

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AMERICAN CIVIL LIBERTIES)
UNION OF DELAWARE,)
)
Appellant,)
)
v.)
)
DELAWARE DEPARTMENT OF)
JUSTICE)
)
Appellee.)

C.A. No. N25A-07-002 CLS

Date Submitted: March 25, 2026
Date Decided: June 11, 2026

MEMORANDUM OPINION

On Appeal from the Delaware Department of Justice,
REVERSED.

Andrew Bernstein, Esquire of the AMERICAN CIVIL LIBERTIES UNION OF DELAWARE,
Attorney for Appellant.

Stacey L. Bonvetti, Deputy State Solicitor of the DELAWARE DEPARTMENT OF
JUSTICE, *Attorney for Appellee.*

SCOTT, J.

The American Civil Liberties Union of Delaware (“ACLU”) requested legal fees invoices in connection with a law firm’s representation of the Delaware Department of Corrections (“DOC”) in a federal lawsuit under the Freedom of Information Act (“FOIA”). The Delaware Department of Justice (“DOJ”) denied the request because the ACLU’s representation of the plaintiffs in the federal lawsuit invoked FOIA’s litigation exception. The ACLU now appeals the DOJ’s decision. For the following reasons, the Court finds that this record does not support the DOJ’s justification. Thus, the DOJ’s decision is **REVERSED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 2025, the ACLU sent a letter to the DOJ “seeking information about the DOJ’s procurement of special counsel and invoices paid to special counsel in some legal matters” under FOIA.¹ The ACLU requested the following information:

1. All written policies that govern the process by which DOJ selects a law firm to act as special counsel on DOJ’s behalf. This request seeks policies on how DOJ selects special counsel . . . , not on how billing arrangements between DOJ and special counsel work.
2. All written communication . . . between DOJ and the law firm Saul Ewing regarding that firm’s selection as special counsel in the case *Davis v. Neal*, D. Del. C.A. No. 1:21-cv-01773-GBW. These communications most likely occurred in October and/or November 2021.

¹ R. at 2–3; 29 *Del. C.* § 10001 *et seq.*

3. The legal services agreement between DOJ and Saul Ewing in *Davis v. Neal*.
4. All written communications . . . between DOJ and the law firm Saul Ewing regarding that firm’s selection as special counsel in the case *Flores v. Emig*, D. Del. C.A. No. 1:25-cv-00100-GBW. These communications most likely occurred earlier this year.
5. Copies of all invoices [(the “*Samuel* invoices”)] that Saul Ewing as charged to DOJ in the case *Samuel v. Centene, Corp.*, D. Del. C.A. No. 1:23-cv-01134-GBW-SRF [(“*Samuel*”)]. This includes all invoices from 2023 to the present.
6. Copies of all invoices [(the “*Adger* invoices”)] that Saul Ewing has charged to DOJ in the case *Adger v. Coupe*, D. Del. C.A. No. 1:18-cv-02048-GBW [(“*Adger*”)]. This includes all invoices from 2018 to the present.²

By way of background, the ACLU filed the *Samuel* class action complaint on October 11, 2023, in the United States District Court of Delaware. The complaint alleges that the DOC and private healthcare agencies denied prison inmates their civil rights under the Eighth and Fourteenth Amendments of the United States Constitution. The DOC retained the law firm, Saul Ewing, for its legal representation in the case. The parties are still in the discovery stage of litigation.

On April 29, 2025, the DOJ provided the requested *Adger* invoices—albeit heavily redacted—but did not provide the *Samuel* invoices, citing FOIA’s litigation exception as its justification.³ Consequently, the ACLU filed an appeal to this Court

² R. at 4.

