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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE UNIVERSITY OF DELAWARE'S CORRECTED ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Pursuant to 29 Del. C. § 10005(e),[1] Judicial Watch, Inc. and the Daily Caller News Foundation (together, the "Appellants") appealed to the Superior Court from Attorney General's Opinions Nos. 20-IB19 and 20-IB20 ("AG Opinions"), each of which concluded that the University of Delaware (the "University") had not violated the Freedom of Information Act ("FOIA") when it denied Appellants' separate requests for: a) the U.S. Senate records of Joseph R. Biden (the "Senatorial Papers"); b) records or communications about the Senatorial Papers, including "logs or sign-in sheets" identifying visitors who might have inspected the Senatorial Papers;[2] and c) communications on any subject between the University and former Vice President Biden or his representative. On January 4, 2021, the Superior Court affirmed the AG Opinions. Appellants' appeal to this Court was timely.[3]

Despite the express command of Delaware's FOIA that the University must provide public access only to its records "relating to the expenditure of public [*i.e.*

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1 Delaware's Freedom of Information Act is codified at Chapter 100 of the Delaware Code's Title 29 and will be hereinafter referred to as "FOIA § ___."

2 The Superior Court rejected Appellants' claim regarding this particular FOIA demand and Appellants have not challenged that decision in this appeal.

3 *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

State][4] funds," Appellants claim they are entitled to inspect documents that came into the University's possession only because a former U.S. Senator donated them to the University's library for archive purposes. There is no reason to believe that the documents have anything to do with the University's expenditure of public funds and, indeed, the Appellants' requests do not seek information about the University's expenditure of State funds.

For those reasons, the requests were properly denied on their face as a matter of law, without any review of the Senatorial Papers. That being the case, the appeal can be rejected without further analysis and Appellants' inaccurate claims – that the University must prove certain facts and failed to do so – need not be considered.

Alternatively, and adopting *arguendo* the Appellants' distorted interpretation of FOIA suggesting that the Senatorial Papers were public records if, for example, the librarian's salary was paid with State funds,[5] the University's response, delivered by an individual who serves as Deputy General Counsel, Associate Vice President, and designated FOIA Coordinator, properly informed Appellants that the requested

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[4] "'Public funds' are those funds derived from the State or any political subdivision of the State." 29 Del. C. §10002(k).

[5] It is undisputed that, for the year in question, the State contributed approximately 11% of the University's annual budgeted expenditures. A-115.

documents did not "relate to the expenditure of public funds." Nothing further is required under FOIA.

SUMMARY OF THE ARGUMENT

1. ***Appellants:*** The Superior Court erred by improperly shifting the burden of proof to Appellants in violation of 29 *Del. C.* § 10005(c), which provides, in pertinent part, that "[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records." A-96, A-144.

Appellee: Denied. Appellants ignore another FOIA provision, 29 Del. C. §10003(h)(2), which amplifies the duty of a responding public body. When read together, both the Superior Court and the Attorney General have declared that the public body's duty is properly discharged with a statement of the reasons for which a request has been denied. The University's response met that duty.

2. ***Appellants:*** The University failed to prove that no public funds are utilized for the upkeep of the Biden Senatorial Papers. *Delphi Petroleum, Inc. v. Magellan Terminal Holdings, L.P.,* 177 A.3d 610 (Table) (Del. 2017) (reversing in part and remanding where findings of fact were not supported by the record). A-97 to A-100, A-149.

Appellee: Denied. To the extent that such a matter is relevant to the application of FOIA's requirement that access be provided to records "relating

to the expenditure of public funds," the representations of the University's Deputy General Counsel/Associate Vice President/FOIA Coordinator provided an adequate basis for the University's denial.

3. ***Appellants:*** The Superior Court erroneously concluded that the requested records are not "public records" as defined by 29 *Del.* C. § 10002. A-100, A-149.

Appellee: Denied. Appellants urge an interpretation of FOIA §10002(i) that would stretch it beyond the purpose intended by the General Assembly. Indeed, if Appellants' interpretation were correct, the University's FOIA duties would be no different than those of a state agency – precisely opposite the legislative command and intent.

