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Case Number 419,2025

IN THE

Supreme Court of the State of Delaware

ROBERT E. VANELLA, on behalf of THE DELAWARE CALL
Plaintiff-Appellant
v.
CHRISTINA DURAN, in her official capacity as FOIA Coordinator for THE DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DELAWARE STATE POLICE
Defendant-Appellee

No. 419, 2025
On Appeal from the Superior Court of the State of Delaware
C.A. No. K24A-02-002

APPELLANT'S REPLY BRIEF

Dated: March 10, 2026

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

Internet Sources

INTRODCUTION

In the wake of Watergate, Delaware's General Assembly sought to ensure that the people of Delaware could obtain basic information about how their own state government functions. FOIA did not simply aspire to make state and local government more transparent, it demanded it. Ignoring this demand, DSP withholds the most basic information about its officers, people entrusted to make life and death decisions on behalf of the Delawareans they serve. The people have a right to know that law enforcement officers have the requisite qualifications and prior work experience to be entrusted with this power, and that law enforcement agencies represent the communities that they serve and protect.

Still, DSP wants to keep this information secret. They have come up with a variety of shifting excuses for shielding this information from disclosure. Explanations have ranged from "we don't have the information you are seeking," to "we do have that information but we gave it to another third-party website, and so we don't need to repeat ourselves to you," to "we do have the information but it would take us too much effort to gather it all," to "it would jeopardize officer safety." But, as Mr. Vanella has shown and will continue to show, the first three excuses have been thoroughly debunked. That leaves DSP clinging only to an attenuated claim that disclosure would jeopardize officer safety. The safety of police officers is of course a laudable public policy goal, but DSP cannot amend

FOIA to create an "officer safety exemption," nor re-write an existing FOIA exemption to include a police officer safety component, especially when this very Court rejected such an argument more than twenty years ago. DSP instead tries to claim that revealing the requested information would compromise their officers' personal privacy. But DSP does not even try to explain how this Court should evaluate claims of privacy. Nothing about the information that Mr. Vanella requested infringes on officers' personal privacy.

Furthermore, the GA believed that disclosure of public records was so important that it abrogated its own sovereign immunity regarding attorneys' fees to encourage people to challenge public bodies who deny access to public records. Despite FOIA's clear text and evidence from its legislative history, DSP has twisted itself in knots to convince the Court that the statute limits this clear abrogation. DSP's argument cannot and should not prevail.

ARGUMENT

I. DSP's Briefing Essentially Admits that They Have Responsive Records to Requests 4 and 6 Despite Previously Claiming that they Do Not Have Such Records

DSP starts by asserting, through counsel, that they do not have an existing spreadsheet or other record that contains prior employers and job titles of all their current officers (Request 4), while admitting that the Doherty Affidavit does not explicitly address that issue. Ans. Br. 14. It is puzzling that DSP clings to this position when this Court expressly stated only five years ago that representations through counsel are not sufficient to satisfy the FOIA burden; a sworn affidavit is required. *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1012 (Del. 2021).

If that weren't enough, DSP added a revelatory footnote in their brief. DSP admitted that responsive information to Request 4 likely exists in their files, it is just spread throughout its records for each of its individual troopers, not kept in one central spreadsheet. Ans. Br. 14, n. 38. This is a jarring admission as DSP previously maintained that no such responsive information exists whatsoever. Attch. 1 at 24.

First, the fact that DSP can only state that responsive information "likely" exists demonstrates that DSP has disobeyed this Court's instructions to describe in its affidavits "the efforts taken to determine whether there are responsive records and the results of those efforts." *Jud. Watch*, 267 A.3d at 1012. Had DSP actually

undertaken such efforts as mandated, they would have been able to definitively say whether such responsive records exist.

