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Case Number 281,2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE DEPARTMENT OF JUSTICE,	:	
	:	
Appellant,	:	No. 281, 2026
	:	
	:	On Appeal from the
	:	Superior Court,
	:	
v.	:	N25A-07-002 CLS
	:	
AMERICAN CIVIL LIBERTIES UNION OF DELAWARE,	:	
	:	
	:	
Appellee.	:	

CORRECTED REPLY BRIEF OF THE APPELLANT

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT 1

I. APPELLATE REVIEW OF STATUTORY INTERPRETATION IS REVIEWED *DE NOVO*, AND THE OPENING BRIEF ELABORATES A PRESERVED ISSUE RATHER THAN RAISE A NEW ONE 2

II. THE PLAIN LANGUAGE OF THE FREEDOM OF INFORMATION ACT CONTROLS 5

III. DELAWARE COURTS WILL NOT ABIDE DISCOVERY ADVANTAGES FAVORING ONE SIDE 8

CONCLUSION 13

TABLE OF CITATIONS

Page

CASES

Adger v. Coupe,
D. Del. C.A. No. 1:18-cv-02048-GBW 11

Del. Solid Waste Auth. v. Del. Dep't of Nat. Res & Env't Control,
250A.3d 996 (Del. 2021) 2

Grimaldi v. New Castle County,
2016 WL 4411329 (Del. Super. Aug 18, 2016)..... 9-10

Giuricich v. Emtrol Corp.,
449 A.2d 232 (Del. 1982) 1, 6

In re Pennell,
583 A.2d 971 (Del. Super. 1989).....8

Jud. Watch, Inc. v. Univ. of Del.,
267 A.3d 996 (Del. 2021) 5

Koyste v. Del. State Police,
2001 WL 1198950 (Del. Super. Sept. 18, 2001) 9

Mell v. New Castle County,
835 A.2d 141 (Del. Super. 2003).....9

McBurney v. Young,
569 U.S. 221 (2013).....12

Mundy v. Holden,
204 A.2d 83 (Del. 1964) 3

Vanella on Behalf of Del. Call v. Duran,
2026 WL 2473687 (Del. Aug. 24, 2026).....2

Samuel, Desmond, and Goven v. Centene Corp.,
Centurion of Delaware, LLC, Vitalcore Health Strategies,
Acting Comm'n Terra Taylor, Former Comm'n Claire M. DeMatteis,
former Comm'n Monroe B. Hudson, Jr., Medical Director
Dr. Awele Maduka-Ezeh and Bureau Chief Medical Records,
De. Del. C.A. No. 1:23-cv-01134-GBW-SRF .....*passim*

Shawe v. Elting,
157 A.3d 152 (Del. 2017) 4

STATUTES

29 *Del. C.* § 10001 11

29 *Del. C.* § 10002(o).....1

29 *Del. C.* § 10002(o)(9).....1, 2, 5, 6, 7

29 *Del. C.* § 10004(b)(4).....6, 7

OTHER AUTHORITY

Delaware Supreme Court Rule 8 3

ARGUMENT

The *Samuel* invoices "pertain to" pending litigation. The parties appear to agree that *Samuel* is pending and that the invoices are not records of any court. D.I. 25, p. 16. On the statute's own terms, that ends the inquiry. The records "shall not be deemed public." 29 *Del. C.* § 10002(o).

To avoid this result, the Answering brief asks this Court to rewrite the exemption. It argues that "pertaining to" really means "attorney work product," or, failing that, "about the merits" of the underlying case. D.I. 25, p. 19. Neither phrase appears in Section 10002(o)(9). The General Assembly knew how to write a work-product limitation if that is what was intended; it did so elsewhere in the same statute, but not here. Reading those words into the exemption is precisely the "impermissible judicial legislation" that this Court forbids. *Giuricich v. Emtrol Corp*., 449 A.2d 232 (Del. 1982).

The DDOJ preserved the controlling issue below and may support it on appeal with additional authority.