4. ***Appellants:*** The Superior Court erroneously permitted the University to deny Appellants their legal right to inspect covered documents by failing to perform an adequate search for responsive records. A-105.

Appellee: Denied. FOIA requires that the University provide access only to records "relating to the expenditure of public [*i.e.*, State] funds." If a FOIA request does not seek records "relating to the expenditure of public funds," then no search is necessary, particularly when the records are not those of the University, but rather papers generated by a third party, not connected to the University, who gave

his papers to the University Library for archival purposes.

5. ***Appellants:*** The Superior Court erred by not awarding Appellants their attorneys' fees and costs under 29 *Del. C*. § 10005(d). A-106, A-155.

Appellee: Denied. Only a "successful plaintiff" may be awarded fees under the cited provision. Appellants requests were properly denied; they are not entitled to any award of fees.

STATEMENT OF FACTS

The facts are not in dispute and Appellants do not challenge any fact found by the Court below. However, Appellants' Statement of Facts[6] should be supplemented on three points:

First, the history of the FOIA provision at the heart of this dispute – FOIA §10002(i) – included delicate communications between legislative leaders and the University regarding how to meet the public's right to follow the expenditure of its tax dollars while simultaneously respecting the University's privately-governed status. That history is summarized, as it was to the Superior Court,[7] at pp. 11-14 *infra* and need not be repeated here. Those facts are critical in understanding and interpreting FOIA §10002(i).

Second, this appeal involves Appellants' claim that both the Attorney General and the Court below erred in accepting a factual representation – *i.e.,* that the requested documents did not "relat[e] to the expenditure of public funds"[8] – from

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6 Appellants' Opening Brief at pp. 5 – 12, (cited hereinafter as "AOB at 5 - 12").

7 A-115-118.

8 Delaware's Freedom of Information Act, 29 Del. C. § 10002(i) (cited hereinafter as "FOIA, §10002(i)"), requires that the University provide public access only to "university documents relating to the expenditure of public funds."

"the University's counsel." Indeed, Appellants' opening argument urges that "[u]nsworn representations by counsel are generally *not* sufficient to establish substantive facts in Delaware courts."[9]

Appellants fail to point out that the lawyer in question – Jennifer Becnel-Guzzo, Esq. – is more than "the University's counsel." As Associate Vice President,[10] she is also an officer of the University. Moreover, as the FOIA Coordinator for the University,[11] she is *the* officer charged with the task of responding to FOIA requests.[12] In short, Ms. Becnel-Guzzo's representations were not "[u]nsworn representations by counsel." Instead, she was the officer statutorily bound to speak for the University.

Finally, while Appellants report in their Statement of Facts that the Senatorial Papers consist of "more than 1,850 boxes of archival records,"[13] they failed to mention that, as the Superior Court found, the University has not yet reviewed the

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9 AOB at 14 (emphasis in original).

10 A-43.

11 A-48.

12 FOIA requires that each public body have a FOIA Coordinator, whose duties are to work "in cooperation with other employees and representatives" and "make every reasonable effort to assist the requesting party in identifying the records being sought[.]" FOIA, § 10003(g)(2).

13 AOB at 5.

contents of each box.[14] Thus, the position urged by Appellants, in addition to being inconsistent with the law, would also require that a lengthy archival process be compressed into FOIA time periods.[15]

[14] Opinion at 12-13.

[15] FOIA generally requires responses within fifteen (15) days. In the event that additional time is requested, a "good faith estimate of how much additional time is required to fulfill the request."

ARGUMENT

I. FOIA LIMITS THE UNIVERSITY'S DUTY TO PROVIDE PUBLIC ACCESS ONLY TO THOSE DOCUMENTS WHICH, *BY CONTENT*, "RELATE TO THE EXPENDITURE OF PUBLIC FUNDS." APPELLANTS' REQUESTS WERE PROPERLY REJECTED.

Question Presented

Did the Attorney General and the Superior Court correctly conclude that FOIA's criteria for determining public access to University records can only be met if the phrase "relating to the expenditure of public funds" is read to refer to the content of the record, rather than the source of funds used to house or manage it? Yes. A-120-26.

