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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 OPENING BRIEF

Dated: January 16, 2025

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NATURE OF THE PROCEEDINGS

This case involves important and novel issues related to government transparency and accountability under Delaware's Freedom of Information Act.

On October 3, 2023, Plaintiff-Appellant Robert E. Vanella submitted a Delaware Freedom of Information Act ("FOIA") request (the "Request") to the Delaware State Police ("DSP"). A9-11. On November 3, 2023, DSP denied the Request. A12-14. On November 7, 2023, Plaintiff-Appellant petitioned the Attorney General's Office (the "AG") for a determination pursuant to 29 *Del. C.* § 10005(e). On January 11, 2024, the AG issued Attorney General Opinion No. 24-IB01 (the "AG Opinion") affirming DSP's denial of the Request. A22-26.

On February 29, 2024, Plaintiff-Appellant filed a Notice of Appeal to the Superior Court for Kent County pursuant to 29 *Del. C.* § 10005(e), seeking reversal of the AG Opinion and DSP's underlying denial of records. A27-37. On December 23, 2024, the Superior Court issued an order and opinion reversing in part and affirming in part DSP's denial of records. Attch. 1.

On January 21, 2025, Plaintiff-Appellant filed a Notice of Appeal to this Court, seeking reversal in-part of the Superior Court opinion. A38-39. On March 7, 2025, this Court issued an order dismissing the appeal as untimely and ordering proceedings regarding attorneys' fees to be resolved first in the Superior Court. A40-43.

On March 13, 2025, Plaintiff-Appellant filed a motion for attorneys' fees and costs. A44. On September 4, 2025, the Superior Court issued its order and opinion denying the motion. Attch. 2.

On October 2, 2025, Plaintiff-Appellant timely filed a Notice of Appeal with this Court pursuant to Supreme Court Rule 6(a)(i), seeking reversal in-part of the Superior Court's December 23, 2024, opinion on the merits and reversal of the September 4, 2025, opinion denying Plaintiff-Appellant's motion for attorneys' fees.

SUMMARY OF THE ARGUMENT

1. Plaintiff-Appellant is entitled to all requested records pertaining to 1) past employers and past job titles of current DSP officers and 2) previously employed DSP officers. DSP has not met its burden under 29 *Del. C.* § 10005(c) and this Court's precedent to sufficiently state that they do not possess the requested records; further, the record suggests that DSP does, in fact, possess responsive records.

2. Plaintiff-Appellant is entitled to the requested records pertaining to the resumes and demographic information of current DSP officers. These records are not exempt from disclosure under the personnel files exemption to FOIA. 29 *Del. C.* § 10002(o)(1). Defendant-Appellee does not meet the two-prong test for the personnel files exemption to apply because disclosure of resumes and demographic information would not constitute an invasion of personal privacy, and demographic information is not part of a personnel file.

3. Plaintiff-Appellant is further entitled to the requested demographic information of current DSP officers because the Law Enforcement Officer's Bill of Rights ("LEOBOR") does not apply where information is not part of a personnel file and the FOIA *request* is not a civil proceeding. 11 *Del. C.* § 9200 *et seq*.

4. Plaintiff-Appellant is entitled to attorneys' fees for his successful appeal of the Chief Deputy Attorney General's decision. The plain text of FOIA's remedies provision clearly states that fees are available in any action authorized by the statute and makes no distinction between a court ruling on an administrative appeal and a court ruling in a lawsuit. 29 *Del. C.* § 10005(d). Any contrary finding effectively prevents state-entities from being subject to remedies or protections following a FOIA dispute, contrary to FOIA's purpose. Such a ruling would also authorize the issuance of advisory opinions. Furthermore, when the General Assembly amended the FOIA statute in 1988, it unquestionably and explicitly waived sovereign immunity regarding attorneys' fees when FOIA requestors prevail in disputes against state-entities. 66 *Del. Laws* c. 354 (1988). This waiver has not been revoked.

STATEMENT OF THE FACTS

I. The Original FOIA Request

The Delaware Call ("DE Call"), is a non-profit independent investigative journalism news publication committed to increasing government transparency. DE Call has a keen interest in providing information to readers about Delaware police officers sworn to protect the people of Delaware. Efforts to conceal public information about basic characteristics of police forces thwart the public's ability to hold officers accountable and subverts institutional trust. Because the purpose of FOIA is to provide citizens "the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials," 29 *Del. C.* § 10001, Plaintiff-Appellant sought to learn more information about DSP via a FOIA request (the "Request").