A document collection device available to one litigant but not the other is presumptively unfair, without regard to whether the documents sought provide a litigation advantage. The Superior Court grafted additional proof requirements onto a two element statute. This Court should reverse.

I. APPELLATE REVIEW OF STATUTORY INTERPRETATION IS REVIEWED *DE NOVO*, AND THE OPENING BRIEF ELABORATES A PRESERVED ISSUE RATHER THAN RAISE A NEW ONE.

The Answering brief asserts that the DDOJ "waived" its discovery advantage argument by not citing each specific case cited in the Opening brief in the briefing below. D.I. 25, p. 26. But the standard of review and the preservation doctrine both support the DDOJ.

The dispute here is the proper interpretation of the Delaware Code. The question is one of law, reviewed *de novo*. This appeal turns on the meaning of Section 10002(o)(9). This is a question of law. This Court "review[s] questions of law, including questions of statutory interpretation, *de novo* and without deference to the Superior Court's or the Chief Deputy's reading of the statute," and the legal sufficiency of a public body's submissions under Section 10005(c)'s burden of proof is likewise a question of law reviewed de novo. *Vanella on Behalf of Del. Call v. Duran*, 2026 WL 2473687, *4 (Del. Aug. 24, 2026); *accord Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021); *Del. Solid Waste Auth. v. Del. Dep't of Nat. Res. & Env't Control*, 250 A.3d 94 (Del. 2021). The parties appear to agree that statutory interpretation and the burden of proof inquiry are reviewed *de novo*. D.I. 25, p.9. On a *de novo* question, this Court decides the meaning of the statute for itself; it is not confined to the specific authority either party cited below.

Here, the controlling issue was preserved. The assertion that FOIA may not be used to circumvent the court's discovery rules, and that the pending litigation exemption requires no proof of the requestor's motive were both squarely before the Superior Court. The DDOJ argued below 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." D.I. 25, p. 27. That is the issue. The additional decisions cited in the Opening brief, each applying the same fundamental fairness principle in an adjacent procedural setting, are further legal support for a proposition argued below, not a new theory.

The DDOJ's supporting authorities should be considered as they are "additional reason[s] in support of" the preserved proposition that FOIA cannot be weaponized to obtain one-sided discovery. *See Mundy v. Holden*, 204 A.2d 83, 87 (Del. 1964) (holding that while a litigant may not raise an entirely new theory for the first time on appeal, "there is no acceptable reason" not to consider additional support for a proposition made below). Supreme Court Rule 8 bars new issues, not new authority for a preserved one. Indeed, Rule 8 exists because it is "fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider," and so that opponents have "a fair chance to address arguments at the trial court." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). Neither concern is present here. The Superior Court considered and ruled on

the discovery circumvention question; it fashioned its new two part test precisely to address it. The citations in the Opening brief respond directly to the Superior Court decision's reasoning, which a party must be entitled to address on appeal.

The legal authority relied upon by the Answering brief are inapposite as they address genuinely new issues raised for the first time on appeal, not elaboration of a preserved one. D.I. 25, p. 26-27. And this Court may reach an issue fairly presented to the trial court, even if it was not addressed by the trial court. The discovery fairness issue was both fairly presented and addressed below.

II. THE PLAIN LANGUAGE OF THE FREEDOM OF INFORMATION ACT CONTROLS.

When interpreting FOIA, the Court looks to the plain language of the Code before seeking to determine or give effect to legislative intent. "The starting point is the language of the statute," and "[i]f the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls." *Jud. Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021). The exemption at issue provides that "the following records shall not be deemed public . . . [a]ny records pertaining to pending or potential litigation which are not records of any court." 29 *Del. C.* § 10002(o)(9). It has two elements: the record must pertain to pending or potential litigation, and it must not be a record of a court. The *Samuel* invoices satisfy both.