Standard and Scope of Review

Because the question presented requires a proper interpretation of Delaware's FOIA, this Court's review is *de novo.* "[T]he standard and scope of review is *de novo* where this Court is asked to review a question of law." *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County,* 34 A.3d 1087, 1090 (Del. 2011) ("Questions of law are reviewed *de novo*. Statutory interpretation is a question of law. …").

Merits of the Argument

Appellants claim that "[t]he Superior Court erred by holding that [FOIA § 10002(i)]'s reference to documents 'relating to the expenditure of public funds' denotes only those records 'that discuss or show how the University itself spends

public funds.'"[16] Instead, they suggest that the *contents* of requested documents are irrelevant and that "[i]f public funds are used to finance the University's storage, management, and curation of the Senatorial Papers, then the records sought by the Judicial Watch Request relate to the expenditure of public funds and are therefore 'public records' under FOIA."[17]

But even that incredibly broad interpretation does not get the Appellants all the way home. In order to bridge the final gap, Appellants manufacture inferences and assumptions built upon the fact that the University receives approximately 11% of its total budget from annual State appropriations:

- They assert that "it *must be inferred*" that University personnel who maintain the Senatorial Papers "are paid with State funds"[18] without offering any reason why it must be so inferred. (Emphasis supplied).
- Similarly, Appellants insist that "archival storage space and professional staff members' time are things of value that *it can be inferred* are paid for with public funds."[19] (Emphasis supplied). Again, Appellants offer no support for

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16 AOB at 25-26.

17 AOB at 26.

18 AOB at 20.

19 AOB at 21.

this inference, other than the fact that approximately 11% of the University's expenditures are State-funded.

- Regarding requested records of communications between University personnel and the donor's staff, Appellants say, without any support or explanation, that "communications with the University regarding the release of the Senatorial Papers *necessarily involve* communicating with individuals whose salaries are paid with public funds."[20] (Emphasis supplied).
- In support of their demand to inspect the agreement pursuant to which the Senatorial Papers were donated, Appellants state, with no support or explanation, that the "University is admittedly publicly funded, and the Gift Agreement *necessarily pertains* to the expenditure of public funds to curate and maintain the Senatorial Papers."[21] (Emphasis supplied).

Appellants reading of FOIA § 10002(i) is wrong and their fact assumptions are based on pure *ipse dixit*.

A proper understanding of the University's duties under that provision begins with FOIA's history. As the General Assembly considered opening governmental activity up to public scrutiny in the mid-1970s, it was easy to decide how to treat

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20 AOB at 26-27.

21 AOB at 28.

documents within the custody of State agencies – unless they fall into very narrow exceptions, each must be produced at the public's request. But, what to do with the University's documents? On the one hand –

- it has a perpetual Charter that may not be altered except with the Trustees' consent;[22]
- the University is privately governed by a Board of Trustees, the majority of whom are selected by the Board itself;[23]
- its Charter provides that no State law may "impos[e] any duty upon, or creat[e] the occasion for, any state official … to audit, question or inquire into the receipt, handling or expenditure of any funds coming to the University from any source other than a state appropriation …;"[24]

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22 The University's Charter is found at 14 Del. C. Ch. 51 (hereinafter cited as "*Charter* § __"). The University has "perpetual succession and existence." *Charter* § 5101(a). Moreover, Article I, Section 10 of the U.S. Constitution prohibits state laws "impairing the obligations of contract." This applies to a charter granted to a private college. *See Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819).

23 *See Charter* § 5105.

24 *Charter* § 5109.

