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

APPELLANTS' REPLY BRIEF

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Appellants[1] respectfully submit this Reply Brief in support of its appeal. For the reasons stated herein as well as in the Opening Brief, the appeal should be granted and the decision of the Superior Court should be reversed.

PRELIMINARY STATEMENT

In this appeal under FOIA, Appellants Judicial Watch and DCNF seek access to two categories of documents (the Requests):

- The Communication Records, comprising "communications about the proposed release of the Biden Senatorial Papers, and any communications between the University on the one hand, and President Biden, or any individual acting on his behalf, on the other;"[2]
- The Gift Agreement, which is "the agreement governing President Biden's donation of the Biden Senatorial Papers to the University."[3]

The Requests, as limited on appeal, thus solely seek documents and communications pertaining to the University's acquisition, maintenance, and upkeep of the Biden Senatorial Papers. Oddly, the University persists in mischaracterizing this appeal as seeking "an examination of the Senate Papers themselves."[4]

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[1] Capitalized terms not otherwise herein defined shall have the meanings previously ascribed to them in Appellants' Opening Brief (the "Opening Brief" or "OB").

[2] OB at 6.

[3] *Id.*

[4] Appellee's Answering Brief ("AB") at 10.

To the contrary, Appellants have been consistent in asserting their fundamental position that the University has not carried its burden of proof in denying the Requests. It was on this basis that this Court reversed the decisions of the Superior Court and the Attorney General below. After not carrying its burden prior to the first appeal, and after having two bites at the apple on remand, the University has still not satisfied its burden of proof.

The University unfairly mischaracterizes Appellants' legal argument as an "accusation that the FOIA Coordinator (who also happens to be an officer of this Court) has made false statements under oath[,]" and asserts that Appellants have exceeded "the bounds of proper advocacy before our courts."[5] The University's accusation is regrettable, melodramatic, and ultimately, unpersuasive. This Court held that "when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath." *Judicial Watch, Inc. v. University of Delaware*, 267 A.3d 996, 1010-11 (Del. 2021). In so holding, the Court also stated:

> We do not mean to cast aspersions on Ms. Becnel-Guzzo or the veracity of the University's representations. Nor do we suggest that the record, such as it is, implies any misrepresentations of fact. Instead, *we simply hold that any person seeking to establish facts based on personal knowledge must do so under oath, regardless of that person's title or profession*.

Id. at 1012 n.116 (emphasis added).

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[5] AB at 16.

Appellants do not accuse the FOIA Coordinator of making false statements under oath. The focus here is that the Supplemented Affidavit plainly shows that the FOIA Coordinator lacks the personal knowledge required to create a competent fact record. The information in the Supplemented Affidavit is secondhand or, in other words, hearsay. No inquiry or search was made in response to the Requests. Rather, the University relied on prior inquiries—made months in advance—related to separate and unrelated FOIA requests received by the University. The University asserts that performing any contemporaneous and confirmatory inquiry would be "needless," despite the reality that information changes over time. Personnel, budgets, and sources of funding change. The information on which the University relies to justify its decision to deny the Requests must be competent, accurate, and current—which requires, at minimum, a confirmatory inquiry to verify that nothing has changed since the last time the University denied a FOIA request seeking similar records.

Despite FOIA's acknowledgement that "public entities, as instruments of government, should not have the power to decide what is good for the public to know,"[6] over the multi-year course of this FOIA proceeding, the University's efforts to satisfy its statutory burden of proof have been parceled out piecemeal, in

[6] 267 A.3d at 1004 (quoting *Del. Solid Waste Auth. v. News-Journal Co*., 480 A.2d 628, 631 (Del. 1984)).

miniscule increments, and only in response to court orders, entered after briefing by Appellants. When the shortcomings of the University's effort are noted in briefing, the University calls "foul." The University's umbrage at these proceedings is misplaced. To date, the FOIA Coordinator's efforts (and her recollections of what steps she took) remains untested by cross examination. Appellants have every right to challenge what they believe has been a lackluster effort by the University to satisfy its statutory burden.

For the reasons stated herein, Appellants respectfully request that this Court reverse the decision of the Superior Court in accordance with the arguments outlined herein.

LEGAL ARGUMENT

I. THE UNIVERSITY FAILED TO CARRY ITS BURDEN TO PROVE THAT THE REQUESTED RECORDS ARE NOT SUBJECT TO FOIA.

Even after two attempts on remand, the University has still not carried its burden to prove that the documents sought by the Requests are not subject to FOIA. The Supplemented Affidavit is based on stale hearsay and vague assertions which show that the University has not satisfied its statutory obligations in response to the Requests.

FOIA provides that "the burden of proof shall be on the custodian of records to justify the denial of access to records." 29 *Del. C.* § 10005(c). This Court thus provided the following guidance to the parties and the Superior Court:

> 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. A description of the search and the outcome of the search must be reflected through statements made under oath, such as statements in an affidavit, in order for the public body to satisfy its burden of proof. 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. On 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.[7]

[7] 267 A.3d at 1012-13.

This Court held that "the resolution of a legal action must rest on competent, reliable evidence," and that "when an attorney seeks to establish facts based on *personal knowledge*, those facts must be asserted under oath."[8]

The University does not dispute that the purported "personal knowledge" asserted in the Supplemented Affidavit is largely based on hearsay.[9] The word "hearsay" does not even appear in the Answering Brief. By requiring a fact record based on personal knowledge, this Court rejected hearsay as the basis for the required sworn statement. *See, e.g.*, 267 A.3d at 1010 n. 105 ("[W]hen the public body is seeking to assert a fact based on *personal knowledge*, that assertion must be made under oath in order to establish some competent record.") (emphasis added).

