EFiled: Sep 22 2026 09:58AM EDT
Filing ID 80702570
Case Number 281,2026

IN THE

Supreme Court of the State of Delaware

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

No. 281, 2026
On Appeal from the Superior Court of the State of Delaware
C.A. No. N25A-07-002-CLS

APPELLEE'S CORRECTED ANSWERING BRIEF

Dated: September 22, 2026

/s/ Andrew Bernstein
Andrew Bernstein (#7161)
abernstein@aclu-de.org

/s/ Jared Silberglied
Jared Silberglied (#7683)
jsilberglied@aclu-de.org

ACLU of Delaware
100 W. 10th St. #706
Wilmington, DE 19801
(302) 654-5326

Attorneys for Appellee

TABLE OF CONTENTS

INTRODUCTION 1

NATURE OF THE PROCEEDINGS 2

SUMMARY OF THE ARGUMENT 3

STATEMENT OF THE FACTS 5

ARGUMENT 9

I. **The Plain Meaning of the Litigation Exemption does not Sweep in Documents that are Neither Attorney Work Product nor Related to the Merits of the Underlying Case** 9

A. *Under The Plain Meaning of the Litigation Exemption, the Exemption Applies Only to Documents that Directly Relate to the Merits of the Underlying Litigation* 10

B. *Documents that "Pertain to" Pending Litigation are Equivalent to Work Product* 14

C. *Utilizing Such a Test for "Pertaining to" Pending Litigation Creates a Set of Objective Criteria Under Which a Document is Either Public or it is Not* 17

D. *The DDOJ had the Opportunity to Develop a Factual Record but Failed to do so* 21

II. **The DDOJ has Waived all of its Arguments About Discovery Advantages in Other Forms of Litigation Because it did not Raise them in the Superior Court** 26

III. **Even if this Court Considers all the DDOJ's Arguments, the DDOJ Has Not Shown that Disclosure Would Constitute "Unfairness"** 29

A. *Cases Concerning Discovery Disputes in Other Procedural Postures are Readily Distinguishable from FOIA* 29

B. *There is Nothing Unfair About the ACLU-DE's Request for the Samuel Invoices* 34

CONCLUSION 38

TABLE OF CITATIONS

Cases

A. Schulman, Inc. v. Citadel Plastic Holdings, LLC,
2017 WL 5035497 (Del. Ch. Nov. 2, 2017).....30
Am. Civ. Liberties Union of Del. v. Danberg,
2007 WL 901592 (Del. Super. Mar. 15, 2007).....17
Fairley v. Superior Ct.,
66 Cal. App. 4th 1414 (Cal. Ct. App. 1998).....15
Fawcett v. State,
697 A.2d 385 (Del. 1997) 4
First Jersey Secs., Inc. v. Bruton,
1980 WL 273547 (Del. Ch. May 8, 1980) 31, 32
Gannett Co., Inc. v. Christian,
1983 WL 473048 (Del. Super. Aug. 19, 1983) 35
Giuricich v. Emtrol Corp.,
449 A.2d 232 (Del. 1982) 15
In re Pennell,
583 A.2d 971 (Del. Super. Ct. 1989).....29, 32
Jud. Watch, Inc. v. Univ. of Del.,
267 A.3d 996 (Del. 2021) .....*passim*
Lane County Sch. Dist. v. Parks,
55 Or. App. 416 (1981) 15
Mell v. New Castle County,
835 A.2d 141 (Del. Super. 2003) 26
Ortiz v. State,
869 A.2d 285 (Del. 2005) 26
Shawe v. Eltig,
157 A.3d 152 (Del. 2013) 25, 26
Shlansky v. City of Burlington,
13 A.3d 1075 (Vt. 2010) 18
State v. Spicer,
1999 WL 463548 (Del. Super. Mar. 31, 1999).....30, 32
Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.,
616 A.2d 1205 (Del. 1992) 8, 28

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995) 13, 28
Vanella on Behalf of the Del. Call v. Duran,
2026 WL 2473687 (Del. Aug. 24, 2026) .....*passim*

Statutes

28 U.S.C. § 1988 35
29 *Del. C.* § 10001 .....1, 30
29 *Del. C.* § 10002(o) 33
29 *Del. C.* § 10002(o)(11) 17, 18
29 *Del. C.* § 10002(o)(13) 17, 18
29 *Del. C.* § 10002(o)(18) 17, 18
29 *Del. C.* § 10002(o)(4) 17, 18
29 *Del. C.* § 10002(o)(9) 2, 7, 9
29 *Del. C.* § 10003(c) 23
29 *Del. C.* § 10004(b)(4) 15, 16
29 *Del. C.* § 10005(c) 21
29 *Del. C.* § 10005(e) 2, 7, 23
29 *Del. C.* § 10007 23
29 *Del. C.* § 2504 23
60 *Del. Laws*, c. 641, § 1 (1976) 10
Cal. Government Code § 7927.200 14
Or. Rev. Stat. Ann. § 192.345(1) 14

Other Authorities

Del. Op. Atty. Gen. 06-IB09,
2006 WL 1779490 (2006) 19
Del. Op. Atty. Gen. 11-IIB15,
2011 WL 7637780 (2011) 19
Pertain, Black's Law Dictionary (12th Ed. 2024) 10
Pertain, Black's Law Dictionary (4th Rev. Ed. 1968) 10

Rules

Fed. R. Civ. P. 26(b)(1) 33
Fed. R. Civ. P. 26(b)(3)(B) 14

Internet Sources

Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations (May 24, 2023), https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2026/04/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf 22
Our Budget Equity Platform, ACLU Delaware, https://votedelaware.org/budget-equity/ (last visited Sept. 9, 2026) 4
Pertain to Something, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/pertain-to?q=pertain (last visited Sept. 8, 2026) 11
Pertain, Dictionary.com, https://www.dictionary.com/browse/pertain (last visited Sept. 8, 2026) 11
Pertain, Simple Definition, Merriam-Webster, https://www.merriam-webster.com/simple/pertain (last visited Sept. 8, 2026) 11
State of Oregon Department of Justice Attorney General's Public Records and Meetings Manual at 42 (2024) https://www.doj.state.or.us/wp-content/uploads/2024/12/2024-PRM-Manual.pdf 15
Xerxes Wilson, *State-Backed Whistleblower Suit Claims Neglect in Delaware Prison Care*, Delaware Online (June 16, 2026) https://www.delawareonline.com/story/news/2026/06/16/delaware-sues-prison-healthcare-contractor-over-fraud-allegations/90494603007/.....31

INTRODUCTION

People are entitled to know how their tax dollars are spent. Government documents showing expenditures of such public funds are quintessential public documents that the people are entitled to view "to monitor the decisions that are made by [government] officials in formulating and executing public policy[.]"[1]

Yet, the Delaware Department of Justice ("DDOJ") denied a request under the Freedom of Information Act ("FOIA") made by the American Civil Liberties Union of Delaware ("ACLU-DE") asking for those exact documents. In doing so, the DDOJ decided that some requestors are entitled to public records while other requestors are not. This defies all logic of what a "public" record is. A record is either public, or it is not. Any test that holds otherwise does not withstand scrutiny under FOIA.