- except where Constitutional civil rights are implicated,[25] the University is not an "arm or alter ego of the state of Delaware."[26]

On the other hand, a portion of the University's budget comes from State appropriations and the public has a legitimate interest in knowing how those funds are spent. Perhaps Ms. Becnel-Guzzo captured it best in responding to the Appellants demands – "not a state agency, but it spends state dollars."[27]

Indeed, what to do? On June 28, 1975, the leaders of the State Senate and House of Representatives wrote the Chair of the University's Board of Trustees, acknowledging the tension between the University's autonomy under the Charter and the public's right to know.[28] The result of those communications was the adoption of a provision in FOIA that recognized the University's unique status: only the meetings of the full Board would be considered a "meeting" under FOIA and, in the case of documents, only those "relating to the expenditure of public funds" would

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25 *Parker v. Univ. of Del.*, 75 A.2d 225, 228-30 (Del. Ch. 1950).

26 *Gordenstein v. Univ. of Del.,* 381 F. Supp. 718, 722 (D. Del. 1974). *See also Del. Bldg. & Const. Trades Council v. Univ. of Del.*, 2016 WL3703113 (Del. Super. 2016) (the University is not a "subdivision of the state" under Delaware's prevailing wage statute, 29 *Del. C.* § 6960).

27 June 5 Letter from Jennifer M. Becnel-Guzzo, Esq., University Deputy General Counsel. A-157.

28 Letter from the Hon. J. Donald Isaacs and Casimir S. Jonkiert to Dr. Samuel Lehner, attached as Exhibit A to the University's Answer Brief to the Superior Court. A-132.

be deemed "public records."[29] To avoid doubt, "public funds" were defined as "those funds derived from the State or any political subdivision of the State." Thus, the General Assembly resolved the tension with an elegantly simple provision – *only those documents that might inform the public about how State funds were spent would be subject to disclosure under FOIA.* And, in order to make that point clear, the General Assembly, in its next statutory breath, included examples of University records that would be subject to public inspection:

> any university request for proposal, request for quotation, or other such document soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure proposed to involve any amount or percentage of public funds by or on behalf of the university shall indicate on the request for proposal or other such document that it relates to the expenditure of public funds.

The Superior Court found, "in light of these examples… that documents which 'relate to the expenditure of public funds' are those that discuss or show how the University itself spends public funds."[30] Precisely so.

Appellants ask the Court to stretch FOIA significantly beyond this legislative solution, designed to let the public know about how the University was spending State dollars without infringing on the University's right, secured in its Charter, to be free from the examination of expenditures "from any source other than a state

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29 FOIA § 10002(i).

30 Opinion at 11.

appropriation."[31] Put another way, the Appellants want to ignore the General Assembly's intention delicately woven into FOIA. Their position violates the most fundamental rule of statutory construction: "[a] court must look to legislative intent when the meaning or intent of a statutory provision is disputed."[32]

If Appellants' arguments are accepted, and if the University continues to enjoy annual financial support from the State, regardless of how large or small, then every record within the University's possession will be a "public record" under FOIA and, therefore, available to the public. Such a construction would not only go way beyond inquiries related to the "expenditure of public funds" but would also collide with the insulation, promised by the Charter, from public inspection of the expenditure of any other funds.

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31 *Charter* § 5109.

32 S*tate Dept. of Labor v. Reynolds,* 669 A.2d 90, 93 (Del. 1995) (citation omitted).

II. CONTRARY TO APPELLANTS' CLAIM, NEITHER THE SUPERIOR COURT NOR THE ATTORNEY GENERAL IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANTS.

Questions Presented

Did the Superior Court properly read FOIA, § 10005(c) *in pari materia* with FOIA, § 10003(h)(2) in order to determine that which was required of the University in responding to Appellants' demand to inspect documents? Yes. A-127-28.

Standard and Scope of Review

The parties agree that "the standard and scope of review is *de novo* where this Court is asked to review a question of law." *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County,* 34 A.3d 1087, 1090 (Del. 2011) ("Questions of law are reviewed *de novo*. Statutory interpretation is a question of law. …").[33] Because the question presented requires a proper interpretation of Delaware's FOIA, this Court's review is *de novo.*

Merits of the Argument

Appellants err by reading only one of two relevant FOIA provisions speaking to the burden imposed upon a public body in receipt of a demand to inspect documents. In their Opening Brief, Appellants rely exclusively on FOIA §10005(c), which provides that "[i]n any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records … ." It

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[33] AOB at 13.

was error, say the Appellants, not to require the University to prove the facts underlying the FOIA Coordinator's conclusion that the requested documents did not "relate to the expenditure of public funds."

