



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,) No. 402,2022
)
v.)
)
UNIVERSITY OF DELAWARE,) On Appeal from C.A. No. N20A
) 07-001 MMJ in the Superior
) Court of the State of Delaware
)
Respondent-Below, Appellee.)
)

**APPELLEE UNIVERSITY OF DELAWARE'S
ANSWERING BRIEF**

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NATURE OF THE PROCEEDINGS

As the Court may recall, FOIA¹ provides access only to those records of the University of Delaware (the “University”) that “relat[e] to the expenditure of public funds.”² This matter, challenging the University’s rejection of Appellants’ FOIA requests for information about then-Senator Biden’s papers (the “Senate Papers”), is before the Court for the second time.

Appellants first took their complaints about the University’s denial of their requests to the Department of Justice, which rejected their challenge, finding that the reasons for denial provided by the University’s Deputy General Counsel and FOIA Coordinator (the “FOIA Coordinator”) were sufficient.³ The Superior Court, in an appeal on the record,⁴ agreed.⁵

¹ Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007,(hereinafter, “FOIA, § ___”).

² FOIA, § 10002(l). The same limitation applies to Delaware State University, and under FOIA, only “those funds derived from the State or any political subdivision of the State” are “public funds.” *Id.* at § 10002(n).

³ A-20-23, A-25-28.

⁴ An appeal to Superior Court challenging a determination made by the Chief Deputy Attorney General is on the record. *See* FOIA, § 10005(e).

⁵ A-161-75.

Appellants appealed that decision, and in its December 6, 2021 Opinion,⁶ this Court rejected Appellants’ overly broad construction of that key phrase and discussed, for the first time, what the University must do in order to satisfy its FOIA burden of demonstrating that requested documents do not “relate to the expenditure of public funds.” In particular, the Court concluded that the burden could not be discharged with an unsworn statement by a university’s FOIA Coordinator and that,

unless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.⁷

On remand, those requirements were clarified further. The University submitted, on February 4, 2022, a sworn affidavit from its FOIA Coordinator that described the inquiries made in order to determine that no public funds were spent on anything related to the University’s custody and curation of the Senate Papers. On June 7, 2022, the Superior Court asked for more detail:

The University of Delaware must articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University’s email system for communications between University personnel and

⁶ *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996 (Del. 2021) (the “December 2021 Opinion”).

⁷ *Id.* at 1012.

Biden representatives; when such inquiries were made; and what, if any, documents (other than *(sic)* the gift agreement) were reviewed.⁸

On July 22, 2022, the University complied precisely with those instructions, naming, in the FOIA Coordinator's Supplemented Affidavit, those University officers from whom and when the requested information was gathered.⁹

On October 19, 2022, the Superior Court concluded that the University met its burden.¹⁰ Appellants appealed that decision on October 25, 2022 and filed their Opening Brief ("OB at __") on December 13, 2022. This is the University's Answering Brief.

⁸ *Judicial Watch, Inc. v. University of Delaware*, 2022 WL 2037923, at *3 (Del. Super. Ct. June 7, 2022) (the "*June 2022 Opinion*").

⁹ *See generally* Supplemented Affidavit (A-222-26).

¹⁰ *Judicial Watch, Inc. v. University of Delaware*, 2022 WL 10788530, at *3 (Del. Super. Ct. Oct. 19, 2022) (the "*October 2022 Opinion*") (Ex. A to OB). Although Appellants pressed the Superior Court for the award of fees and costs, the order from which they appeal – the *October 2022 Opinion* – is silent on that subject and does not award fees. Appellants do not raise that subject in this appeal.

SUMMARY OF ARGUMENT

1. Denied. The University followed the mandates of both this Court and the Superior Court and unequivocally satisfied its burden of proof to justify its denial of Appellants' FOIA requests. FOIA requires that access be given to records "relating to the expenditure of public funds," and the FOIA Coordinator provided an adequate basis for the University's denial.