"Pertaining to" is broad, as the Answering brief makes clear. D.I. 25, p. 11-12 (cataloging dictionary definitions of "pertain" as "to belong or relate to," "to relate directly to; to concern or have to do with," and "to relate to someone or something"). Those definitions are capacious; they ask only whether the record relates to, or has a connection with, the litigation. Invoices for legal services rendered in the *Samuel* case plainly have to do with the *Samuel* case. Nothing in the word "pertaining" supports the transformation of its meaning here from "relating to" or "concerning" to "constituting solely attorney work product or documents directly addressing the merits of the litigation."

The "work product or underlying merits only" argument requires this Court impose a limitation the statute does not contain. Neither limitation appears in the text. Where unambiguous statutory language "contains no other condition or exception, express or implied," and "requires no additional showing," "[i]t is impermissible judicial legislation to engraft any such prerequisite" onto the statute. *Giuricich,* 449 A.2d at 238. The proposed work product or merits only addition is just such a prerequisite. The Answering brief seeks a judicial interpretation that would shrink "pertaining to" down to a fraction of its ordinary meaning.

This argument is further undercut by the totality of the language of FOIA. When the General Assembly wanted to tie an exclusion to "legal advice or opinion from an attorney," it said so expressly in Section 10004(b)(4). In Section 10002(o)(9) the General Assembly chose different, broader language "any records pertaining to" pending litigation, without reference to work product or legal advice. That contrast is dispositive. The General Assembly is presumed to have inserted every provision for some useful purpose, and when different terms are used in various parts of a statute it is reasonable to assume that a distinction between the terms was intended; and 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. *Id.* The Answering brief invites this Court to collapse the broad "pertaining to" language of § 10002(o)(9) into the narrow

"legal advice" language of § 10004(b)(4), erasing the clear distinction the General Assembly drew. The Court should deny this invitation.

III. DELAWARE COURTS WILL NOT ABIDE DISCOVERY ADVANTAGES FAVORING ONE SIDE.

It is fundamentally unfair to permit one party to litigation to exploit a document gathering mechanism unavailable to the other. In response, the Answering brief asserts Plaintiff's counsel in *Samuel* cannot use the requested invoices to their advantage in *Samuel*, and that civil discovery is broader than FOIA, so there is no discovery circumvention possible. D.I. 25, p. 17, 33-34. But the unfairness is structural and does not depend on proof of motive. Delaware courts have refused to permit information gathering through mechanisms available to only one side because the imbalance itself is unfair, not because the party invoking the mechanism harbors provable bad intent. In *In re Pennell*, the Court quashed the State's subpoena finding it operated as "a Court-assisted trial discovery technique . . . one that would be unavailable to the defense," holding that "[f]undamental fairness dictates that the Court not be called upon to provide an unfair advantage" and that "[t]o implement trial discovery for the State while denying it to the defense would be a denial of that fundamental fairness." 583 A.2d 971, 974 (Del. Super. 1989). The defense witnesses were not required to prove their specific testimony would be advantageous to the State in order to defeat the subpoena; the imbalance of the mechanism's availability was enough. *Id.* Here, Plaintiffs' counsel in *Samuel* can wield FOIA against the State, but the State's counsel cannot wield FOIA against the ACLU-DE. That imbalance ***is*** the unfairness, and no inquiry into motive is needed.

FOIA is not a discovery substitute. "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." *Mell v. New Castle Cnty*., 835 A.2d 141, 147 (Del. Super. 2003). A requestor's protest that they are "not seeking discovery" "cannot obscure the fact that [they are] attempting a circuitous route around the normal discovery channels," and "[a]llowing such a bypass could interfere with or render meaningless the criminal discovery rules." *Koyste ex rel. Fed. Pub. Def.'s Off. v. Del. State Police,* 2001 WL 1198950, *3 (Del. Super. Sept. 18, 2001). A litigant's private, self-serving, litigation driven purpose is precisely what the pending litigation exemption guards against, because "when parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance the public's right to know, but rather to advance their own personal stake in the litigation." *Mell*, 835 A.2d at 147.

