit stated the efforts taken by the DDOJ to determine whether

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ In her Reply, Kelly challenged the DDOJ's responsive pleading as violative of this Court's Order setting a briefing schedule and Superior Court Civil Rule 107(f). This argument was addressed and dismissed on the record. In dismissing this issue, the Court cited general the courtesies extended generally in the Delaware legal practice, this Court's occasioned practice of accepting letter submissions in lieu of formal motion responses, as well as the general public policy to decide cases on the merits and not on a technicality. While full briefing is preferred and helpful to the Court, it was not appropriate to strike the DDOJ pleading as violative of any Court Rule or Order.

responsive records existed and the results. Kelly's alternative argument that the Affidavit does not support a legal finding is rejected, as no such records exist, therefore nothing can be produced and no exceptions can apply.

C. AN AWARD OF COSTS IS NOT WARRANTED UNDER 29 DEL. C. § 10005(d).

Under 29 Del. C. § 10005(d), “[t]he court may award attorney fees and costs to a successful plaintiff of any action brought under this section.”⁵² While the facts of this appeal begs the question as to whether this litigation could have been avoided had the DDOJ simply stated from the start there were no records in existence, that is not determinative of the issue of costs.⁵³ Kelly was not successful in her challenge to the DDOJ's FOIA denial, therefore costs or other sanctions are not appropriate.

IT IS SO ORDERED.



Danielle J. Brennan, Judge

⁵² *Jud. Watch, Inc.*, 267 A.3d at 1012 (citing 29 Del. C. § 10005(d)).

⁵³ The vague language used by the DDOJ in its denial, namely “[t]o the extent the DOJ might have these records...” is disfavored. More articulate language is urged to be used by the DDOJ in hopes that clarity can be provided to the average citizen making these requests. This should also result in avoiding unnecessary litigation before the Court.