Because the ACLU-DE requested routine public documents that do not "pertain to" any pending litigation, the Superior Court's decision must be affirmed, and the DDOJ must be ordered to produce the requested documents.

[1] 29 *Del. C.* § 10001.

NATURE OF THE PROCEEDINGS

On April 7, 2025, an individual at the ACLU-DE submitted a FOIA request to the DDOJ requesting, *inter alia*, the invoices that the law firm Saul Ewing charged to the DDOJ for representing the Delaware Department of Correction ("DDOC") in the federal district court case *Samuel v. Centene Corp* ("*Samuel*"), a case pertaining to alleged constitutionally inadequate healthcare in Delaware prisons.

On May 9, 2025, the DDOJ denied the disclosure of the *Samuel* invoices, citing the litigation exemption to FOIA, 29 *Del. C.* § 10002(o)(9). The ACLU-DE subsequently appealed the DDOJ's denial on the record to the Superior Court pursuant to 29 *Del. C.* § 10005(e).

On June 11, 2026, the Superior Court held that the DDOJ had not met its burden under FOIA in denying the requested invoices pursuant to the litigation exemption. The DDOJ appealed that decision to this Court. On August 17, 2026, the DDOJ filed its opening brief.

This is the ACLU-DE's answering brief.

SUMMARY OF THE ARGUMENT

1. **The DDOJ's Argument number one is denied.** The DDOJ raises new arguments about imbalances in discovery mechanisms in other forms of litigation that were not raised below. Such arguments have been waived and should not be considered by this Court. Even if the DDOJ's arguments about discovery are considered, the cases the DDOJ raises are all easily distinguishable, as they pertain to scenarios wherein courts determined a party sought an unfair litigation advantage. Here, the Superior Court made no such finding. Regardless, the DDOJ hypothesizes about malicious scenarios that are simply not present here to try to claim that the request for invoices was "unfair."[2]
2. **The DDOJ's Argument number two is denied.** The *Samuel* invoices do not "pertain to" any pending litigation. The plain meaning of the statute applies only when the documents in question are attorney work product, or at the very least when they directly relate to the merits of the underlying case. Either objective test is consistent with the statutory text and purpose of FOIA and does not consider the identity of the requestor. Invoices paid to

[2] These arguments appear as Sections II and III of the ACLU-DE's argument section.

private lawyers are not attorney work product nor do they directly relate to the merits of a case about prison healthcare.[3]

3. **The DDOJ's argument number three is denied.** The DDOJ had an opportunity to develop the record in this case, but failed to do so, and has not met the test that the Superior Court laid out.[4]

[3] This argument appears as Section I of the ACLU-DE's argument section.
[4] This argument appears as Section I.D of the ACLU-DE's argument section.

STATEMENT OF THE FACTS

In October 2024, as part of the ACLU-DE's advocacy work in monitoring the State's use of taxpayer money,[5] John Reynolds, ACLU-DE's Deputy Policy & Advocacy Director, submitted a FOIA request to the DDOJ inquiring into various policies and practices around the State's hiring of outside counsel to represent state agencies as well as all invoices charged to the DDOJ by outside retained counsel across all law firms in all cases over the prior four years.[6] On November 14, 2024, the DDOJ responded with responsive documents to some of the requests.[7] However, on the request for invoices, the DDOJ responded that it did not maintain

---

[5] The ACLU-DE frequently engages in non-litigation advocacy work pertaining to the expenditure of public funds. *See Our Budget Equity Platform*, ACLU Delaware, https://votedelaware.org/budget-equity/ (last visited Sept. 9, 2026).

[6] Appellee's Appendix at 1-4 ("B 1-4"). The ACLU-DE recognizes that this fact along with some other facts presented here were not briefed to the Superior Court. The ACLU-DE did not believe that such facts were necessary to decide the legal issues presented to that court. However, given the DDOJ's misrepresentations of the facts to this Court, the ACLU-DE must correct the record. Evidence of all facts stated here are included in the appendix filed with this brief. This evidence comprises entirely of public records that are available under FOIA or on PACER with a single redaction for an internal communication among the ACLU-DE staff. Therefore, the ACLU-DE respectfully requests that this Court take judicial notice of these documents because their accuracy cannot be reasonably questioned. *See Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) ("A court may take judicial notice of a fact if that fact is 'not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'") (citing D.R.E. 201(b)). Furthermore, as discussed *infra* notes 20 and 69, the DDOJ did not provide any opportunity to develop the factual record in this case. Had it done so, these facts would have been included in that record.

[7] B 4.

the final payment records requested.[8] DDOJ added that "payments are made by the client agency or the Office of Management and Budget."[9]

Now believing agencies such as the DDOC to be the custodian of the invoices, Mr. Reynolds filed a new FOIA request with the DDOC on January 2, 2025, asking for the invoices.[10] After a variety of delays and the involvement of an ACLU-DE attorney, Jared Silberglied, the ACLU-DE agreed to start by asking for invoices in only one case, the federal district court case of *Davis v. Neal* ("*Davis*"), instead of all cases where the DDOC retained private counsel.[11] On April 2, 2025, the DDOC disclosed all seventy-two invoices that the law firm Saul Ewing had charged as part of its representation in *Davis* at that time.[12]

---

[8] B 1.
[9] *Id*.
[10] B 18. In the midst of this timeline, in early 2025, there was a discovery dispute in the *Samuel* case. As the Superior Court recognized below, "the ACLU states, and the [D]DOJ does not challenge, that the discovery dispute was based on another *Samuel* defendant's noncompliance with electronic discovery and production requests, and had nothing to do with the [D]DOC." Appellant's Exhibit A at 3. The DDOJ now tries to flag this discovery dispute to this Court's attention. The DDOJ's Opening Brief at 4 ("OB 4"). It is unclear why the DDOJ is trying to distract this Court by again highlighting a completely unrelated discovery dispute that did not even involve the DDOC in the *Samuel* case.
[11] B 8.
[12] B 5-6. By way of example and as proof that such invoices were in fact disclosed with redactions, the ACLU-DE has attached two of the *Davis* invoices in the appendix to this brief. B 20-29. For sake of convenience and saving paper, the ACLU-DE has not put all seventy-two disclosed invoices in the appendix.