The ACLU-DE insists the invoices cannot prove its constitutional claims, so the requested invoices provide no advantage to them in that litigation. D.I. 25, p. 31. The Superior Court rejected that argument in *Grimaldi* and the result should be no different here. In *Grimaldi,* the requestor also argued the record "does not pertain to this litigation because it will not prove or disprove any element of the claims that he is pursuing," but the court recognized the practical reality that the request "very much related to this litigation" and is exempt from the definition of a public

document subject to FOIA. *Grimaldi v. New Castle Cnty*., 2016 WL 4411329 (Del. Super. Aug. 18, 2016). Whether a record would be admissible or dispositive is not the test; whether it will provide the requesting attorney any litigation advantage is not the test; whether it pertains to the litigation is all the statute requires.

The parties appear to agree that these invoices are not discoverable in *Samuel*. D.I. 25, p. 33 (noting that "[t]he 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'"). That agreement proves the circumvention. The invoices are unavailable through the broad civil discovery mechanism precisely because they are irrelevant to the merits; FOIA is the only route by which the ACLU-DE could obtain opposing counsel's billing records during the pendency of the litigation. The same option is not available to defense counsel. Using FOIA to reach what discovery will not supply is the very "circuitous route" that *Koyste* and *Mell* warn against. The Superior Court's additional requirement here that the agency now must show that the requested documents would be advantageous to the requestor is not supported by the clear language Code.

The Answering brief repeatedly asserts that a record is either public to everyone or to no one, so the exemption cannot turn on the requestor's identity. D.I. 25, p. 18. But 10002(o)(9) does not turn on identity in the abstract; it turns on whether the records pertain to pending litigation. And controlling case law at that

time was clear that the rationale is that a party may not use FOIA to circumvent discovery. That the DDOJ disclosed the *Adger* invoices requested in a case where the ACLU-DE represents no one does not defeat the DDOJ's position here. It follows the controlling caselaw at that moment. That is, records are exempt when they pertain to the litigation, and a party should not be permitted to use FOIA to circumvent discovery.

The Answering brief provides a list of examples where they could use a straw man to obtain records that would be unavailable to them directly. Every one the examples provided is plausible, and the Answering brief makes clear there are numerous pathways to "get around the rules." This underscores that the intent of this, like most FOIA requests, is not government oversight, but self-interest. FOIA provides that "citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy . . . ." 29 *Del. C.* § 10001. Only certain records are exempt.[1] One such exemption is documents pertaining to pending litigation. Controlling case law at the time this FOIA request was received was clear that this exemption provides that a party may not use FOIA to get around discovery.

[1] It is important to note that a document may be exempt from the definition of a public document under Section 10002, and an agency is not therefore required to produce it in response to a FOIA request. However, FOIA does not create a privilege. That is, exempt, non-public documents can always be produced at the discretion of the agency. It is only public documents that an agency is *required* to produce under FOIA.

That the Answering brief provides numerous ways it can do just that does not render the statutory exemption meaningless. The same document would be available to "citizens" of Delaware, but not "non-citizens." *McBurney v. Young*, 569 U.S. 221, 228 (2013) (recognizing that restricting public documents to only citizens "recognizes that . . . taxpayers foot the bill for the fixed costs underlying recordkeeping"). The records sought here will be available to the ACLU-DE when the underlying litigation is no longer "pending." The identity of the requestor is taken into account; the timing of the request is taken into account; the litigation posture is taken into account. A record is not, as asserted in the Answering brief, public to everyone or to no one.

CONCLUSION

The *Samuel* invoices pertain to pending litigation and are not records of any court. That is all 29 *Del. C.* § 10002(o)(9) requires. The Superior Court's engrafted proof requirements contravene the statute's plain text and the settled rule that FOIA may not be used to obtain one sided discovery. For these reasons and those stated in its Opening brief, the DDOJ respectfully requests that this Court reverse the judgment of the Superior Court and affirm the DDOJ's invocation of the pending litigation exemption.

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