In making this argument, Appellants ignore a separate FOIA provision that expands upon the duty imposed upon the public body. FOIA, § 10003(h)(2) provides:

> If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial. The public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.

In ignoring one part of a statute in order to contort the meaning of another, Appellants depart from a fundamental rule of statutory construction: "statutes must be considered and construed together and harmonized if reasonably possible."[34] Indeed, that rule has been judicially applied to the very provisions at issue here. In 2017, the Superior Court held that FOIA §§ 10003(h)(2) and 10005(c) must be read *in pari materia*. In *Flowers v. Office of the Governor,* 167 A.3d 530 (Del. Super. Ct. 2017), the Governor's Office denied a FOIA request for a host of emails. The Attorney General concluded that the denial was proper and, as in our case, the requesting party appealed to the Superior Court. The Court concluded that the

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[34] *State ex rel. Price v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)(citation omitted).

General Assembly intended "that a public body could meet its burden of proof without resorting to the production of an index or compilation of each document withheld under each FOIA exemption."[35] Thus, the legislative judgment inherent in FOIA, § 10003(h)(2) is that it is sufficient for the public body to state the reasons for its denial of access to records and that it need not prove up the facts supporting the stated reason as if it were in an adversarial adjudication.

Appellants complain that this reading of FOIA leaves a requesting party at a disadvantage. AOB at 19. The *Flowers* court, noting that Delaware's FOIA may leave requestors with less than ideal tools for challenging a denial, held "[n]onetheless, the Court must apply the unambiguous language of § 10003(h)(2). Section 10003(h)(2) only requires a public body to provide 'reasons' for withholding records without the requirement of submitting an index."[36]

Following *Flowers*, the Attorney General's Office expanded upon this point, noting:

> that Delaware's FOIA does not require this Office – or the courts – to conduct an investigation or an *in camera* review of records that a public body has withheld in response to a FOIA request. Rather, as the Superior Court has recently made clear, FOIA *only* requires a determination of whether the Council provided sufficient *reasons* for withholding the redacted information to satisfy its burden of proof.[37]

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35 *Id.* at 549.

36 *Id.* at 548-49.

37 Del. Op. Att'y Gen. 17-IB59, 2017 WL 6348853 (emphasis original).

In this case, both the Attorney General and the Superior Court were correct to conclude that the University's response – *i.e.,* that the requested documents did not "relat[e] to the expenditure of public funds" –provided a "sufficient reason" for the denial of access.

Not only is that conclusion consistent with current authority and a fair reading of FOIA, the alternative urged by Appellants would impose a significant burden on the University, other "public bodies," and the Attorney General. A great deal of time would have been required if it had been necessary to conduct a full-blown evidentiary hearing regarding the contents of 1,850 boxes of documents (most of which have yet to be curated). And, of course, FOIA applies to a host of other public bodies, making Appellants' view of its requirements quite daunting. In declaring that a "public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied,"[38] the General Assembly deliberately chose not to impose the burden of superintending a full adversarial process in each case.

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38 FOIA at § 10003(h)(2).

III. HAVING CORRECTLY DETERMINED THE EXTENT OF THE BURDEN IMPOSED ON THE UNIVERSITY UNDER FOIA, BOTH THE ATTORNEY GENERAL AND THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE UNIVERSITY MET THAT BURDEN.

Question Presented

Did the Superior Court and Attorney General correctly conclude that the responses made by the University's Deputy General Counsel/ Associate Vice President/ FOIA Coordinator were adequate to discharge the FOIA duty described in the preceding section? Yes – even if one accepts Appellants' expansive (and incorrect) view of FOIA's meaning of the phrase "relating to the expenditure of public funds," the Attorney General and Superior Court were correct to rely on the University's representations and response to the FOIA requests. A-120-27.