Despite disclosing the *Davis* invoices, the DDOC claimed that it was not the custodian of those records, so it would not respond to any future FOIA request regarding similar invoices.[13] In reviewing the invoices, Mr. Reynolds and Mr. Silberglied noticed that they were addressed to the DDOJ.[14] That led them to believe that the DDOJ's initial contention that it did not possess the invoices was incorrect.

Those previous two FOIA requests led to the FOIA request that is the subject of the instant dispute.[15] On April 7, 2025, Mr. Silberglied, who is not and has never been counsel of record to the plaintiffs in the *Samuel* case, submitted a new FOIA request to the DDOJ requesting, *inter alia*, all the invoices in two cases presently pending before the federal District of Delaware: *Samuel* and *Adger v. Coupe* ("*Adger*").[16] Despite the DDOJ's previous claim that it did not possess any invoices, this time it disclosed all the invoices that Saul Ewing had charged in the *Adger* case with redactions to specific time entries.[17] The DDOJ did not disclose any of the invoices in the *Samuel* case, citing the litigation exemption, 29 *Del. C.* §

---

[13] B 6.
[14] B 20, 24.
[15] This contradicts the DDOJ's counterfactual narrative that the ACLU-DE has been engaged in a targeted campaign to seek invoices in the *Samuel* case. The ACLU-DE began this endeavor by broadly seeking policy documents and invoices pertaining to outside counsel retention in all cases where the DDOJ has considered hiring outside counsel.
[16] Appellant's Appendix at 000076-78 ("A 76-78").
[17] *Id.*

10002(o)(9).[18] At the time, the DDOJ did not explain why it applied the litigation exemption to *Samuel* but not to *Adger*.[19] The ACLU-DE intuited what the DDOJ later asserted after the instant case was filed: the only difference is that the ACLU-DE represents the plaintiffs in the *Samuel* case but not in the *Adger* case.

On July 8, 2025, the ACLU-DE filed an on the record appeal to the Superior Court pursuant to 29 *Del. C.* § 10005(e).[20] While this case was pending in the Superior Court, Saul Ewing withdrew as counsel in the *Samuel* case and the firm Husch Blackwell replaced it.[21]

On June 11, 2026, the Superior Court ruled in favor of the ACLU-DE and held that the DDOJ had not met its burden to withhold the *Samuel* invoices pursuant to FOIA's litigation exemption. The DDOJ subsequently appealed that decision to this Court.

---

[18] *Id.*

[19] *Id.*

[20] As this Court recently recognized, when a state public body is the subject of a FOIA dispute, the requestor must first file a petition with the DDOJ to resolve the dispute. 29 *Del. C.* § 10005(e); *Vanella on Behalf of the Del. Call v. Duran*, 2026 WL 2473687 at *9-10 (Del. Aug. 24, 2026). If that office decides against the requestor, then the requestor files an on the record appeal to the Superior Court. *Id.* However, as the DDOJ told the Superior Court, it declines to hear petitions against itself, and so the ACLU-DE did not have the option to file a petition here. A 79-80. Therefore, the ACLU-DE proceeded to file an on the record appeal without first submitting a petition, and the DDOJ has not disputed that procedural posture.

[21] B 54, dkt. 174. As clearly indicated on the PACER docket in the *Samuel* case, all insinuations that the DDOJ made in its opening brief that Saul Ewing still represents the State in the *Samuel* case are demonstrably false.

ARGUMENT

I. The Plain Meaning of the Litigation Exemption does not Sweep in Documents that are Neither Attorney Work Product nor Related to the Merits of the Underlying Case

Question Presented

Does the litigation exemption apply when the requested documents are unrelated to the merits of the underlying litigation?[22]

Scope of Review

In an administrative appeal, this Court's standard of review matches that of the Superior Court.[23] This Court must review whether the agency's decision was based on substantial evidence and free from legal error.[24] Questions of law, including statutory interpretation and whether the DDOJ met its burden of proof under FOIA, are reviewed *de novo*.[25]

Merits of the Argument

Despite the DDOJ's extensive discussion of various discovery doctrines, the start and end point of this dispute is whether the invoices paid by a state agency to

---

[22] A 22-25.
[23] *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).
[24] *Id.*
[25] *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1003 (Del. 2021) (internal citations omitted).

a private law firm fall within the plain meaning of an exemption in FOIA's statutory text. They do not.

A. Under The Plain Meaning of the Litigation Exemption, the Exemption Applies Only to Documents that Directly Relate to the Merits of the Underlying Litigation

When interpreting the meaning of a statute enacted by the General Assembly, this Court's priority is to give effect to the legislative intent.[26] The starting point must be the language of the statute.[27] If the statute is clear and unambiguous, then its plain meaning must control.[28] In determining the plain meaning of a statute, this Court relies on dictionary definitions of terms in the statute.[29] Exemptions to the FOIA statute are to be narrowly construed.[30]

The litigation exemption states in its entirety, "the following records shall not be deemed public . . . [a]ny records pertaining to pending or potential litigation which are not records of any court[.]"[31] The DDOJ recognizes that the plain meaning of the statute must control and that textual analysis is required to determine what the words "pertaining to" mean.[32] Yet, the DDOJ provides only a

[26] *Id.* at 1003-04.
[27] *Id.* at 1004.
[28] *Id.*
[29] *See, e.g.*, *Vanella*, 2026 WL 2473687 at *10.
[30] *Id.* at *4.
[31] 29 *Del. C.* § 10002(o)(9).
[32] OB 27.

passing footnote to the definition of that phrase,[33] and spends the rest of the "statutory interpretation" section of its brief not actually analyzing what the words of the statute mean.[34]

The ACLU-DE does not dispute that *Samuel* is "pending" litigation. The ACLU-DE also does not dispute that the invoices are not "records of any court."[35] Therefore, this entire case hinges on the statutory interpretation of the words "pertaining to."

The litigation exemption has not been amended since the original FOIA statute was enacted in 1976.[36] At the time that FOIA was enacted, Black's Law Dictionary defined "pertain" as "to belong or *relate* to, whether by nature, appointment, or custom."[37] At present, Black's Law Dictionary defines "pertain" as "to *relate* directly to; to concern or have to do with."[38] In non-legal dictionaries,

---

[33] OB 27 n. 5.
[34] OB 23-27.
[35] Although not in dispute here, the ACLU-DE proposes that the phrase "records of any court" refers to documents that are publicly filed on the docket in pending litigation. That means that once a document is filed on the public docket, the public body would be required to disclose it through FOIA rather than requiring the requestor to go through an e-filing service to obtain a copy of the document, assuming that the public body has a copy of the document itself.
[36] 60 *Del. Laws*, c. 641, § 1 (1976).
[37] *Pertain*, Black's Law Dictionary (4th Rev. Ed. 1968) (internal citation omitted) (emphasis added). This Court has found that the edition of Black's Law Dictionary published at the time of the statutory enactment in question is relevant but not dispositive evidence for a statute's intended meaning. *Vanella*, 2026 WL 2473687 at *10 n. 89.
[38] *Pertain*, Black's Law Dictionary (12th Ed. 2024) (emphasis added).