³ R. at 10–222; Appellant’s Opening Br., D.I. 8, Ex. A (“Opening Br.”); 29 *Del. C.* § 10002(o)(9).

on July 8, 2025, under 29 *Del. C.* § 10005(b).⁴ On August 25, 2025, the DOJ's counsel informed the ACLU that the litigation exception applied to the *Samuel* invoices because the ACLU, and more specifically requesting counsel, is representing the plaintiffs in the *Samuel* case.⁵

On October 9, 2025, the ACLU filed its Opening Brief on appeal of the DOJ's decision not to disclose the *Samuel* invoices.⁶ The DOJ filed its Answering Brief on October 29, 2025.⁷ The ACLU filed a Reply Brief on November 12, 2025.⁸ The Court held oral argument on March 25, 2026. The matter is now ripe for decision.

II. PARTIES' CONTENTIONS

The ACLU makes two arguments on appeal. First, it argues that the *Am. Civ. Liberties Union of Del. v. Danberg*⁹ test used by Delaware courts to determine whether the litigation exception applies under FOIA should be overruled as contrary to the policy, text, structure, and legislative history of FOIA.¹⁰ Instead, the ACLU asks the Court to adopt a brightline rule that the litigation exception only applies to attorney work product.¹¹ Alternatively, the ACLU asks the Court to order that the

⁴ Notice of Appeal, D.I. 1.

⁵ Opening Br. at Ex. B.

⁶ *See generally id.*

⁷ *See generally* Appellee's Answering Br., D.I. 9 ("Answering Br.").

⁸ *See generally* Appellant's Reply Br., D.I. 11 ("Reply Br.").

⁹ 2007 WL 901592, at *3–4 (Del. Super. Mar. 15, 2007)

¹⁰ Opening Br. at 6.

¹¹ *Id.*

DOJ disclose the *Samuel* invoices because they are not related to the subject matter of the litigation.¹²

In contrast, the DOJ argues that the ACLU's argument for overturning the *Danberg* test is not "compelling" because the *Danberg* test is a precedential, straightforward, and narrowly tailored analysis for determining whether information falls under FOIA's litigation exception.¹³ Further, the DOJ argues that the ACLU is not a "citizen" for purposes of its FOIA request because it is attempting to circumvent denied discovery requests, rather than seeking the invoices to advance Delaware citizens' right to know.¹⁴

III. STANDARD OF REVIEW

Under 29 *Del. C.* § 10005(b), a petitioner may appeal the denial of a FOIA request by the DOJ to this Court. "An appeal of a FOIA request occurs 'on the record.'"¹⁵ In any appeal under FOIA, "the burden of proof shall be on the custodian of records to justify the denial of access to records[.]"¹⁶ "When interpreting a statute

¹² Reply Br. at 9–10.

¹³ Answering Br. at 8–16.

¹⁴ *Id.* at 17–18.

¹⁵ *Am. Civ. Liberties Union of Del. v. Martin*, 2026 WL 1392382, at *3 (Del. Super. May 18, 2026) (quoting *Flowers v. Off. of the Governor*, 167 A.3d 530, 540 (Del. Super. 2017)).

¹⁶ 29 *Del. C.* § 10005(c); see also *Danberg*, 2007 WL 901592, at *3 (citing *Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 781 (Del. Super. 1995)).

such as FOIA, ‘the most important consideration for a court [] is the language of the General Assembly used in writing the statute.’”¹⁷

IV. DISCUSSION

FOIA provides “Delaware’s citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities.”¹⁸ FOIA aims to “ensure government accountability, inform the electorate and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know.”¹⁹ The “statute’s declaration of policy . . . guarantee[s] that Delaware citizens ‘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.’”²⁰

A. THE PENDING OR POTENTIAL LITIGATION EXCEPTION

Despite FOIA’s policies, the statute provides for limitations on the public’s access to public records in certain circumstances, creating “barrier[s] to the public’s

¹⁷ *Martin*, 2026 WL 1392382, at *3 (quoting *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021)).

¹⁸ *Jud. Watch, Inc.*, 267 A.3d at 1004 (citations omitted); 29 *Del. C.* § 10003(a).

¹⁹ *Danberg*, 2007 WL 901592, at *3 (quoting *Mell v. New Castle Cnty.*, 835 A.2d 141, 146 (Del. Super. 2003)) (internal quotation marks omitted).