Plaintiff-Appellant Robert E. Vanella, DE Call Coordinating Editor, sent the Request on behalf of DE Call to DSP on October 3, 2023, seeking data about DSP officers. A9. The items requested were as follows:

1) names of all certified law enforcement officers,
2) the current annual salary of each certified officer,
3) the current employing state agency and rank of each certified officer,
4) the past employers and job titles of each certified officer,
5) resumes of each certified officer,
6) a list of all formerly certified officers and their current status, and
7) the age, sex, and race of each certified officer.

("Requests 1-7"). A11. Plaintiff-Appellant expressly welcomed redaction of nonpublic information that might otherwise cause an entire record to be withheld. A9.

On November 3, 2023, DSP denied Plaintiff-Appellant's entire request ("the Denial"). A12-14. For each requested item, DSP claimed that they do not keep the records and, in the alternative, cited a variety of FOIA exemptions. *Id.* Relevant to this appeal, DSP claimed that it did not have a "readily generated" list available of the past employers of their current officers (Request 4) or of all formerly certified officers (Request 6). *Id.* Next, DSP stated that resumes (Request 5), if available, would be exempt under the "personnel files exemption." A13; 29 *Del. C.* §10002(o)(1). Finally, DSP claimed that officer certification status (Request 6) and demographic information (Request 7) would be exempt under both the personnel files exemption and the "statute or common law exemption" applying the Law Enforcement Officer's Bill of Rights ("LEOBOR"). A13-14; 29 *Del. C.* §10002(o)(6); 11 *Del. C.* § 9200 *et seq*.

II. <u>The AG Petition</u>

On November 7, 2023, Plaintiff-Appellant petitioned the AG for a determination pursuant to 29 *Del. C.* § 10005(e). FOIA generally provides Delawareans with two separate procedures to challenge a public body's denial of access to public records, depending on the identity of the public body. There is a

lawsuit track, whereby a FOIA requestor can directly sue a public body not represented by the AG over a violation of FOIA. 29 *Del. C.* § 10005(b). Alternatively, there is the administrative petition track, whereby a FOIA requestor can petition the AG to determine whether a public body has violated FOIA. 29 *Del. C.* § 10005(e). The administrative petition track is required for all public bodies represented by the AG, including DSP.

For public bodies not represented by the AG, if the requestor disagrees with the AG's determination, they may file a lawsuit without any regard for, or appeal of, the AG's opinion. *Id.* However, for FOIA actions against state-entities represented by the AG, such as DSP, a petition regarding denial must be referred to the Chief Deputy Attorney General ("CDAG"). *Id.* The CDAG's determination can only be challenged via an on the record appeal ("OTRA"), by either party, to Superior Court. *Id.* . There is no procedure under FOIA to file a lawsuit against a state entity represented by the AG regarding the denial of a FOIA request.

Following the petition, on November 13, 2023, DAG Handlon again offered partial information, inquiring whether Plaintiff-Appellant would accept, instead, general demographic statistics without trooper names. A46. Plaintiff-Appellant responded that masked trooper names through a "unique ID or position number" would be acceptable, so long as complete data profiles were otherwise produced. *Id.* The parties were unable to resolve this dispute. A45.

On November 16, 2023, DAG Handlon submitted a Petition Response ("Response") reiterating the same objections from the Denial and included an affidavit from DSP Captain James P. Doherty ("Doherty Affidavit"). A17-19. The Doherty Affidavit stated, *inter alia*, the following: 1) DSP has computer files that contain officer names, ranks, assignments, and pedigree information for all current officers, A17 at ¶ 3; 2) DSP does not require resumes for all its officers, but it does have some resumes on file, all of which are considered personnel files, *Id.* at ¶ 4; 3) DSP has records of only some of its former troopers because modern record keeping practices did not begin until 2012, *Id.* at ¶ 5; and 4) DSP has demographic information about all its officers but releasing such records would threaten officer safety, *Id.* at ¶ 6.

III. The AG Opinion

On January 11, 2024, CDAG Alexander S. Mackler issued the AG Opinion. A22. He determined that DSP did not violate FOIA by failing to provide any responsive records to Appellant's Request. A26. The Opinion, relying upon the public safety exemption, reiterated DSP's concern that, because DSP performs some undercover and intelligence operations, the disclosure of officer identities would pose a security threat. A24-25.

IV. The Superior Court Opinions

On February 29, 2024, Plaintiff-Appellant appealed the AG Opinion to the Superior Court for Kent County pursuant to 29 *Del. C.* § 10005(e). A27-37.