Merriam-Webster's "simple definition" of "pertain" is "to *relate* to someone or something."[39] Likewise, dictionary.com defines it as "to have reference or *relation*."[40] Cambridge Dictionary even defines the full phrase of "pertain to [something]" as meaning "to *relate* to or have a connection with something."[41]

These definitions are useful because this Court has already defined the term "relating to" in a different section of the FOIA statute. In *Judicial Watch*, this Court held that documents "related to" the expenditure of public funds only when the *contents* of the documents in question were about expenditure of funds.[42] In other words, the document needed to directly discuss expenditures of public funds to "relate to" their expenditure; a document did not "relate to" public funds merely because public funds had to be expended to create and maintain them.[43] Likewise, under the litigation exemption, documents can be withheld only when their *contents* are about the merits of the litigation. This means that a document can be exempt only when it directly discusses the merits of the underlying litigation. Further, because this Court has recently made clear that "[a] record is not exempt

---

[39] *Pertain, Simple Definition*, Merriam-Webster, https://www.merriam-webster.com/simple/pertain (last visited Sept. 8, 2026) (emphasis added).
[40] *Pertain*, Dictionary.com, https://www.dictionary.com/browse/pertain (last visited Sept. 8, 2026) (emphasis added).
[41] *Pertain to Something*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/pertain-to?q=pertain (last visited Sept. 8, 2026) (emphasis added).
[42] *Jud. Watch*, 267 A.3d at 10005-06.
[43] *Id.*

in its entirety because a discrete portion of that record is exempt from disclosure," an entire document can be withheld only where the *entirety of the document's content* is about the merits of the litigation.[44] As this Court explained, to allow otherwise would be to "permit a public body to withhold any record containing a single exempt data point."[45]

The primary contents of attorney invoices are the number of hours worked, the hourly rate, and the total dollar amount billed. Nothing about that "pertains" to the merits of any litigation. To be clear, it is possible that such invoices could include a description of specific legal tasks performed, and those descriptions certainly could "pertain" to the merits of some pending litigation. Under those circumstances, as this Court recently made abundantly clear in *Vanella*, the appropriate course of action for the public body is to redact the portions of the invoices that "pertain" to pending litigation, not to completely deny access to the public records. In fact, that is exactly what the DDOJ did with the *Adger* invoices,[46] and the ACLU-DE has never claimed that those redactions were improper. The ACLU-DE would welcome disclosure of the *Samuel* invoices with the same redactions.

---

[44] *Vanella*, 2026 WL 2473687 at *6.
[45] *Id*.
[46] B 67-69.

Therefore, the plain meaning of the litigation exemption holds that documents can be withheld only when their contents are about the merits of the underlying litigation. Because the primary purpose of invoices is to communicate the cost of legal services, not to speak to the merits of litigation, they are not covered by the litigation exemption and must be disclosed.

B. Documents that "Pertain to" Pending Litigation are Equivalent to Work Product

As the ACLU-DE argued in the Superior Court, interpreting the litigation exemption as applying only to attorney work product is the most faithful and logical understanding of the exemption in light of the statute's text and purpose. Further, it is far easier to administer and does not require consideration of a requesting party's motives. Under such a rule, the ACLU-DE would be entitled to the documents requested because the DDOJ has not and cannot allege that the requested records qualify as attorney work product. For the sake of certainty in future FOIA disputes, this Court should adopt the work product test.

This Court has recognized that it "may affirm on the basis of a different rationale than that which was articulated by the trial court," and it may "rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court."[47] The ACLU-DE fairly presented this argument to the Superior Court,

[47] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

arguing in both its opening and its reply briefs to that court that the litigation exemption should apply to attorney work product only.[48]

As noted *supra* Part I.A, definitions of "pertain" and "pertain to" require the object of "pertain" to relate to, refer to, or have a connection to the subject of "pertain." So, considering these definitions and the purpose of FOIA, the exemption is best understood as applying only to attorney work product (i.e. tangible things made for or in anticipation of litigation which relate to, refer to, or have a connection to litigation).[49]

In analyzing arguably ambiguous text within FOIA, this Court has also recently looked to sister states to confirm the reasonableness of its interpretation.[50] Here, states with similarly worded litigation exemptions in their FOIA equivalents have adopted this work product test. For example, Oregon exempts "[r]ecords of a public body *pertaining to* litigation to which the public body is a party . . . ."[51] Additionally, California exempts "[r]ecords *pertaining to* pending litigation to which the public agency is a party . . . ."[52] Both of these provisions, which use the

---

[48] A 18-22, 61-65. The Superior Court's correct observation that the parties eventually agreed that it did not need to reach the *Danberg* precedent does not mean that the ACLU-DE abandoned the argument that a work product rule should apply to the litigation exemption. Appellant's Exhibit A at 3.
[49] *See* Fed. R. Civ. P. 26(b)(3)(B).
[50] *See Vanella*, 2026 WL 2473687 at *12.
[51] Or. Rev. Stat. Ann. § 192.345(1) (emphasis added).
[52] Cal. Government Code § 7927.200 (emphasis added).

critical term "pertain" and speak to pending litigation, have been construed to apply only to attorney work product.[53] This Court should follow the model laid out by those states.

In a footnote, the DDOJ argues that the ACLU-DE's work product test cannot be correct by invoking the *expressio unius est exclusio alterius* canon of statutory interpretation.[54] That canon holds that "where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it."[55] The DDOJ then refers to 29 *Del. C.* § 10004(b)(4) as the part of the FOIA statute where "work product" is expressly mentioned. That section reads that a public *meeting* can move into executive session and be closed to the public when its purpose is to be a "[s]trategy session[], including those involving legal advice or opinion from

---

[53] *See* State of Oregon Department of Justice Attorney General's Public Records and Meetings Manual at 42 (2024) https://www.doj.state.or.us/wp-content/uploads/2024/12/2024-PRM-Manual.pdf ("The exemption applies only to records 'compiled or acquired by the public body for use in the litigation,' as distinguished from records compiled or acquired in the ordinary course of business that subsequently become relevant to litigation. The Oregon Court of Appeals has suggested that this exemption is analogous to the attorney-client privilege and the work product protection.") (*citing Lane County Sch. Dist. v. Parks*, 55 Or. App. 416, 420 (1981)); *Fairley v. Superior Ct.*, 66 Cal. App. 4th 1414, 1421-22 (Cal. Ct. App. 1998) ("The construction we give to 'pending litigation,' which focuses on the purpose of the document, serves to protect documents created by a public entity for its own use in anticipation of litigation, which documents it reasonably has an interest in keeping to itself until litigation is finalized.").