STATEMENT OF FACTS

In the *December 2021 Opinion*, this Court summarized the background facts as follows:

In 2012, then-Vice President Joseph R. Biden, Jr. donated his Senatorial papers to the University of Delaware. The donation was made pursuant to a gift agreement that placed certain restrictions on the University's ability to make the Biden Senatorial Papers publicly available. In April 2020, Judicial Watch, Inc. and The Daily Caller News Foundation submitted requests under the Delaware Freedom of Information Act, 29 Del. C. §§ 10001-10007, to access the Papers and any records relevant to or discussing the Papers.¹¹

A. The Remaining FOIA Requests.

During their prior appeal, Petitioners abandoned their demand to inspect library log-in sheets, as well as the Senate Papers themselves.¹² Thus, the following demands remain:

- a. As summarized by Petitioners, the Judicial Watch Request “solely seeks communications *about* the proposed release of the [Senate Papers], and any communications between the University on the one hand, and President Biden, or any individual acting on his behalf, on the other.”¹³
- b. “The DCNF Request ... seeks the agreement governing President Biden’s donation of the [Senate Papers] ..., [and] communications

¹¹ *December 2021 Opinion*, 267 A.3d at 999 (internal definitions omitted).

¹² OB at 9 n. 6.

¹³ A-95 (emphasis in original).

between University staff and anyone representing President Biden[.]”¹⁴

B. The Supplemented Affidavit Confirms the Documents Requested Do Not “Relate to the Expenditure of Public Funds.”

As noted above, in response to the Superior Court’s ruling on June 7, 2022, the University executed a Supplemented Affidavit from the University’s FOIA Coordinator, adding the information requested by the Superior Court.¹⁵ Specifically, the Supplemented Affidavit confirms that no public funds were expended in the custody and curation of the Senate Papers and identifies by name the University officers from whom this confirmation was obtained:

- a. The University’s Budget Director and Vice Provost of Libraries and Museums confirmed no public funds were used in matters relating to the University’s relationship with Joseph R. Biden or to pay consideration for the Senate Papers or the salaries of University personnel involved in the custody and curation of the same;
- b. The University’s Budget Director confirmed the University did not make payments to Joseph R. Biden using public funds and did not use such funds in the administration of University’s email system over which communications between University personnel and representatives of Joseph R. Biden may have occurred;
- c. The University’s Associate University Secretary confirmed the Senate Papers were not discussed in meetings of the full Board of Trustees; and
- d. The FOIA Coordinator stated she reviewed the gift agreement for the

¹⁴ OB at 9.

¹⁵ *June 2022 Opinion*, 2022 WL 2037923, at *3.

Senate Papers and confirmed it does not mention public funds.¹⁶

As such, the Supplemented Affidavit confirms, with precisely the detail requested by the Superior Court, that no public funding was used by the University in relation to the custody and curation of the Senate Papers.

¹⁶ See Supplemented Affidavit at ¶¶ 5-12 (A-224-26).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE UNIVERSITY MET ITS BURDEN TO JUSTIFY ITS DENIAL OF APPELLANTS' FOIA REQUESTS.

A. Question Presented

Whether the Superior Court was correct in concluding that “the University has met its burden of creating a record from which the Court can determine that the University performed an adequate search for responsive documents[,]” and that “the University’s denial of appellants’ requests does not violate FOIA?”¹⁷

B. Scope of Review

The University agrees with Appellants’ summary of the standard of review applicable to this appeal. *See* OB at 11. The Superior Court’s determination that the University met the burden imposed by FOIA is a legal determination which may be reviewed by this Court *de novo*.

¹⁷ *October 2022 Opinion*, 2022 WL 10788530, at *3; A-194-96, A-244-49.

C. Merits of the Argument

1. The University has done precisely that which this Court, and the Superior Court on remand, directed.

In its *December 2021 Opinion*, after directing that the University's submissions be made under oath, this Court held that "[o]n remand, the University bears the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents."¹⁸

On remand, the Superior Court described in detail what that record must include:

The University of Delaware must articulate who (identified at least by position within the University) provided the information: that no State funds were spent by the University; that no salaries of any University personnel involved in the custody and curation of the papers were paid with State funds; that no State funds were spent on the University's email system for communications between University personnel and Biden representatives; when such inquiries were made; and what, if any, documents (other than *(sic)* the gift agreement) were reviewed.¹⁹

The University's Supplemented Affidavit squarely met each of those requirements.

Indeed, Appellants do not say to the contrary.