On December 23, 2024, the Superior Court issued its order and opinion on the merits ("Merits Opinion"), reversing in part and affirming in part the AG Opinion and DSP's denial, as follows:

1) Request 1 – DSP must disclose trooper names for all DSP officers. The Doherty Affidavit confirmed that DSP had a system to produce trooper names, and neither the public safety nor the personnel files exemptions applied. Attch. 1 at 17-21.
2) Request 2 – DSP must disclose salary information for all DSP officers. Providing a link to a third-party website did not satisfy DSP's FOIA burden. *Id.* at 21-23.
3) Request 3 – DSP must disclose officer ranks for all DSP officers. The Doherty Affidavit confirmed that DSP had a system to produce trooper ranks, and neither the public safety nor the personnel files exemptions applied. *Id.* at 23-24.
4) Request 4 – DSP did not need to disclose all past employers and job titles for all DSP officers. The Doherty Affidavit stated that DSP did not maintain such records.[1] *Id.* at 24.
5) Request 5 – DSP did not need to disclose resumes for DSP officers. Trooper resumes were exempt from disclosure under the personnel files exemption. *Id.* at 25-27.
6) Request 6 – DSP did not need to disclose a list of formerly certified officers and their current certification status. The Doherty Affidavit stated that DSP did not maintain such records.[2] *Id.* at 27.
7) Request 7 – DSP did not need to disclose demographic information for DSP officers. Demographic information was exempt from disclosure under

[1] As discussed in Argument Part III.A.i *infra*, this conclusion was factually incorrect.

[2] As discussed in Argument Part III.A.ii *infra*, a proper reading of Request 6 reveals that DSP does have some of the information that Plaintiff-Appellant requested.

the personnel files exemption. *Id.* at 27-28. The Court did not reach the question of whether demographic information would also be exempt under LEOBOR. *Id.* at 12-13.

On September 4, 2025, the Superior Court issued its order and opinion on Plaintiff-Appellant's Motion for Attorneys' Fees and Costs ("Fees Opinion") denying the motion in its entirety. Attch. 2. The Superior Court held that although 29 *Del. C.* § 10005(d) authorizes attorney's fees and costs in a "lawsuit," the provision is ambiguous as to whether it does so in an OTRA from an AG opinion, Attch. 2 at 19-21, and its legislative history did not resolve the ambiguity. *Id.* at 23-27. It then determined that due to the proclivity against awarding fees, any ambiguity should be decided against a fee award. *Id.* at 10-12.

Plaintiff-Appellant now appeals the Superior Court's decisions pertaining to 1) Requests 4-7 in the Merits Opinion, and 2) the Fees Opinion.

ARGUMENT

I. Questions Presented

1. Did the Superior Court err in concluding that the Doherty Affidavit met DSP's burden to prove that they did not have materials responsive to Requests 4 and 6? Attch. 1 at 24, 27.
2. Did the Superior Court err in concluding that DSP did not need to disclose trooper resumes and demographic information under the personnel files exemption, 29 *Del. C.* § 10002(o)(1)? Attch. 1 at 27-28
3. Does LEOBOR bar the disclosure of trooper demographic information? A 13-14.
4. Did the Superior Court err in concluding that 29 *Del. C.* § 10005(d) does not allow for an award of attorneys' fees and costs in an OTRA? Attch. 2.

II. Scope of Review

This Court reviews interpretations of the FOIA statute, including its exemptions, *de novo*. *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1003 (Del. 2021) (hereinafter "*Judicial Watch I*") (internal citation omitted). Although this Court reviews decisions to award attorneys' fees under the FOIA statute for abuse of discretion, *Id.*, the antecedent question of whether attorneys' fees are statutorily authorized under this procedural posture is a question of statutory interpretation that is reviewed *de novo*. *Id.*

This Court has not yet articulated the standard by which it reviews the Superior Court's interpretation of an agency's affidavit in a FOIA case. This Court should adopt a *de novo* standard because the alternative approaches that some federal and state courts utilize are at odds with Delaware FOIA law, which expressly disavows the *Vaughn* indices that are necessary for such approaches. 29 *Del. C.* § 10003(h)(2); *Flowers v. Off. of the Governor*, 167 A.3d 530, 548 (Del. Super. 2017). Many federal and state courts agree, finding nothing unique about FOIA that should divert it from the ordinary standard of review. *See, e.g., Animal Legal Def. Fund v. U.S. F.D.A.*, 836 F.3d 987, 989-90 (9th Cir. 2016) (abandoning the two-tiered approach in favor of traditional *de novo* review); *Amster v. Baker*, 453 Md. 68, 74-75 (2017) (agreeing that the Ninth Circuit was correct to abandon the two-step approach in favor of *de novo* review); *see also, Petroleum Info. Corp.*

v. U.S. Dep't of Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (the first federal court to abandon the two-step approach).