Standard and Scope of Review

Because FOIA forwards to the Attorney General any challenges to a public body's denial of access to records and is silent regarding just *how* the agency's burden might be met, that Office has the discretion to determine such matters. That discretion is entitled to deference and, on appeal, Appellants must demonstrate an abuse of that discretion. *See Stanford v. State Merit Employee Relations Bd.*,[39] in which this Court held that the lower court correctly deferred to the MERB's interpretations of its own evidentiary regulations. *See Chevron, U.S.A., Inc. v. Nat'l*

[39] 44 A.3d 923 (Del. 2012).

Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."); *see also Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999) (holding that this Court will give substantial weight to the [agency's] interpretation of a statute it is empowered to enforce, provided that construction is not clearly erroneous). That said, the University believes that the conclusions of the Attorney General and Superior Court should be affirmed even if this Court applies a more rigorous standard of review.

Merits of the Argument

Given that Appellants challenge the reading of "relating to the expenditure of public funds" adopted by the University, the Attorney General, and the Superior Court, the adequacy of the University's response must be tested against both readings.

A. If FOIA provides public access only to University records, the contents of which "relate to the expenditure of public funds," then a review of Appellants' requests was all that was necessary. With no authority, Appellants argue that FOIA's limitation of the public's right to inspect University records "relating to the expenditure of public funds" is not shaped by the content of the requested documents, but rather gives the public the right to inspect documents that

might have been managed or stored by employees or in facilities paid for with State funds.[40] In other words, documents which have nothing to do with the University's expenditure of State funds will be, nevertheless, provided to the public under FOIA. The University demonstrates the fallacy of Appellants' interpretation in Argument I, *supra* at pp. 8 – 14, and if the University's reading is correct, this question is easily answered. In short, because the Appellants did not seek information "relating to the expenditure of public funds," the requests could be denied based on nothing other than a review of the requests themselves and there would be no argument whether the response by the University's Deputy General Counsel/ Associate Vice President/ FOIA Coordinator conveyed facts upon which the Appellants could rely. Put another way, no facts beyond the requests themselves would matter.

B. **Even under the expanded FOIA duty urged by Appellants, the University's response satisfied its FOIA obligations.** For purposes of this analysis, the University assumes *arguendo* that Appellants' expansive reading of FOIA is correct and, therefore, that the University's response needed to consider whether the Senatorial Papers were housed or supported with State funds. Even were that to be so, the Superior Court and Attorney General correctly concluded that the response

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40 AOB at 25-26.

by University Deputy General Counsel/Associate Vice President/FOIA Coordinator was reliable and adequate.

It was hardly an abuse of discretion for the Attorney General's Office to continue its practice of reliance on the duty of candor and faithfulness owed by members of our Bar to both judicial and administrative forums, particularly when a contrary view would require a tedious proceeding in which the University was charged with proving a negative – *i.e.,* that the requested documents did not "relate to the expenditure of public funds."

The Superior Court agreed with this reasoning, citing to the Principles of Professionalism for Delaware Lawyers[41] and the Delaware Lawyers' Rules of Professional Conduct:

> Every lawyer licensed in Delaware is bound by a duty of candor. "Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor." A Delaware attorney who makes a false statement in the course of legal representation is subject to discipline by the Delaware Supreme Court. In light of this duty, statements made by the University's [Deputy] General Counsel may be given proper weight. Further, Appellants have provided nothing other than unsupported speculation in opposition to University's Counsel's representation. The Court also notes that FOIA only requires a public body to provide its reasons for denying a request; there is no requirement to provide supporting proof.[42]

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41 https://www.courts.delaware.gov/Superior/pdf/principles_of%20_professionalism_for_lawyers.pdf

42 Opinion at 11-12. Citations omitted.

The Attorney General has consistently agreed with that view. In an earlier opinion, the Attorney General reasoned:

> Pursuant to the Delaware Lawyers' Rules of Professional Conduct, "[a] lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall . . . conform to the provisions of Rules 3.3(a) through (c) . . . ." Del. Lawyers' R. Prof'l Conduct 3.9. Rule 3.3(a) provides that a lawyer shall not knowingly make a false statement of law or fact. The reasoning behind this duty of candor is that "[t]he decision-making body, like a court, should be able to rely on the integrity of the submissions made to it." Del. Lawyers' R. Prof'l Conduct 3.9 cmt. 1.[43]