DSP then complains that such an "enormous undertaking" would require them to charge administrative fees under 29 *Del. C.* § 10003(m). Ans. Br. 14-15 n. 38. This may be true, but it is not an excuse to disregard FOIA's obligations. FOIA contains a safeguard for both requesters and public bodies by requiring public bodies to provide a well-reasoned cost estimate of the number of hours and the hourly rate for fulfilling a large FOIA request prior to beginning work on that request. 29 *Del. C.* § 10003(m)(2). The public body must present that estimate to the requester who then can proceed with, modify, or cancel the request. *Id.* The fact that a request *might* require significant time and effort to respond to is a valid reason to charge such administrative fees, but it is by no means an excuse to deny a request outright. Yet, that is precisely what DSP has done. FOIA was passed in a time when sifting through filing cabinets was the norm. Request 4 essentially asks DSP to do exactly that, no more. Whether Mr. Vanella would decide to modify or cancel his request upon seeing the cost estimate is irrelevant when DSP has not even provided him with the estimate that the statute requires.

As for a list of former DSP officers (Request 6), DSP now does not even attempt to deny that they have such a list from at least 2012 to the present. *See* Ans. Br. 14-16. Instead, all that DSP can muster is a meek statement that they did

not feel obligated to provide it because the parties could not successfully negotiate a resolution. Ans. Br. 15. This argument defies all logic under FOIA's requirements. DSP tried to resolve the entire FOIA request by negotiating on Request 7 only.[1] A46. Mr. Vanella then proposed a different solution for Request 7 but stated that the other six requests still stood. *Id.* At that point, DSP stated that the parties could not successfully negotiate a resolution. A45. But FOIA requires public bodies to disclose all public records in their possession unless a relevant exemption applies. *See generally Flowers v. Off. of the Governor*, 167 A.3d 530 (Del. Super. 2017) (some records not subject to an exemption were disclosed while others were not). There is no justification in the statute for denying access to a record that the public body has in its possession and has no objections to disclosing simply because the parties could not agree on an entirely separate item in the FOIA request. Yet, DSP argues that it was not obligated to identify which items in the request it had no objections to. Ans. Br. 15. This is a truly baffling position. The entire purpose of FOIA is to mandate public bodies disclose all records in their possession unless an exemption applies. 29 *Del. C.* § 10003(a). DSP must disclose its records of former officers' names.

[1] Request 7 was Mr. Vanella's request for demographic information, which has nothing to do with former officers.

II. DSP's Arguments Regarding Personal Privacy Are Not Based Upon Any Existing Legal Standards

A. "Officer Safety" is Not a Part of Personal Privacy, and Disclosure will Not Jeopardize It

As they did before the Superior Court, DSP spends large portions of its brief discussing the ramifications that disclosure *could* have on officer safety. *See, e.g.*, Ans. Br. 21. This argument is a red herring. More than twenty years ago, this Court held that "officer safety" is not an exemption under the FOIA statute and that concerns about officer safety cannot be squeezed into the personnel files exemption. *Gannett Co., Inc. v. Bd. of Managers of the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232, 1239 (Del. 2003). Mr. Vanella recognizes that officer safety is important, but it is simply not an exemption to providing public records under the FOIA statute. The GA has not changed the relevant statutory language since it was enacted, so *stare decisis* compels this court to maintain its prior holding. *State v. Barnes*, 116 A.3d 883, 892 (Del. 2015).

Even if officer safety could be considered, DSP entirely misrepresents Mr. Vanella's intention to "track" officers. Ans. Br. 3. First, the AG has correctly recognized that the motive of the requesting party is entirely irrelevant under FOIA. *See Del. Op. Att'y Gen. 06-IB09*, 2006 WL 1779490 at *5 (2006) ("To inquire into a requester's purpose would turn FOIA into a battleground for

disputes.").[2] Second, Mr. Vanella has been clear throughout this litigation that he wants to "track" officers that are hired in Delaware *after being disciplined in other jurisdictions* so that he can report about that issue on his news website.[3] The suggestion that Mr. Vanella desired to "stalk" officers in a way that jeopardizes their safety is a transparently manipulative appeal to emotions rather than reason. DSP's gross mischaracterization of what Mr. Vanella means by "tracking" officers is a clear example of why motives should not and cannot be considered.