[54] OB 25 n. 4.

[55] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

an attorney-at-law, with respect to collective bargaining or pending or potential litigation . . . ."[56] This actually cuts against the DDOJ's argument. It suggests that attorney work product ("legal advice or opinion from an attorney") is what is at stake when FOIA refers to "pending or potential litigation." Further, its command to go into executive session only where not doing so would adversely impact the litigation position of the public body demonstrates that FOIA is not concerned with blocking access to all documents or discussions that make passing references to litigation but rather is concerned with disclosure of records which could tip the scales in litigation. If anything, it appears that the language of 10004(b)(4) is broader and allows for more exclusions than the language of 10002(o)(9) despite the DDOJ's seeming statement to the contrary.

Therefore, this Court should affirm the lower court's decision but make clear that it is doing so because the ACLU-DE has not requested attorney work product.

C. Utilizing Such a Test for "Pertaining to" Pending Litigation Creates a Set of Objective Criteria Under Which a Document is Either Public or it is Not

The DDOJ argues that it is beyond the scope of FOIA to force it to prove that a requestor had an ill intent in requesting the documents in question to satisfy the litigation exemption. On this point, the parties agree. "[P]rolonged, involved, and expensive discovery would be contrary to the summary process envisioned by

[56] 29 *Del. C.* § 10004(b)(4).

the General Assembly when it enacted FOIA."[57] To ensure that FOIA does not become a battleground of costly litigation, an objective test is necessary. However, unlike what the DDOJ suggests here, such an objective test simply cannot depend on the identity of the requesting party.

Although the text of the FOIA statute does not call for consideration of a requesting party's intent or motive, and despite the Superior Court's recognition that such criteria are "generally . . . irrelevant in the FOIA analysis," lower Delaware Courts have made an extratextual choice to allow the motive or identity of the requestor to factor into analysis of the litigation exemption.[58] However, where the General Assembly intended departure from the general rule of treating all FOIA requestors the same and allowed consideration of the identity of the requestor in FOIA, it said so explicitly.[59] This Court has recently affirmed that it "must view the General Assembly's use of different terms" within a section of FOIA "as intentional,"[60] so it stands to reason that this Court should also view the presence or lack of text regarding the identity of a requestor as at least equally intentional. The general rule is that all documents are public regardless of who asks

---

[57] *Am. Civ. Liberties Union of Del. v. Danberg*, 2007 WL 901592 at *3 (Del. Super. Mar. 15, 2007).
[58] *Id.* at *4.
[59] *See* 29 *Del. C.* § 10002(o)(4); *Id.* at (11); *Id.* at (13); *Id.* at (18) (exemptions where the identity of the requestor is explicitly considered).
[60] *Vanella*, 2026 WL 2473687 at *10.

for them. The General Assembly can decide differently for specific documents, as they have done in certain instances.[61] The fact that they have explicitly done this in certain instances but not others is evidence of the general presumption that document requests do not turn on the identity of the requestor.

This Court's explicit adoption of a work product test would remove consideration of identity from FOIA beyond that required explicitly within its text, and it would do so while continuing to ensure that public bodies are not at a disadvantage in litigation. As the Supreme Court of Vermont acknowledged, "the relevance of . . . documents to the specific pending litigation must be established independently" of the requestor's motive.[62]

An objective test that does not consider the requestor's motive also follows the purpose of the FOIA statute. The entire premise of FOIA's open records provisions is that there are many public documents that all citizens of Delaware are entitled to see. As the DDOJ itself has previously said in FOIA opinions, it simply

---

[61] In fact, when the General Assembly has directed the public body to consider the identity of the requestor, it typically does so to *expand* access to records to certain people, not to deny them based on identity. *See* 29 *Del. C.* § 10002(o)(4) (this exemption does not apply if a person is requesting records about themselves); *Id.* at (11) (this exemption does not apply to law enforcement officers); *Id.* at (18) (this exemption does not apply if the subject of the record consents to disclosure). The only exemption that narrows accessibility based on the identity of the requestor applies only when a prisoner makes a request to the DDOC, which is a unique scenario that is not at all relevant to this case. *See Id.* at (13).

[62] *Shlansky v. City of Burlington*, 13 A.3d 1075, 1080-1081 (Vt. 2010) (discussing Vermont's litigation exemption to its FOIA-equivalent statute).

does not make sense for a document to be "public" to some requestors but shielded from others.[63]

The issues presented in this case illustrate the dilemmas caused by an examination of the identity of the requesting party. Once a document is deemed public and disclosed to a requestor, FOIA does not contain any confidentiality provisions limiting the requestor from giving those documents to other people. This intuitively makes sense as the General Assembly has decided that, unless specifically provided for otherwise in the statute, such documents must be available to all citizens of Delaware, and a provision limiting the dissemination of the documents received via FOIA would contradict that ideal.

By way of example, based on the DDOJ's reasoning and disclosure of the *Adger* invoices, it would readily disclose the *Samuel* invoices to the news media if requested. If said news outlet then published the information contained in the invoices, the ACLU-DE would find out the contents of the invoices. Simply put, the DDOJ cannot put the genie back in the bottle.

Or take an example even more directly to the point: there is nothing that prevents the ACLU-DE from providing the disclosed *Adger* invoices to Mr.

---

[63] *See Del. Op. Atty. Gen. 06-IB09*, 2006 WL 1779490 at *5 (2006) ("Under FOIA, a record is public or it is not . . . . To inquire into a requestor's purpose would turn FOIA into a battleground for disputes."); *Del. Op. Atty. Gen. 11-IIB15*, 2011 WL 7637780 at *2 (2011) ("It seems untenable to make non-disclosure hinge on the identity of the party making the request[.]").

Adger's counsel. Likewise, if Mr. Adger's counsel requested the *Samuel* invoices, the DDOJ would seemingly disclose them. Mr. Adger's counsel could then give those invoices to the ACLU-DE.

As these examples make clear, the arrangement that the DDOJ's interpretation creates is nonsensical, and this Court does not read FOIA to "lead[] to an absurd result."[64] The only logical solution is to conclude that all documents must either be public or not. Any test that turns on the identity of the requesting party simply does not work.

The ACLU-DE's proposed work product test solves this problem by offering an objective and workable test under the litigation exemption. Either a document is work product or it is not, and it thereby is either public or it is not. Even if this Court does not adopt the work product test, it can still develop an objective test by asking whether a document's contents are about the merits of pending litigation or not. If the contents are about the merits of pending litigation, then the litigation exemption would be satisfied, and the documents would not be public. If the contents are not about the merits of pending litigation, then the documents would be public unless some other FOIA exemption applies.