With the following arguments, the University will demonstrate that the Superior Court correctly concluded that the University met its burden under FOIA.

¹⁸ *December 2021 Opinion*, 267 A.3d at 1013.

¹⁹ *June 2022 Opinion*, 2022 WL 2037923, at *3.

2. The University provided “competent, reliable” evidence that no public funds were expended on its custody and curation of the Senate Papers. Thus, there was no need for an examination of the Senate Papers themselves.

Throughout this case, Appellants have argued that the University, in order to meet its burden, must review particular documents even when the University knows that the answer required under FOIA lives elsewhere. *See* OB at 16-17. They have made that argument because, throughout this case, Appellants have refused to acknowledge that FOIA applies to the two universities in a way that is very different from its application to State agencies.²⁰

Because FOIA limits the information that must be disclosed by the two universities, their response to many FOIA requests begins not with the inspection of the requested documents themselves, but rather by inquiring with knowledgeable staff whether public funds were spent on the activities or undertakings discussed in the requested documents.

For example, the University frequently receives FOIA requests for the inspection of employment agreements and related communications between it and its coaches, executives, or other personnel. But, while those agreements are certain to contain the financial terms of such employment, they rarely, if ever, specify the source of funds to be used. Indeed, that is typically a matter of indifference to the

²⁰ A-209-11, A-238-40.

employee and, therefore, there is no need to include that information in the contract itself or in communications surrounding that contract. Put differently, there may be nothing in the document itself that gives an accounting of how (or indeed, if) the University spent public funds. If the University has concluded that the hypothetical coach's salary is not paid with public funds, then the University is free to decline to produce either the contract or communications about it.

So it was in this case. The University's FOIA Coordinator, a member of the Bar of this Court and whose job it is to respond to FOIA requests, inquired of appropriate University officials whether public funding was used by the University in relation to the custody and curation of the Senate Papers. Having found that the answer was "no," and based on the FOIA Coordinator's personal knowledge of the University's expenditure of public funds, it was clear that none of the requested communications or other records could possibly contain information about public-funded expenditures that never took place.

In the *December 2021 Opinion*, this Court held that "[u]nless 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."²¹ We take that to mean that if, without further inquiry, it is clear that the demanded records are not subject to FOIA, no

²¹ *December 2021 Opinion*, 267 A.3d at 1012.

search of the requested documents is necessary. That is precisely the case here. With “competent, reliable”²² evidence, the University demonstrated that no public funds were spent in any way related to the Senate Papers. In light of that knowledge, it was “clear on the face of the request that the demanded records are not subject to FOIA.”

While this discussion could otherwise end on the point just made, something else said by this Court in its *December 2021 Opinion* requires further comment:

We note that it is not clear on the face of the requests for the Agreement or Communication Records that they are not subject to FOIA, and the University does not contend otherwise.²³

The Court’s observation is correct if it was intended to describe the University’s (or anyone else’s) appreciation of the FOIA requests *before* it was determined that no public funds were spent on the University’s custody or curation of the Senate Papers. As, for example, with the hypothetical request for a coach’s contract; there would be no way for the reader to know whether the documents related to the expenditure of public funds without further inquiry.

However, once that preliminary determination had been made, then it was clear, without any further inquiry, that the requested documents could not provide

²² *Id.* at 1010.

²³ *Id.* at 1013.

information about an expenditure of public funds related to the Senate Papers – the only information sought by Appellants – because there was no such expenditure.²⁴

3. The information provided in the Supplemented Affidavit was based on personal knowledge; was not stale; and does not deserve Appellants’ baseless attack on the University’s veracity.

i. The University provided information based on personal knowledge.

Appellants complain that the conclusion offered by the Supplemented Affidavit – *i.e.* that no public funds were spent on anything related to the Senate Papers – was not based on the FOIA Coordinator’s “personal knowledge.”

Yes, it was. The FOIA Coordinator states under oath that, “on several occasions” prior to Appellants’ FOIA requests, she has had to inform herself, through discussion with University budget officials, whether “State funds have been spent on a variety of matters or undertakings related to Mr. Biden, including the Biden Senate Papers.”²⁵ Further, the FOIA Coordinator’s knowledge gained by such consultation with budget officials was confirmed by her own review of the

²⁴ It is fair to say that Appellants initially hoped to gain access to documents the contents of which have nothing to do with any expenditures at all. Then this Court rejected their distorted reading of “related to the expenditure of [State] funds.” As a result, the remainder of this case has been about the University’s burden in responding to FOIA requests for information far different than that which Appellants originally hoped to gain.