In addition to misunderstanding precisely what burden is imposed on public bodies by FOIA, Appellants assert that that burden cannot be met with representations from Counsel. In support of this claim, Appellants offer rules of our trial courts regarding: a) interrogatory answers; b) evidentiary affidavits in support of motions for summary judgment; c) plaintiff's verification of complaints; and d) administration of oaths or affirmation to deposition witnesses.[44] In addition to these rules governing our trial courts' adjudicatory process, Appellants rely on a case regarding the burden of proof at trial before Superior Court.[45]

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43 Del. Op. Att'y Gen. 17-IB59, 2017 WL 6348853 at n. 12.

44 AOB at 14 – 15.

45 AOB at 16, citing to *State Farm Mutual Automobile Ins. Co. v. Spine Care Delaware, LLC*, 238 A.3d 850, 861 (Del. 2020).

In other words, Appellants *presume* that which the General Assembly *rejected* – that, in considering a FOIA appeal, the Attorney General is bound to apply the same evidentiary rules and processes that would apply in an adversary proceeding in our courts.

Appellants criticize the deference given to Ms. Becnel-Guzzo's representations by the Attorney General and Superior Court, asserting that such reliance "places members of the bar in the precarious position of serving not as the representative of the party, but as the actual party denying access. The Superior Court's holding blurs the distinction between advocate and client."[46] In making this argument, Appellants overlook a critical fact. Ms. Becnel-Guzzo not only serves as Deputy General Counsel, but is also an officer of the University (Associate Vice President)[47] and also designated as its "FOIA Coordinator."[48] In short, she is the University officer whose responsibility it is to consider FOIA requests and respond. To accept Appellants' argument, one must conclude that FOIA requires more than a reasoned response by the designated officer; perhaps *in camera* inspection of the

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46 AOB at 16.

47 A-43.

48 A-48.

evidence supporting the response or even a full evidentiary hearing in front of the Attorney General. And, yet, FOIA expressly rejects any such notion.

IV. UNDER FOIA, THE ONLY 'MEETING' OF A "PUBLIC BODY" ASSOCIATED WITH THE UNIVERSITY IS A MEETING OF THE "FULL BOARD OF TRUSTEES."

Question Presented

Did the Attorney General and Superior Court correctly conclude that the University did not violate FOIA in refusing to provide records of communications other than those occurring at a meeting of the full Board of Trustees? Yes. The only records of Trustee communications for which public access is required are communications at a meeting of the full Board. A-100-103.

Standard and Scope of Review

The parties agree that "the standard and scope of review is *de novo* where this Court is asked to review a question of law." *Delaware Dept. of Natural Resources & Environmental Control v. Sussex County,* 34 A.3d 1087, 1090 (Del. 2011) ("Questions of law are reviewed *de novo*. Statutory interpretation is a question of law. …").[49] Because the question presented requires a proper interpretation of Delaware's FOIA, this Court's review is *de novo.*

Merits of the Argument

The remaining issue does not turn on whether Appellants' FOIA demands sought University records "relating to the expenditure of public funds." Instead, it revolves around the other FOIA provision specifically crafted for the University (and

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[49] AOB at 13.

Delaware State University): that FOIA's open meeting requirements would only apply to meetings of the "full Boards of Trustees" of both institutions. Among the Appellants' FOIA demands were requests for "notes, agenda, minutes, or similar records created in preparation for, during, and/or pursuant to any meeting of the Board of Trustees during which the proposed release of the [Senatorial Papers] was discussed." The University's Deputy Counsel/Associate Vice President/FOIA Coordinator responded that the Senatorial Papers "were not discussed during meetings of our full Board of Trustees."

The Appellants seem to challenge the University's response, relying once more on pure supposition. "[B]ecause the Biden Senatorial Papers are voluminous and historically important, it is likely, if not certain, that such high-profile gift would be discussed by and among Trustees."[50] If this can be taken as a challenge to the reliability of the University's response, then, for reasons discussed *supra* at pp. 20 - 26, that challenge fails.