D. The DDOJ had the Opportunity to Develop a Factual Record but Failed to do so

[64] *Vanella*, 2026 WL 2473687 at *12.

Finally, the DDOJ disapproves of tests requiring factual development because, according to them, "the judicial review process established in FOIA does not provide for the creation of an administrative record."[65] This is a preposterous position given that (1) the section of the code DDOJ cites, 29 *Del. C.* § 10005, contains no such explicit language, (2) FOIA places the burden of proof on the public body that denies the records,[66] and (3) this Court has held that facts need to be provided as part of the administrative record for a public body to justify its denial of a FOIA request.[67]

Now, perhaps DDOJ meant that it did not have an opportunity to develop the factual record in *this* case because of its unique procedural posture. The ACLU-DE certainly agrees that the DDOJ did not develop any factual record. However, the ACLU-DE maintains that the DDOJ absolutely had an *opportunity* to do so; it just failed to take it. When the public body subject to a FOIA dispute is a state agency, FOIA ordinarily requires that a requestor must first petition the denial to the DDOJ before they can take the dispute to any court.[68] An administrative record is developed during that petition process.[69] But in this case, the DDOJ took the

---

[65] OB 26.
[66] 29 *Del. C.* § 10005(c).
[67] *See Jud. Watch*, 267 A.3d 1010-12.
[68] *Vanella*, 2026 WL 2473687 at *9-10.
[69] The ACLU-DE agrees that the administrative record typically developed in petitions to the DDOJ is rather sparse. There are a couple reasons for this. FOIA requests typically contain an information imbalance. The requestor knows very

position that it does not entertain such petitions against itself.[70] Nothing in the FOIA statute tells the DDOJ that it is not allowed to entertain a petition against itself; that is just the position that the DDOJ has taken. Because the DDOJ took that position and subsequently failed even to ask for the opportunity to develop a factual record at any stage in this dispute, it passed on the opportunity under which all other public bodies develop a factual record. The DDOJ should not be held to a lower standard than other public bodies, especially considering its elevated role

---

little while the public body knows everything. *See Jud. Watch*, 267 A.3d at 1011 ("Courts have long recognized the requesting party's inherent disadvantage in the FOIA process."). Therefore, requestors typically have very little evidence to submit as part of their initial petitions. However, once the initial petition is submitted, the DDOJ does not allow petitioners to amend their petition even in response to any factual evidence that the public body produces. *Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations*, IV.F (May 24, 2023), https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2026/04/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf. There is nothing in the FOIA statute that requires such a cabined record far below what most if not all other administrative proceedings in Delaware have. It is true that the General Assembly has provided the DDOJ with only a limited time to consider petitions, but the procedure also allows for extensions of time by consent. *Id.* at IV.H.2. In such a case, if the parties consent, the DDOJ can have more time to fully develop an administrative record. Although the rules of procedure are concerned about how extensions impact the statute of limitations for filing suits, as this Court made clear in *Vanella*, there is no ability to file a suit when a state agency is involved, and so the statute of limitations for filing suits is irrelevant. *Vanella*, 2026 WL 2473687 at *9-10.

[70] *See supra* note 20.

under FOIA.[71] The DDOJ's contention that it cannot meet a test that requires the development of a factual record is therefore baseless.

The DDOJ makes one last ditch argument that, because the DDOC is the opposing party in the *Samuel* case, it is only the DDOC that knows all the intricacies of how the ACLU-DE might be advantaged in the *Samuel* litigation if the invoices are disclosed.[72] This is perhaps the DDOJ's most head-scratching argument for one simple reason – the DDOJ represents the DDOC in that case.[73] Yes, the DDOJ chose to delegate that representation to Saul Ewing[74] in the *Samuel* case, but the DDOJ is still ultimately responsible for the representation.[75] It should not be difficult for the DDOJ to figure out what is going on in a case that it is responsible for.

Therefore, it is possible for the DDOJ to meet the burdens created by the imposition of either objective factual test proposed here. It simply did not do so in this case, which is why it now tries to argue that such a test cannot exist in the first

---

[71] *See generally* 29 *Del. C.* § 10003(c); 29 *Del. C.* § 10005(e); 29 *Del. C.* § 10007 (assigning the DDOJ specific duties under FOIA).
[72] OB 25. The DDOJ also attempts to use this argument as proof that the ACLU-DE acted "underhandedly." *Id.* As stated previously ACLU-DE did in fact try to request the invoices from the DDOC but was told that DDOC was not the custodian of the records. *Supra* pages 6-7. This simple fact completely unravels every insinuation that the DDOJ makes that the ACLU-DE acted "underhandedly" by requesting the invoices from the DDOJ instead of the DDOC.
[73] 29 *Del. C.* § 2504.
[74] And subsequently to Husch Blackwell.
[75] B 93 at II.

place. The DDOJ is wrong. The plain language of the FOIA statute requires that, in order to satisfy the litigation exemption, the DDOJ must prove facts via an affidavit to show that the requested documents are work product, or, in the alternative, that the requested documents' content is about the merits of the pending litigation in question. Either test is objective and does not depend on the identity of the requestor.

II. The DDOJ has Waived all of its Arguments About Discovery Advantages in Other Forms of Litigation Because it did not Raise them in the Superior Court

Question Presented

Whether the DDOJ has waived its arguments about discovery advantages by failing to raise them below.[76]

Scope of Review

"Under Supreme Court Rule 8, this Court only considers questions fairly presented to the trial court."[77] Arguments raised for the first time on appeal will not be considered.[78] There is one narrow exception to this rule that exists if the Supreme Court finds that the trial court committed plain error requiring review in the interest of justice.[79] That doctrine is limited to "material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which . . . clearly show manifest injustice."[80]

Merits of the Argument

Vast portions of the DDOJ's Opening Brief discuss doctrines about discovery advantages that a party may have in other forms of proceedings. DDOJ

---

[76] Because the ACLU-DE's argument is that the issue in question was not preserved below, it cannot point to the area of the appendix where this issue was preserved as Supreme Court Rule 14(b)(vi)A.(1) requires.
[77] *Shawe v. Eltig*, 157 A.3d 152, 168 (Del. 2013).
[78] *Id.*
[79] *Id.*
[80] *Id.*

did not raise any of these arguments before the Superior Court. Therefore, this Court should not consider them.

All DDOJ raised to the Superior Court were threadbare arguments under *Mell* and *Koyste* that "Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure."[81] The DDOJ did not previously make any arguments about 1) the doctrines limiting its own powers of discovery in criminal cases, 2) the doctrines limiting the power of criminal defendants to simultaneously utilize civil discovery, and 3) the doctrines limiting a state agency's subpoena power.