III. Merits of the Argument

A. DSP Did Not Meet its Burden to Prove that they Have No Responsive Records to Requests 4 and 6

For a public body to establish that they have no responsive records under FOIA, they must "state, under oath, the efforts taken to determine whether there are responsive records and the result of those efforts." *Judicial Watch I*, 267 A.3d at 1012; 29 *Del. C.* § 10005(c). Generalized statements in an affidavit without specific assertions of the efforts taken to locate responsive records do not satisfy the burden. *Judicial Watch v. Univ. of Del.*, C.A. No. N20A-07-001 MMJ, 2022 WL 10788530 at *2 (Del. Super. Oct. 19, 2022) *aff'd*, 300 A.3d 1270 (Del. 2023) (unpublished table decision) (hereinafter "*Judicial Watch II*"). As articulated in the Merits Opinion, if the public body admits that it stores the requested information in an online database, the public body must use their computer systems to isolate and produce the requested information. Attch. 1 at 18-19, (citing 29 *Del. C.* § 10002(o); *Shapiro v. U.S. Dep't of Just.*, 507 F. Supp. 3d 283, 333 (D.D.C. 2020)). For Requests 4 and 6, DSP failed to meet this burden despite the Superior Court's holding to the contrary.

i. The Superior Court Misread the Doherty Affidavit as it Relates to Records of Past Employers of Current DSP Officers

The Superior Court held that DSP represented through the Doherty Affidavit that DSP does not maintain records of the past employers and prior job titles of

their current officers, i.e., records responsive to Request 4. Attch. 1 at 24. This is incorrect. The Doherty Affidavit fails to sufficiently reference past employers and job titles of DSP's current officers and strongly suggests that DSP actually *does* maintain these records or at least something similar to them. A17 at ¶ 3.

First, under *Judicial Watch II*, the Doherty Affidavit's failure to specifically address whether DSP maintains *any* information about past employers and job titles of their current officers means that DSP failed to meet their FOIA burden for Request 4. 2022 WL 10788530 at *2. Furthermore, despite DSP claiming that they do not have a "database or document" with these records, A13, the Doherty Affidavit states that "DSP maintains computer systems that include trooper . . . pedigree information." A17 at ¶ 3. Although the Doherty Affidavit does not define what it means by "pedigree information," Black's Law Dictionary defines the phrase as meaning "[b]ackground information elicited through routine preliminary questioning of a person — relating, for example, to one's name, address, employment . . . and the like . . . ." *Pedigree Information*, *Black's Law Dictionary* (12th ed. 2024).

Plaintiff-Appellant was seeking "background information" about "employment" when requesting the past employers and job titles of all current DSP officers. It is possible that the pedigree information that DSP maintains does not exactly take the form of the past employers and job titles that Plaintiff-Appellant

sought in the Request. However, a FOIA requester in Plaintiff-Appellant's position often does not know the exact form in which a public body stores its records. *Cf. Judicial Watch I*, 267 A.3d at 1011 ("Courts have long recognized the requesting party's inherent disadvantage in the FOIA process"). That is exactly why the General Assembly required FOIA coordinators to "make every reasonable effort to assist the requesting party in identifying the records being sought." 29 *Del C.* § 10003(g)(2). As such, instead of denying Request 4 outright and claiming that they had no responsive records, DSP had an obligation to assist Plaintiff-Appellant in identifying the records that DSP does have that may satisfy Plaintiff-Appellant's Request 4.

DSP raised only the public safety exemption to this request,[3] but the Superior Court held that DSP did not meet its burden to prove that exemption applied to any of the requests, A19-20, and DSP has not cross-appealed that decision. Therefore, under FOIA, DSP must disclose whatever "pedigree information" it has about its current officers to Plaintiff-Appellant as those are non-exempt public records.

ii. The Doherty Affidavit Clearly Represents that DSP has a List of at Least Some Former Officers

[3] DSP did not raise the personnel files exemption or LEOBOR as a defense to the release of past employers and job titles, A13, so those arguments have been waived. *See Mammarella v. Evantash*, 93 A.3d 629, 636 (Del. 2014) (citing Supr. Ct. R. 8).