²⁵ See Supplemented Affidavit at ¶ 5 (A-224).

University's annual "Statement of State of Delaware Funds Received and Expended."²⁶

Apparently, Appellants believe that a corporate official cannot gain knowledge based on consultation with other corporate officials or by reading an annual audit report prepared by others. That is hardly the case; indeed, Rule 30(b)(6) of the Superior Court and the Court of Chancery rules provide for precisely that method of gaining knowledge from a corporate party. Appellants' demand to depose University budget officials in order to test the FOIA Coordinator's affidavit is not compelled by FOIA; nor is it suggested anywhere in the guidance provided by this Court, nor the court below.

ii. The FOIA Coordinator's information was not "stale."

Appellants cite to nothing in FOIA that requires that the two universities, when responding to a FOIA request, needlessly repeat earlier inquiries about whether a particular activity or undertaking was funded with public funds.²⁷ Nor does logic suggest that, once either of the two universities have reliably concluded that such activity was not paid for with public funds, the inquiry must be repeated each time the same FOIA request is received.

²⁶ *Id.* at ¶ 12 (A-226).

²⁷ OB at 15.

iii. In attacking the FOIA Coordinator’s veracity, Appellants ignore what they know to be true. They also recast the University’s FOIA burden in a way that collides with the University’s Charter.

In their briefs to this Court and the Superior Court, the Appellants charge the University with false testimony under oath:

the University’s representations in Paragraphs 9 and 10 are facially implausible and invite skepticism. It is difficult to believe that no salaries of University personnel involved in the custody and curation of the Biden Senatorial Papers are paid with State funds, and that no State funds have been—or will be—spent on the University’s email system. The implication here is that the salaries of the personnel involved in the custody and curation of the Biden Senatorial Papers are paid for exclusively by private donations.²⁸

Not so – and they know it. Appellants were informed months ago that their assumption – *i.e.* that the University has no sources of revenue beyond public funds or private donations – is false. In the briefing below, Appellants’ attention was drawn to a portion of the University’s website that displays, for all to see, its various revenue sources by amount.²⁹ Since that time, Appellants have known that the University has several other sources of revenue, the largest of which comes from tuition.

Knowing now that their “skepticism” is unfounded, the Appellants obfuscate by trying to change the central – and only – inquiry required under FOIA. Rather

²⁸ OB at 15; A-152, A-238.

²⁹ A-249 at n. 6.

than determine, as FOIA requires, whether a particular expenditure was made with public funds, Appellants now assert that, in order to discharge its duty under FOIA, the University must identify the *non-public funds* supporting a particular activity including, in this case, the custody and curation of the Senate Papers: “[t]he University has chosen not to put the matter to rest by *satisfying its burden* and stating from where the funds that support the Biden Senatorial Papers come.”³⁰

The University has no duty, under FOIA or any other statute, to disclose the source for any expenditure of funds other than public funds. Indeed, the University’s Charter provides to the contrary:

Neither this nor any other law of this State, however, shall hereafter be construed as imposing any duty upon, or creating the occasion for, any state official (with the exception of such state officials as may from time to time also be Trustees of the University) 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....³¹

Appellants’ accusation that the FOIA Coordinator (who also happens to be an officer of this Court) has made false statements under oath goes beyond the bounds of proper advocacy before our courts. And they cannot rescue themselves by asserting that FOIA requires something other than what its text provides.

³⁰ OB at 16 (emphasis supplied).

³¹ 14 *Del. C.* § 5109.

CONCLUSION

The *December 2021 Opinion* and the Superior Court’s rulings on remand have amplified, for the first time, the burden to be met by FOIA on the two specified universities when they deny FOIA requests on the grounds that the requested documents do not “relate to the expenditure of State funds.” The University complied precisely with that guidance and the Superior Court correctly determined that the University met its burden under FOIA. This appeal should be denied.

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