An issue is waived when a party makes only passing references to it in their brief without developing the legal argument or analysis more fully.[82] Consequentially, the DDOJ has waived its argument that discovery doctrines that are active in very different areas of the law should be thrown into the FOIA context. It was not plain error for the Superior Court to ignore an argument that was not presented to it regarding a novel question of law. As this Court has recognized, it is prudent for the development of the law that this Court receive input from the learned judges of the Superior Court before ruling on an issue.[83]

---

[81] *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003). The DDOJ's references to these decisions in its briefing before the Superior Court can be found at A 43, 47, and 51.
[82] *Ortiz v. State*, 869 A.2d 285, 290-91 (Del. 2005) (overruled on other grounds).
[83] *Shawe*, 157 A.3d at 169.

Therefore, the DDOJ has waived all the arguments that it now attempts to present about discovery advantages in other forms of litigation because it did not raise them to the Superior Court. This Court should disregard those arguments.

III. Even if this Court Considers all the DDOJ's Arguments, the DDOJ Has Not Shown that Disclosure Would Constitute "Unfairness"

Question Presented

Whether discovery doctrines that apply in the context of criminal cases and state subpoena power can be applied in the FOIA context, and, if so, whether a FOIA request relating to fees paid to private counsel is actually unfair to the State.[84]

Scope of Review

In an administrative appeal, this Court's standard of review matches that of the Superior Court.[85] This Court must review whether the agency's decision was based on substantial evidence and free from legal error.[86] Questions of law, including statutory interpretation and whether the DDOJ met its burden of proof under FOIA, are reviewed *de novo*.[87]

Merits of the Argument

A. Cases Concerning Discovery Disputes in Other Procedural Postures are Readily Distinguishable from FOIA

Even if this Court finds that the DDOJ's arguments pertaining to discovery doctrines have not been waived, it should still uphold the Superior Court's ruling.

---

[84] Because the ACLU-DE argues *supra* Part II that the issue in question was not preserved below, it cannot point to the area of the appendix where this issue was preserved as Supreme Court Rule 14(b)(vi)A.(1) requires.
[85] *Stoltz Mgmt.*, 616 A.2d at 1208.
[86] *Id.*
[87] *Jud. Watch*, 267 A.3d at 1003 (internal citations omitted).

In its argument, the DDOJ relies heavily on *Pennell*, *Spicer*, *A. Schulman*, and *First Jersey*, yet fails to grasp the animating forces behind those cases that are inapplicable to this one where the ACLU-DE cannot use the requested information to tip the scales in any pending litigation.[88]

In *Pennell*, the Superior Court quashed the DDOJ's attempt to subpoena three people serving as defense witnesses in a criminal case.[89] The DDOJ had already interviewed those witnesses before they were placed on the defense's witness list and did not offer any reason why it needed to reinterview them.[90] The Court, in quashing the subpoena, stated that it was "clear[] the movants would be interviewed as to the nature of their conversations with defense counsel, thus allowing the State an opportunity to *preview defense strategy*."[91] This type of secondary inquiry into privileged material is entirely different from this case where the ACLU-DE has expressly welcomed redactions of privileged or work product material.

Similarly, in analyzing *Spicer*, which contemplated an unfair advantage a criminal defendant could seek in parallel civil litigation, the DDOJ admitted that the Superior Court's finding was motivated by its conclusion that "the facts of the

---

[88] OB 10-17.
[89] *In re Pennell*, 583 A.2d 971, 972-974 (Del. Super. Ct. 1989).
[90] *Id.*
[91] *Id*. at 974 n. 4 (emphasis added).

criminal and civil matters pending before [the court were] inextricably interwoven. Therefore, any information received in the civil context could and will be used in the criminal proceeding."[92] Here, unlike in *Spicer*, knowing how much a private law firm has billed the state for the cost of legal services in no way helps the *Samuel* Plaintiffs prove that the Defendants in that case have provided substandard medical and mental healthcare to incarcerated people in Delaware.

Likewise, in *A. Schulman*, which contemplated a similar issue as *Spicer*, the Court of Chancery noted that one of its "overarching considerations" was "the extent to which *the issues* in the criminal and civil cases overlap."[93] But *A. Schulman* actually weighs against the argument that the DDOJ makes in its brief. The DDOJ neglected to reference two of the critical factors that the Court of Chancery analyzed when deciding whether to issue a stay in a pending civil case due to an ongoing FBI investigation – the interest of non-parties and the interest of the public in both pending litigations.[94] Given that the entire purpose of FOIA is for all citizens of Delaware to have the opportunity to monitor the decisions made by the government,[95] non-parties inherently have an exceedingly strong interest in

---

[92] OB 12 (citing *State v. Spicer* 1999 WL 463548 at *2 (Del. Super. Mar. 31, 1999)).
[93] *A. Schulman, Inc. v. Citadel Plastic Holdings, LLC*, 2017 WL 5035497 at *2 (Del. Ch. Nov. 2, 2017) (*citing In re Herley Indus. Inc. Sec. Litig.*, 2007 WL 1120246, at *1 (E.D. Pa. 2007)) (emphasis added).
[94] *Id.*
[95] 29 *Del. C.* § 10001.

the disclosure of the invoices. Plus, media coverage shows that there is a strong public interest in the prison healthcare issues at the center of the *Samuel* case.[96] When this analysis is combined with the other factors analyzed in *A. Schulman*, which already held that there was a strong presumption against issuing a stay of a civil case unless a criminal indictment had issued, it is overwhelmingly clear that *A. Schulman* actually supports disclosure of the invoices.

Finally, *First Jersey* is easily distinguishable. In that case, a Delaware state agency tried to use its administrative subpoena power against an employer that was suing that agency.[97] But that case dealt with the strong powers that Delaware statutes provide to state agencies to conduct investigations. This case, on the other hand, deals only with simple administrative documents that the General Assembly has deemed accessible to all citizens of this State. A state agency has power to learn information about entities that it is investigating, which could give it a substantial litigation advantage. A FOIA requestor simply obtaining public

---

[96] *See, e.g.*, Xerxes Wilson, *State-Backed Whistleblower Suit Claims Neglect in Delaware Prison Care*, Delaware Online (June 16, 2026) https://www.delawareonline.com/story/news/2026/06/16/delaware-sues-prison-healthcare-contractor-over-fraud-allegations/90494603007/. The fact that the DDOJ is now suing one of its previous healthcare providers under the same allegations as the incarcerated plaintiffs make in the *Samuel* case only adds to the public interest in knowing how much money the State has spent defending a lawsuit that it now admits is at least partially meritorious.