Finally, DSP cites multiple times to the widely publicized shooting that occurred at the DMV at the end of 2025 as a reason why they cannot disclose the requested information.[4] Ans. Br. at 1, 20-22. DSP cites no evidence linking that incident to the information requested in Mr. Vanella's FOIA. It cannot now be a *post hac* rationalization for nondisclosure.[5]

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[2] If a request on its face is clearly threatening towards an officer, DSP would certainly be allowed to refer that request for criminal investigation under existing criminal statutes, such as terroristic threatening. *See* 11 *Del. C.* § 621. Nothing about Mr. Vanella's request implicates these kinds of safety concerns. If DSP was legitimately worried about their officers' safety, they would have taken additional measures.

[3] *See* Sam Stecklow, *Delaware Opened Up Access to Some Police Misconduct Records – But Still Denies Requests for Basic Police Data*, The Delaware Call (Mar. 14, 2024) https://delawarecall.com/2024/03/14/delaware-opened-up-access-to-some-police-misconduct-records-but-still-denies-requests-for-basic-police-data/.

[4] It is ironic that DSP continuously accuses Mr. Vanella of straying from the record presented to the CDAG considering that this shooting did not occur until more than two years after the FOIA denial in this case.

[5] In fact, one of Delaware's largest police departments requires its officers to identify themselves when asked, demonstrating that there are no safety concerns

B. The State's Own Definition of "Personnel Files" Should Be Accepted

Under Delaware's FOIA statute, a "personnel file" is "a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions." *Del. Op. Att'y Gen. 02-IB24*, 2002 WL 31867898, at *1 (2002); *see also* Attch. 1 at 20.[6]

DSP takes the untenable position that such a definition cannot be used because it was not presented on the record to the CDAG. Ans. Br. 18. But this is routine statutory interpretation, a quintessential question of law, not a fact on the record. *Jud. Watch*, 267 A.3d at 1003. In addition, DSP does not provide this Court with any alternative definition of what the FOIA statute means by "personnel file." Instead, DSP's only argument is that demographic info must be considered as part of a personnel file because they swore in an affidavit that they consider it to be part of officers' personnel files. Ans. Br. 24. But saying does not make it so as a matter of law. This Court should adopt the same definition that the State has long adopted in other matters.

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resulting from officers identifying themselves to the public. *See* Wilmington Police Department Directive 7.2(H) https://www.wilmingtonde.gov/home/showpublisheddocument?id=9213.

[6] Mr. Vanella's Opening Brief conflated the AG's adoption of the personnel file definition with DSP's adoption of it. Op. Br. 19. He recognizes that DSP itself has never affirmatively adopted that definition, but DSP's attorneys have adopted it in other matters.

C. DSP's Claimed Privacy Invasions are Not Incorporated into Any Legal Test

The personnel files exemption is only implicated where there is "an *invasion* of personal privacy." 29 *Del. C.* § 10002(o)(1) (emphasis added). The statute does not define what this phrase means, but the Court can borrow from tort caselaw that delimits conduct constituting an invasion of privacy. *See, e.g.*, *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 175 (1993). DSP does not even engage in the argument that the tort standard is the appropriate standard under this exemption. Ans. Br. 18 (acknowledging that Mr. Vanella made said argument without discussing it any further). The inescapable conclusion is that DSP knows that it cannot possibly meet the standard, so it simply lets the pitch pass by without swinging.

DSP instead states that *Grimaldi* and other AG Opinions did not create a bright-line rule requiring disclosure of resumes. Ans. Br. 20. Mr. Vanella agrees with that contention, the opinions state as much. Rather, those opinions reflect that resumes are not some documents the disclosure of which grievously infringes on a person's personal privacy.

DSP proceeds by simply reiterating that there are privacy issues involved with disclosure. Mr. Vanella has never argued that there are zero privacy interests at stake in this case. Instead, he has argued that the mere existence of privacy interests does not automatically trigger the personnel files exemption, and that

instead some legal standard must be invoked to determine whether disclosure of the records results in an *invasion* of personal privacy. DSP does not fit its arguments into any of the existing legal standards or argue to create a new one. It simply states that there are privacy issues at stake, nothing more.