However, the nature of Appellants' challenge here is not clear. The Superior Court concluded that Appellants did not challenge the University's statement, but rather wanted the Superior Court to re-craft the University's statutory obligations

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50 AOB at 26.

simply because they disagreed with FOIA's clear meaning.[51] They make the same complaint to this Court, that "the University should not be permitted to circumvent FOIA by hiding its decision-making with respect to matters of public interest behind executive sessions or delegation to a subset of the Board of Trustees."[52] The supposition behind that statement is, apparently, that such communications *did* take place but that the University orchestrated them outside of a full Board meeting in order to hide them from public view. Appellants offer nothing to support their skepticism about the University's response, made by an officer bound by statute to "make every reasonable effort to assist the requesting party … [and] work to foster cooperation between the public body and the requesting party."[53]

If, as it appears, the Appellants simply want this Court to re-write FOIA, then the Superior Court's decision is not only correct, but one cannot imagine anything else: "[I]t is clear that the General Assembly took care to define exactly how the legislation would apply to the University. Applying FOIA as clearly written, Appellant's request for information from any meeting where the Board discussed

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51 Opinion at 10.

52 AOB at 27; Opinion at 10.

53 FOIA, § 10003(g)(2).

the Papers may be properly denied because the matter was never discussed before the full Board."[54]

We are not aware of any other occasion on which our courts have been asked whether FOIA means what it says in this particular regard – *i.e.,* that the University's Board of Trustees conduct a "meeting" for FOIA purposes only when the "full Board" meets. However, on two earlier occasions, Attorneys General have so opined.[55] Appellants offer no basis on which to depart from those consistent opinions.

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54 Opinion at 10.

55 *See* Del. Op. Att'y Gen. 10-IB14, 2010 WL 5090031 (2010); Del. Op. Att'y Gen. 20-IB30, 2002 WL 31867904 (2002).

V. APPELLANTS' ARE NOT ENTITLED TO ATTORNEYS' FEES AND COSTS UNDER 29 *DEL. C.* § 10005(d) BECAUSE THEY WERE NOT A "SUCCESSFUL PLAINTIFF."

Question Presented

Did the Superior Court properly conclude that Appellants were not entitled to attorneys' fees and costs under 29 *Del. C.* § 10005(d) because only a "successful plaintiff" may be awarded fees under the cited provision? Yes. A-129; A-106.

Standard and Scope of Review

The parties agree that "the standard and scope of review is *de novo* where this Court is asked to review a question of law." *Del. Dept. of Natural Resources & Environmental Control*, 34 A.3d at 1090 (Del. 2011). Because the question presented requires a proper interpretation of Delaware's FOIA, this Court's review is *de novo.*

Merits of the Argument

As Appellants admit, FOIA provides that "[t]he court may award attorney fees to a ***successful plaintiff*** of any action brought under this section."[56] They suggest that the Superior Court's footnote request[57] that the University review the Gift Agreement to confirm that it did not discuss the use of public funds somehow equates to a "success on the merits," thus entitling them to fees. As they know,

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56 AOB at 32, (emphasis supplied).

57 Opinion at 11, n. 38.

however, the University did confirm that the Gift Agreement said nothing about the University's expenditure of State funds, leaving the Appellants without any of the items sought in their FOIA demands. A-157. It is difficult to describe that result as a success. Because Appellants have failed to succeed on a single claim, no fees or costs should be awarded and their request was properly denied by the Superior Court.

CONCLUSION

Appellants have misread FOIA, urging that the requested records must be produced if the employee responsible for them was paid with State funds. On top of this improper interpretation, they layer assumptions and inferences that have no basis other than Appellants' say so. Then they claim that responses from the officer charged with such duties are inadequate, even though that is precisely what FOIA requires. Finally, simply because they disagree with it, they ask the Court to re-write FOIA's declaration that the University's Board of Trustees is only a public body with FOIA duties when it meets as a "full Board."

The decisions of the Superior Court should be affirmed.

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