[97] *First Jersey Secs., Inc. v. Bruton*, 1980 WL 273547 at *1 (Del. Ch. May 8, 1980).

information that any other person in this State could examine offers no such litigation advantage.

Thus, all of these cases are entirely consistent with the Superior Court's ruling in the instant matter, which contemplated and rejected the DDOJ's baseless assertion that the ACLU-DE was seeking through FOIA any kind of litigation advantage in the *Samuel* litigation. Simply put, there is no way for the ACLU-DE to use the information about how much Saul Ewing billed the state to prove its constitutional claims in *Samuel*.[98] So, contrary to the DDOJ's unsupported argument, the ACLU-DE is not seeking a litigation advantage.

Finally, the DDOJ's argument flips the instant case upside down. In *Pennell* and *First Jersey*, the DDOJ subpoena power at issue was a far more powerful tool for information gathering than the rules of criminal and civil procedure respectively.[99] Likewise, in *Spicer*, the criminal defendant tried using his broader deposition powers under the rules of civil procedure that he did not have under the rules of criminal procedure.[100] By contrast, here, the powers of information-gathering that the *Samuel* plaintiffs have in civil discovery far exceed the powers of a FOIA requestor. The *Samuel* plaintiffs can obtain through discovery any

---

[98] The DDOJ concurs: "it is difficult to imagine a scenario in which Plaintiffs could demonstrate that Defendants' attorneys' invoices are relevant to any claims in the litigation." OB 34.
[99] *Pennell*, 583 A.2d at 973; *First Jersey*, 1980 WL 273547 at *1.
[100] *Spicer*, 1999 WL 463548 at *2.

information "that is relevant to any party's claim or defense and proportional to the needs of the case," with few caveats.[101] By contrast, FOIA requestors have nineteen specific and enumerated caveats when it comes to requesting documents via FOIA.[102] The cases that the DDOJ cites where one party tried to use a more powerful information gathering tool to thwart the limitations of a weaker tool do not translate to a context where the reverse is true.

B. There is Nothing Unfair About the ACLU-DE's Request for the Samuel *Invoices*

In imagining ways that the ACLU-DE may actually be advantaged by obtaining the *Samuel* invoices, the DDOJ first complains that complying with FOIA requests is burdensome.[103] This argument is precluded by the General Assembly's creation of the FOIA statute in the first place. Responding to a FOIA request inherently puts a burden on state agencies. The General Assembly decided that putting that burden on state agencies was appropriate to satisfy FOIA's aims of transparent government. The DDOJ cannot thwart FOIA's clear obligations by complaining that they are burdensome.

Second, the DDOJ gestures at a "risk" of disclosing attorney work product when it discloses the invoices.[104] However, the ACLU-DE has already debunked

---

[101] Fed. R. Civ. P. 26(b)(1).
[102] *See generally* 29 *Del. C.* § 10002(o) (the nineteen FOIA exemptions).
[103] OB 34.
[104] *Id.* at 34-35.

that notion. The ACLU-DE welcomes all necessary redactions to foreclose this risk and specifically advocates for a rule which prevents attorney work product from being turned over. Any purported concern that the DDOJ has about the risks and disadvantages to the DDOC is belied by that department's disclosure of the *Davis* invoices.[105] Clearly, the DDOC did not think it would be so disadvantaged by disclosing those invoices or else it would have made the same argument and refused to disclose them. Therefore, this Court has not been confronted with any evidence or logical argument that the ACLU-DE is seeking a litigation advantage here.

The DDOJ instead assumes that the ACLU-DE had a nefarious purpose because the ACLU-DE asked only for the invoices in a case where the ACLU-DE represents the plaintiffs. The DDOJ postulates that perhaps if this was a FOIA request for all of the money that the State has spent on private counsel, then the request would be legitimate.[106] The ACLU-DE welcomes that view, because that was exactly how this FOIA request started.[107]

Salary records also serve as a useful comparator here. It has been well established for over forty years that the salaries of public officials are subject to

[105] *See supra* page 6.
[106] OB 22.
[107] *See supra* page 5.

disclosure under FOIA.[108] That basic rule applies to *all* public employees, including those hired by the State to litigate cases. What is the fundamental unfairness about a litigant knowing the salary that the State pays to a lawyer litigating a case against them? Nothing comes to mind.[109]

The DDOJ said it best: citizens are entitled to "review the actions of state government to monitor operations and *how tax dollars are spent*," under FOIA.[110] That is what the ACLU-DE seeks here. Nothing more.[111]

---

[108] *Gannett Co., Inc. v. Christian*, 1983 WL 473048 at *1 (Del. Super. Aug. 19, 1983).

[109] In fact, as part of this FOIA request, the DDOJ did disclose an omnibus Legal Services Agreement between Saul Ewing and the State that lists the hourly rate of a variety of Saul Ewing lawyers and legal staff. B 70-92. Therefore, the DDOJ seemingly has no issue disclosing the salaries of Saul Ewing's lawyers. The only missing piece is for the DDOJ to disclose the number of hours that each lawyer has worked on the *Samuel* case, which is contained in the invoices. As done on the *Adger* invoices, the names of which lawyers worked on what and when can be redacted as long as the rates and the total amounts are visible.

[110] OB 11 (emphasis added).

[111] The DDOJ has remained fixated with the idea of the ACLU-DE seeking attorneys' fees in the *Samuel* litigation. OB 11. The ACLU-DE respectfully believes that the DDOJ continues to raise this unrelated issue to baselessly paint the ACLU-DE as seeking to drain public resources through underhanded means. The DDOJ failed to articulate precisely how this FOIA dispute would relate to that imagined, future petition when questioned by the Superior Court, and it makes no attempt to do so now. Any suggestion that the ACLU-DE is bringing civil rights cases for the sole purpose of obtaining attorneys' fees is insulting to the clients bringing these cases and completely ignores the fact that most statutes allowing for recovery of attorneys' fees were passed with the express purpose of encouraging attorneys to bring such litigation for the benefit of the public interest. *See, e.g.*, 28 U.S.C. § 1988. This Court should not fall for this subterfuge and should instead uphold the Superior Court's ruling which would provide greater transparency on the use of public funds.

Therefore, even if this court were to consider the DDOJ's arguments about alleged discovery advantages, such hypothetical advantages simply do not exist in this case.

CONCLUSION

The DDOJ wrongfully withheld public records under FOIA's litigation exemption. This Court should therefore affirm the Superior Court's order of disclosure.

Dated: September 22, 2026

/s/ Andrew Bernstein
Andrew Bernstein (#7161)
abernstein@aclu-de.org

/s/ Jared Silberglied
Jared Silberglied (#7683)
jsilberglied@aclu-de.org

ACLU of Delaware
100 W. 10th St. #706
Wilmington, DE 19801
(302) 654-5326

Attorneys for Appellee