To the extent that DSP discusses any legal standards or tests at all, they merely reference the federal balancing test in their citations. Ans. Br. 23 n. 55. But the language of Delaware's personnel files exemption more closely tracks the language of states that have adopted the tort standard. *See, e.g.*, *Perkins*, 228 Conn. at 175; *Athens Observer, Inc. v. Anderson*, 245 Ga. 63, 65-66 (1980); *see also Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 135 (1978) ("Inasmuch as the [open records] statute contains no definition of the term, there is a presumption that the legislature intended the right of privacy to mean what it meant at common law."). Therefore, this Court should analyze Delaware's equivalent exemption with the invasion of privacy tort standard, not the federal balancing test.

Even if the federal balancing test were appropriate, DSP also fails to properly apply that test. That test simply requires courts to balance the privacy interests of the relevant party against the public interest in disclosure. *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171 (2004). The requester must demonstrate that there is a significant public interest in disclosure and that the

information requested is likely to advance that interest.[7] *Id.* at 172. DSP claims that disclosure of such information does little to advance the public interest, Ans. Br. 1. Not true. Mr. Vanella has been clear from the outset that he is interested in informing the public about "wandering officers," which is a significant public interest. *See supra* page 7. Receiving information about the past employers of current DSP officers self-evidently advances that interest.

As for the officers' privacy interests, despite DSP and the Superior Court's contentions to the contrary, Mr. Vanella is not asking for any personally identifying information that would subject officers to "an increased risk of personal harassment in their personal capacity." Ans. Br. 20. To the extent that such information may exist in an officer's resume, DSP can easily redact that information before disclosing the resume in question.[8]

DSP cites to *Clymer*, but this case is entirely different from that one. In that case, the requester sought information about public employees' home addresses and dates of birth. *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 47 (Iowa 1999). Here, by contrast, Mr. Vanella seeks information regarding past employers

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[7] This test requires the requester to state the motivations behind their request, which violates general Delaware FOIA principles that the requester's motives are not relevant to the FOIA inquiry. *See supra* page 6. This contradiction further demonstrates the inapplicability of the federal balancing test in Delaware.

[8] Again, Mr. Vanella recognizes that it would take a non-insignificant amount of DSP's time to redact every resume that it possesses for its current officers, but that is exactly what the administrative fees provision of FOIA is for. *See supra* page 4.

and job titles of current DSP officers, information that is often stored in resumes.[9] There is nothing about this information that would increase the risk of personal harassment to the officer. If it did, LinkedIn would cease to exist. Therefore, the requests do not seriously infringe on officers' privacy.

D. Mr. Vanella Expressly Told DSP he was Willing to Accept Some Deidentified Data

DSP misconstrues the record in asserting that Mr. Vanella was never willing to accept a deidentified list of officers. Ans. Br. 25-26. Via email, DSP stated that they did not want to follow the process laid out in the Superior Court's *Gannett* decision and instead offered some generalized "demographical and other statistical information" to resolve the entire request. A46. Mr. Vanella understood this offer to mean that DSP would disclose documents stating that x% of the department is male, and so on. He responded that such generalized statistics would not satisfy his request, but that unique ID numbers that allowed records to be matched across a line, i.e., the exact list that was produced in the Superior Court's *Gannett* decision, would be acceptable. *Id.* But then DSP took its ball and went home. A45. If DSP understood this request to be a ploy to match trooper demographic information to

[9] In the very case that DSP cites, the Supreme Court of Iowa recognized that they previously considered job application materials as not subject to their state's equivalent of Delaware's personnel files exemption. *Clymer*, 601 N.W.2d at 45-46. That court's position on the issue only shifted after their state's legislature enacted a law specifically barring disclosure of such materials. *Id.* at 46.

their names, an item that Mr. Vanella specifically stated it was okay for DSP to redact, DSP was sorely mistaken.[10] To the extent that this was a genuine miscommunication between the parties, if DSP is willing to disclose such a record, then FOIA obligates them to do so, not to continue litigating against it.