²⁰ *Jud. Watch, Inc.*, 267 A.3d at 1004 (quoting 29 *Del. C.* § 10001).

right to access information . . . [that] must be construed narrowly.”²¹ Among these limitations, and at issue here, is the pending or potential litigation exception.²² The litigation exception provides that “records pertaining to pending or potential litigation which are not records of any court” are not considered accessible public records.²³ For “pending litigation,” this Court has discerned that:

[t]he pending litigation exception to FOIA addresses a practical reality: when parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance ‘the public's right to know,’ but rather to advance their own personal stake in the litigation. Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure.²⁴

The *Danberg* Court observed that the “potential litigation” exception is “more complicated” than construing the pending litigation exception given that “a government agency always faces some threat of suit.”²⁵ Accordingly, this Court adopted a two-prong test to determine whether assertion of the potential litigation exception is justified.²⁶ The test requires the Court to determine whether: (1) litigation is “likely or reasonably foreseeable;” and (2) there is a “clear nexus’

²¹ *Martin*, 2026 WL 1392382, at *3 (quoting *Vanella on Behalf of Del. Call v. Duran*, 2024 WL 5201305, at *3 (Del. Super. Dec. 23, 2024)) (internal quotation marks omitted); 29 Del. C. § 10002(o)(9).

²² 29 Del. C. § 10002(o)(9).

²³ *Id.*

²⁴ *Danberg*, 2007 WL 901592, at *3–4 (quoting *Mell*, 835 A.2d at 147).

²⁵ *Id.* at *4 (internal quotation marks omitted).

²⁶ *Id.*

between the requested documents and the subject matter of the litigation.”²⁷ As mentioned above, the ACLU argues that this test—the *Danberg* test—should be overruled.

i. The Court declines to overrule the *Danberg* test.

The Court finds, and the parties acknowledge, that the circumstances here do not warrant a change in the *Danberg* test, which only applies to the *potential* litigation justification under FOIA. The *Samuel* litigation is ongoing in the District Court of Delaware, so there is no threat of a lawsuit because the lawsuit already exists. As such, the Court applies the pending litigation test from *Mell v. New Castle County* to determine whether, on the record, the ACLU is seeking information that relates to the subject matter of the litigation to advance its position and circumvent discovery in the *Samuel* litigation.²⁸

ii. The *Samuel* invoices do not relate to the pending litigation.

The DOJ contends that the *Samuel* invoices relate to the subject matter of the *Samuel* litigation because the plaintiffs could eventually seek attorneys’ fees down the line in litigation. Further, the DOJ proffers that the ACLU is using the FOIA request to circumvent a discovery dispute that was not decided in the ACLU’s favor in the *Samuel* litigation. The DOJ also claims that acquiescing to the ACLU’s

²⁷ *Id.* (internal citation omitted).

²⁸ 835 A.2d at 147; *see also Danberg*, 2007 WL 901592, at *3–4.

request could be advantageous litigiously for the ACLU in influencing settlement discussions and prolonging litigation. On the other hand, the ACLU argues that the pending litigation exception does not apply to its request “because it does not relate to the discovery or claims at-issue in *Samuel*, nor would such documents confer any litigation advantage to” the ACLU.²⁹ The Court agrees with the ACLU.

Mell is illustrative. There, this Court reviewed a motion to dismiss a petition for a writ of mandamus to compel responses to FOIA requests regarding New Castle County’s transfer of funds and legal invoices from attorneys representing County employees in the investigation.³⁰ When the petitioner filed the writ of mandamus, he was also a plaintiff in a pending Court of Chancery case that sought to enjoin the County “from authorizing payment of certain legal fees incurred by individual employees of the County in connection with a federal investigation[.]”³¹ Before the Court of Chancery ordered a stay of discovery in that litigation, plaintiffs made discovery requests for records relating to the transfer of County funds to pay for legal fees and how those funds were disbursed.³² The County claimed that the pending litigation exception applied to the invoices for legal fees, and the Court agreed, because the FOIA request for the “invoices relate[d] directly to the matters

²⁹ Reply Br. at 9.