Apart from the FOIA Coordinator's review of the Gift Agreement, the personal knowledge presented in the Supplemented Affidavit is solely that of Mr. Gilibert and Mr. Dawes. There is no clarity as to how Mr. Gilibert and Mr. Dawes came by their knowledge, as the Supplemental Affidavit states that no documents

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[8] 267 A.3d at 1010-11 (emphasis added) (citing *Brokenbrough v. State*, 522 A.2d 851, 858 (Del. 1987) (noting that attorneys at trial are prohibited from asserting personal knowledge of facts at issue unless they are giving witness testimony)).

[9] *See* A-225 to A-226 at ¶¶ 5-10 (relying on "communications" between May 2019 and January 2020 with three University personnel).

were consulted in connection with the inquiry.[10] The University's briefing neither illuminates nor attempts to justify the ambiguities in the Supplemented Affidavit.

The University's attempt to minimize the significance of the lack of personal knowledge in the Supplemented Affidavit by analogy to Rule 30(b)(6) is misplaced,[11] as there no basis in either FOIA or this Court's guidance for this comparison. As noted above, this Court specifically held that *personal* knowledge was required to satisfy a FOIA respondent's burden of proof.[12] But more importantly, Rule 30(b)(6), as set forth in both the Superior Court Civil Rules and the Court of Chancery Rules, applies solely to depositions of an organization, rather than to affidavits.[13] If the University seeks to rely on Rule 30(b)(6) to convey organizational knowledge, Appellants are willing to take the depositions of one or more University designees to verify whether the University can carry its burden to

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[10] A-226.

[11] AB at 14.

[12] *See* 267 A.3d at 1010 & n. 105; *id.* at 1012 n. 116.

[13] Del. Super. Ct. Civ. R. 30(b)(6); Del. Ch. Ct. R. 30(b)(6); *see also, ADT Holdings, Inc. v. Harris*, 2017 WL 3913164, at *2 (Del. Ch. Sept. 7, 2017) ("The central purpose of Rule 30(b)(6) is to provide a mechanism for identifying a witness through whom an incorporeal entity can testify and hence be subjected to the evidentiary rules applicable to biological persons.").

create the fact record required by FOIA.[14] Such a deposition would help establish, among other things, how the communications relied on for the fact assertions the Supplemental Affidavit took place, and how the University came to its conclusion that no State funds are used to support the University's email system or in the custody and curation of the Biden Senatorial Papers.[15]

In response to Appellants' observation that the University performed no new inquiry in response to the Requests, but instead relied on information gleaned in the past,[16] the University complains that Appellants want the University to "needlessly repeat earlier inquiries."[17] The University does not explain why it is so certain a confirmatory inquiry would be a waste of time. Budgets and personnel frequently change, and over time, organizations often fund projects with different or additional revenue sources. Facts change; the only way to know is to check. It seems axiomatic that accurate, up-to-date information would be required to satisfy a FOIA respondent's burden of proof. Indeed, Appellants were surprised to learn that there was no follow up with either Mr. Dawes or Mr. Gilibert to confirm that the

[14] Rule 30(b)(6) of both the Superior Court Civil Rules and the Court of Chancery Rules contemplate that an organization may designate more than one witness.

[15] *See* OB at 9.

[16] OB at 7.

[17] AB at 14.

previously acquired information was—and is—still valid, especially because the Requests are not limited by a timeframe, and because personnel, budgets, and funding sources may have changed since the FOIA Coordinator's prior inquiries.

In an attempt to distract from the deficiencies in the Supplemented Affidavit, the University asserts that "Appellants ignore what they know to be true"[18] with respect to how the University funds the custody and curation of the Biden Senate Papers. But the University itself is the sole source of such information. The University's frustration with questions about the basis for its factual assertions is misdirected, as the University bears the statutory burden of proof.

A FOIA respondent who fails to carry its burden of proof is typically found to have violated FOIA.[19] Prior to the first appeal to this Court, the University failed to carry its burden of proof before the Attorney General, then failed to carry its burden of proof before the Superior Court. Even after appeal and remand, the University failed to carry its burden of proof on its first attempt with the Original Affidavit. And on its second attempt after remand, the University's Supplemented Affidavit relies on outdated and vague hearsay.

It was, and is, incumbent upon the University to prove that the requested records are not subject to FOIA by showing that the requested records do not relate

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[18] AB at 15.

[19] *See* OB at 18 & n.44.

to the expenditure of public funds. The University has not made that showing. The Superior Court's conclusion that the requested records do not relate to the expenditure of public funds, or are otherwise exempt from FOIA, is not supported by the record and should be reversed.[20]

Because the University has not satisfied its burden, the Court should remand to allow Appellants the opportunity to conduct limited discovery—to include at minimum, a deposition of a representative of the University and production of documents—in order to create a factual record upon which the Superior Court can determine whether the University performed an adequate search for responsive documents, consistent with the rulings of this Court. Alternatively, the Court should remand this case with instructions to order the turnover of the requested documents since the University has had more than adequate opportunity to satisfy its burden.

[20] *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (reversing and remanding where the "Court of Chancery finding … was based on faulty factual predicates, unsupported by the record.").

CONCLUSION

For the reasons stated herein as well as in the Opening Brief, Petitioners Below-Appellants Judicial Watch, Inc. and the Daily Caller News Foundation respectfully request that this Court reverse the decision of the Superior Court in accordance with the arguments outlined in this appeal.

Dated: January 27, 2023

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