E. Randomly Generating a Unique ID Number is a Form of Redacting, Not Creating a New Record

Finally, DSP argues that requiring it to randomly generate unique ID numbers is equivalent to creating a new record, which is not required by FOIA. Ans. Br. 27. But DSP has previously acknowledged that the Superior Court has required public bodies to do exactly that. A46; *see also Bd. of Managers of Del. Crim. Just. Info. Sys. v. Gannett Co.*, 808 A.2d 453, 460 (Del. Super. 2002), *rev'd on other grounds sub nom*, *Gannett Co., Inc. v. Bd. of Managers of the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232 (Del. 2003) (recognizing that a requester's ask for a fictional linking number was valid). This intuitively makes sense, as generating random numbers on records to keep them organized requires a functionally identical amount of effort as placing a black bar on them.[11] DSP must at the very least disclose a list of officer demographic information with anonymous linking numbers.

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[10] Of course, Mr. Vanella maintains his position that said demographic information is not part of a "personnel file" and must be disclosed even if linked to names.
[11] Again, to the extent that this would require any additional staff time, DSP can request administrative fees.

III. DSP's Reading of LEOBOR Ignores the Plain Text of the Statute

DSP's only argument for why LEOBOR applies to FOIA is that Mr. Vanella's reading would lead to a "patently absurd result" violating the "golden rule of statutory interpretation" by, in DSP's view, making some documents available via FOIA but not available via civil litigation. Ans. Br. 30-31. In DSP's view, LEOBOR essentially prohibits all police records from being disclosed to anyone at anytime except when one of LEOBOR's specific statutory exemptions are met. *Id.* DSP's authority for this proposition, however, is taken entirely out of context. The actual holding of the *Doroshow* case cited by DSP was that when a word in a statute, such as the word "true," has multiple dictionary definitions, then courts should not assign the word at issue a definition that would lead to a "patently absurd result." *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 343 (Del. 2012). But here, unlike in *Doroshow*, DSP offers no alternative definition for "civil proceedings." The only valid definition of that phrase is the definition that Mr. Vanella supplies from Black's Law Dictionary, which should control.

DSP's only real claim is that because the LEOBOR statute uses the words "any" and "proceedings," the GA clearly intended for the statute to be construed

broadly. Ans. Br. 32.[12] DSP ignores, however, the word "civil" between "any" and "proceedings." 11 *Del. C.* § 9200(d). As DSP itself acknowledges, the rule against surplusage requires courts to give meaning to every word in a statute, not just the words DSP quotes. Ans. Br. 32 n. 74 (citing *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020)). The GA explicitly limited LEOBOR to "civil" proceedings. Had the GA intended that police officer personnel files never be disclosed to the people of Delaware, as DSP suggests, the GA could easily have said so. It did not.

DSP misunderstands Plaintiff-Appellant's citation to *MacColl*, which supports his position. Op. Br. 28. He cited *MacColl* because, even though it is not a FOIA case, it stands for the broader position that LEOBOR must be understood as a unique but limited protection for officers rather than an expansive catch-all enabling a secret and unaccountable police force. *State v. MacColl*, I.D. No. 2103011110, 2022 WL 2388397 at *8 (Del. Super. July 1, 2022), aff'd, 312 A.3d 674 (Del. 2024) (unpublished table decision).

Additionally, LEOBOR's structure suggests that it contains merely the same privacy concerns as FOIA's personnel files exemption. LEOBOR, after all, expressly claims that it does not provide protection for officers' personnel files in civil suits regarding officer misconduct, such as cases under 28 U.S.C. § 1983. 11

[12] No matter that DSP strenuously disagreed when Mr. Vanella made the identical argument regarding the FOIA attorneys' fees provision. *See* Superior Court Second Oral Argument Transcript, Apr. 11, 2025, at 21:3-22:12.

Del. C. § 9200(d). LEOBOR should not be understood to give police officers as a class more expansive privacy rights than every other employee in the state.

DSP may very well believe that it is bad policy to apply LEOBOR to some types of civil litigation but not to FOIA requests. But DSP's ardent belief does not change the plain language of the statute. DSP can lobby the GA for its preferred statutory language. But DSP's beliefs are not binding on this Court.

IV. DSTA's Amicus Brief Does Not Make a Legal Argument

The Delaware State Troopers Association filed an amicus brief purportedly to address the reason why officers' previous employment records should not be disclosed. Dkt. 42 at 1. The brief, though, makes no legal argument, and instead merely copies and pastes an unhelpful and irrelevant statute and police misconduct reports. None of this material has anything to do with Mr. Vanella's requests, and the Court can therefore disregard DSTA's brief.