³⁰ 835 A.2d at 142.

³¹ *Id.*

³² *Id.* at 142–43.

in controversy in the Chancery litigation.”³³ The facts here are distinguishable from *Mell*.

Unlike *Mell*, the relationship between the *Samuel* invoices and the litigation is indirectly related. As the ACLU points out, the amount the State of Delaware spent on legal fees in a case is irrelevant to the constitutionality of the healthcare provided in Delaware prisons. Moreover, the ACLU is not using FOIA to advance its clients’ litigation in the District Court of Delaware. First, the DOJ does not specify whether the discovery dispute concerned the *Samuel* invoices or anything related. Simply stating that a discovery dispute occurred is insufficient. Further, the ACLU states, and the DOJ does not challenge, that the discovery dispute was based on another *Samuel* defendant’s noncompliance with electronic discovery and production requests, and had nothing to do with the DOC.³⁴ The Court also adds that the DOJ’s assertions that the ACLU would be advantaged by the *Samuel* invoices is similarly speculative and unsupported. Therefore, on this record, the DOJ has not properly invoked the pending litigation exception under FOIA.

B. THE ACLU HAS STANDING

Finally, the Court is unpersuaded by the DOJ’s contention that the ACLU is not a “citizen” under 29 *Del. C.* § 10003(a). Section 10003(a) provides that access

³³ *Id.* at 149.

³⁴ Reply Br. at 9–10.

to public records “shall not be denied to any citizen.” The DOJ relies on *Off. of Pub. Def. v. Del. State Police*³⁵ to argue that the ACLU is not a citizen because it is seeking to advance its “own client’s litigation and not [its] historical or current mission.”³⁶

Primarily, the Court finds that the DOJ has waived any challenge to the ACLU’s citizenship under FOIA. The ACLU frequently makes FOIA requests to the DOJ and other public bodies, and the DOJ has never raised issues with the ACLU’s standing previously. For that reason, the Court finds that this argument is waived.

Nevertheless, the DOJ’s argument under *Off. of Pub. Def.* is also unavailing. There, this Court held that the Public Defender’s office was not a citizen for purposes of FOIA because the materials requested and the motive behind the request was self-serving as opposed to furthering the public’s right to know the information.³⁷ In *Am. Civ. Liberties Union v. City of Wilmington*, however, this Court held that absent a claim that the requester was “not acting in FOIA’s spirit[,]” “using the corporate form to circumvent FOIA’s requirements, or . . . do anything prohibited by FOIA[,]” the ACLU has standing to request information under FOIA.³⁸ The Court

³⁵ 2003 WL 1769758, at *1 (Del. Super. Mar. 31, 2003).

³⁶ Answering Br. at 18.

³⁷ 2003 WL 1769758, at *2–3.

³⁸ 2012 WL 5358584, at *1 (Del. Super. Sept. 27, 2012).

distinguished its position from the *Off. of Pub. Def.* by reasoning that the ACLU, unlike the Public Defender's office, is not a state agency.³⁹

Here, the ACLU has standing to request the *Samuel* invoices. First, as discussed previously, nothing on this record shows that the ACLU's FOIA request was an attempt to advance its clients' position in the *Samuel* litigation, circumvent FOIA's requirements using its corporate form, or do anything FOIA prohibits. In addition, it is evident that the ACLU is acting in the spirit of FOIA given that it is not a state agency and commonly makes FOIA requests. Hence, the Court rejects the DOJ's argument that the ACLU does not have standing.

CONCLUSION

In sum, the DOJ's justification that 29 *Del. C.* § 10002(o)(9) applies to the *Samuel* invoices is not sufficiently supported by this record. For the foregoing reasons, the DOJ's denial of the request for the *Samuel* invoices is **REVERSED**. The DOJ must disclose the *Samuel* invoices to the ACLU under FOIA.

IT IS SO ORDERED.

/s/ Calvin Scott
Judge Calvin L. Scott, Jr.

³⁹ *Id.*