V. The FOIA Statute Authorizes Claims for Attorneys' Fees and Costs in an OTRA

A. In FOIA Disputes Against State Agencies, FOIA Allows for OTRAs of CDAG Opinions Only and Does Not Allow Requesters to File Suit After Obtaining a CDAG Opinion

DSP asserts that, after obtaining the CDAG's opinion, Mr. Vanella had a choice to either file a "suit" or seek an "appeal," and that by choosing the latter, he terminated his ability to seek attorneys' fees. Ans. Br. 3 n.5. In DSP's view, because both options are available, some requesters can recover attorneys' fees against the State, but because Mr. Vanella chose wrong, he cannot. *Id.* If, on the other hand, the only way to challenge a state agency's denial of records is via an "appeal" and not a "suit," then the only way that attorneys' fees can ever be recovered against a state agency under FOIA is through an OTRA. Op. Br. 37-39. Clearly, to satisfy the GA's intent, there must be some way for a requester to recover attorneys' fees against the State.

Subsection 10005(e) concerns the administrative petition process and applies when the AG receives a petition from a requester who has been denied records by a public body. First, it requires the AG to determine whether the public body in question is a state agency. 29 *Del. C.* § 10005(e). If the AG determines the public body is a state agency, as opposed to another public body (i.e., a municipality, school board, etc.), then the statute requires the AG to refer the petition to the CDAG who then renders a decision on the petition and provides the right to appeal

the CDAG's opinion. *Id.* "In every *other* case . . ." however (i.e., all cases where the public body is *not* a state agency), after the AG's office issues their opinion, the requester is given the "absolute right to file suit." *Id.* So, the "absolute right to file suit" is only available when the public body is *not* a state agency. Here, DSP is a state agency.

This logical reading is further supported by the language of Subsection 10005(b), which describes the statute of limitations and venue for bringing a "suit." 29 *Del. C.* § 10005(b). It states, "[n]otwithstanding the foregoing" the provisions about those requirements, a requester who is denied records by a state agency must present a petition to the CDAG, and then after doing so, has the option to appeal an unfavorable outcome. *Id.* The word "notwithstanding" means "in spite of what has just been said or expressed."[13] This means that the previous provisions about "suits" do not apply when a requester seeks records from a state agency. The only way to challenge a state agency's denial of records is via an OTRA, not by filing a suit.

DSP harps on the idea that Subsection 10005(e) states that a requester "may appeal" an adverse decision of the CDAG. Ans. Br. 35 n. 78. In DSP's view, that means a requester could choose to appeal or file a suit. *Id.* This is an odd

[13] *Notwithstanding*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/notwithstanding (last visited Mar. 9, 2026).

interpretation; there is nothing about the phrase "may appeal" that grants the right to *file a suit* in the first instance. The more logical reading is that a requester could choose to appeal, or they could simply choose to give up their FOIA request after receiving an adverse CDAG opinion.

This case also illustrates that DSP's interpretation results in consequences for the statute of limitations that the GA could not have possibly intended. DSP denied the Request on November 3, 2023. A12. Mr. Vanella submitted his petition to the CDAG, as required by statute because DSP is a state agency, only three days later. Yet, due to the winter holidays and an additional unexplained delay, the CDAG did not issue his opinion until January 11, 2024, more than sixty days after the original FOIA denial. A22. However, FOIA's statute of limitations only provides people with sixty days to file a lawsuit after their request is denied. 29 *Del. C.* § 10005(b). The time that the petition was pending before the CDAG does not toll the statute of limitations.[14] So, even if Mr. Vanella had a right to file suit, as DSP wrongly claims, he would have lost that right due to the State's own inaction on his petition. And, consequently, Mr. Vanella would have also lost his statutory right to attorneys' fees due to the CDAG's delays because he could not legally file

[14] *Delaware Department of Justice Rules of Procedure for FOIA Petitions & Determinations* § IV.J (May 24, 2023) https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2023/05/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf

suit within sixty days. The GA could not have allowed the State to delay in ways that cut off a remedy that was meant to keep itself accountable.

The sole remedial option when a state agency denies a FOIA request is for a requester to seek an OTRA of the CDAG's opinion. Filing a separate "lawsuit" is simply not allowed. If attorneys' fees are not statutorily authorized in an OTRA, a requester can never recover fees against the State, and the State can never recover fees against a frivolous requester, despite the GA's clear intention that both are available. *See also* Op. Br. 37-39.

B. The FOIA Statute Clearly and Unambiguously Authorizes Fee Recovery in an OTRA

Mr. Vanella does not dispute the general principles of sovereign immunity nor that the American Rule applies in Delaware. But the FOIA statute plainly and explicitly waives sovereign immunity in "*any action*" (suit or OTRA) under FOIA. 29 *Del. C.* § 10005(d) (emphasis added); *see also* Op. Br. 32-25. The GA could not possibly have been clearer on this point. Notwithstanding DSP's unique argument to the contrary, the exceedingly clear plain language and intent of the statute must control. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1214 (Del. 2021).

DSP also asserts that because review is limited to the record in front of the CDAG, the Superior Court cannot go beyond the record to make a fact finding regarding the appropriate amount of attorneys' fees. Ans. Br. 36-37. But attorneys'

fees proceedings are entirely ancillary to the merits of a dispute. *Lipson v. Lipson*, 799 A.2d 345, 347 (Del. 2001). And the Superior Court is no stranger to awarding attorneys' fees after a successful appeal from other administrative agencies. *See generally Pollard v. The Placers, Inc.*, 703 A.2d 1211 (Del. 1997) (affirming the Superior Court's fee award after a partially successful appeal from the Industrial Accident Board). Additionally, in *Judicial Watch*, this Court stated, "[o]n remand, the Superior Court . . . . may accept any additional evidence or submissions it deems necessary to determine whether the University has violated FOIA in accordance with this ruling." 267 A.3d at 1013. Likewise, it stands to reason that the Superior Court can conduct additional fact-finding to resolve ancillary issues unrelated to the merits of an OTRA, such as determining attorneys' fees awards.

Finally, DSP argues that its position would not result in issuance of advisory opinions because the Superior Court would still be addressing an actual controversy regarding whether documents are subject to FOIA. Ans. Br. 42. An "advisory opinion" is defined as "[a] nonbinding statement by a court of its interpretation of the law." *Opinion*, *Advisory Opinion*, *Black's Law Dictionary* (12th Ed. 2024). If, as DSP suggests, the Superior Court cannot issue any remedies in OTRAs, then it does not have the power to bind anyone or anything to its opinions. A review process without a remedy cannot be viewed as anything but an advisory opinion. And again, a requester would not be able to separately sue a

defiant public body to force them to comply with the Superior Court's opinion. *See supra* page 18-21.

C. DSP Continues to Misunderstand and Obfuscate the Legislative History of § 10005

DSP pushes a farcical position that the 1988 GA contemplated lawsuits and appeals separately when they passed the attorneys' fees provision. Ans. Br. 36. How DSP possibly came to this conclusion is a mystery. It is impossible that the 1988 GA clairvoyantly contemplated lawsuits and appeals separately as the appeal process was not even created until twenty-two years later. 77 *Del. Laws* c. 400 (2010). For all the talents and wisdom of the GA, oracle it is not.

In fact, DSP's briefing never even mentions the 2010 amendment and instead focuses all of its energy on 1988. True, 1988 is when the attorneys' fees provision was first introduced, but § 10005's history does not end there. It is impossible to decipher whether the attorneys' fees provision applies to OTRAs without looking at the amendment that added OTRAs in the first place; yet, that is exactly what DSP tries to do. For the reasons already discussed in the Opening Brief and not repeated here, the full context of the legislative history of § 10005 demonstrates that the GA intended for attorneys' fees to be available in an OTRA. *See Op. Br.* 40-45.

CONCLUSION

For all the foregoing reasons, Plaintiff-Appellant requests that this Court reverse the Merits Opinion in part, order disclosure of the requested documents, reverse the Fees Opinion, and remand for further proceedings to determine the appropriate amount of attorneys' fees.

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