Similarly, the Superior Court held that DSP represented through the Doherty Affidavit that DSP did not maintain records of formerly certified officers and their current certification status, i.e., records responsive to Request 6. Attch. 1 at 27. However, the Superior Court again misread the Doherty Affidavit. The Doherty Affidavit states that "*DSP maintains* in electronic form only *a limited portion* of former troopers since current record keeping practices began in 2012 . . . . *DSP does not have* an existing roster or other document containing *all former trooper identities.*" A17 at ¶ 5 (emphasis added).

Although Plaintiff-Appellant acknowledges that DSP internally may distinguish between "former troopers" and "formerly certified officers," again, FOIA imposes a duty on public bodies to "make every reasonable effort to assist the requesting party" in identifying sought records. 29 *Del. C.* § 10003(g)(2). Therefore, DSP had a duty to help Plaintiff-Appellant identify whether a list of "former troopers" would be responsive to his request for "formerly certified officers." FOIA requires a public body to release the records that it has in its possession that are responsive to the request, even if said records are not stored in the exact form indicated in a request. Likewise, the fact that DSP has records of former troopers only from 2012 to the present does not give DSP license to deny a request for a list of *all* former troopers. *Cf. Del. Op. Att'y Gen. 18-IB26*, 2018 WL 2994704 at *4 (May 25, 2018) (if no FOIA exception applies to the whole

document, a public body must release the document in part with appropriate redactions). The answer, under FOIA, is to provide such responsive records regarding former troopers that exist since 2012.

The Doherty Affidavit did not sufficiently demonstrate that no records responsive to Request 6 exist. Further, for such records that do exist, the personnel files exemption would not apply to a list of names.[4] Therefore, under FOIA, DSP must release to Plaintiff-Appellant a list of names of all former officers for which DSP has records.[5]

[4] The Superior Court found that releasing names of current troopers did not implicate the personnel files exemption, Attch. 1 at 20-21, and DSP has not cross-appealed that decision. There is no reason to believe that releasing the name of former troopers changes the analysis. To the extent that this Court believes it does, the analysis *infra* Part III.B.ii demonstrates how DSP does not meet the burden to satisfy the exemption.

[5] DSP did not raise LEOBOR as a defense to the release of names, A13, so DSP has waived that argument. *See Mammarella*, 93 A.3d at 636.

B. The Personnel Files Exemption to FOIA Does Not Prevent the Disclosure of Trooper Resumes and Demographic Information

The personnel files exemption states that "[a]ny personnel . . . file, the disclosure of which would constitute an invasion of personal privacy" is exempt from disclosure under FOIA. 29 *Del. C.* § 10002(o)(1). The Superior Court correctly concluded that two elements must be satisfied to meet this exemption: 1) the records must be contained in a personnel file, and 2) disclosing them would constitute an invasion of personal privacy. Attch 1 at 13. The parties agreed that the definition of 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." *Id.* at 20. Neither redacted trooper resumes nor trooper demographic information falls within both elements of this exemption.

i. Disclosing a Trooper's Redacted Resume to the Public Does Not Constitute an Invasion of Personal Privacy

Because resumes are contained in personnel files, the only question is whether disclosing resumes constitutes an invasion of personal privacy. To determine what constitutes an invasion of personal privacy under FOIA, other states look to their own common law tort claims surrounding invasion of privacy. *See, e.g.*, *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 175 (1993)

(explaining the similarities between Connecticut's FOIA exemption for personal privacy and its invasion of privacy torts). The disclosure of resumes does not constitute the common law invasion of privacy tort in Delaware.

Delaware law recognizes four variations on this tort. *Isaac v. Politico LLC*, 346 A.3d 103, 122 (Del. 2025) (internal citation omitted). Two of those variations are relevant here. First, the "intrusion upon seclusion" tort is satisfied when a defendant "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns and the intrusion would be highly offensive to a reasonable person." *Id.* Second, the "publication of private matters violating the ordinary senses" tort is satisfied when a defendant "gives publicity to a matter concerning the private life of another and the information publicized would be highly offensive to a reasonable person and is not of a legitimate concern to the public." *Id.* at 122-23.

For the tort of intrusion upon seclusion, "the *sine qua non* . . . is clearly *intrusion*." *Barker v. Huang*, 610 A.2d 1341, 1350 (Del. 1992) (emphasis in original). Thus, to make a claim under this tort, it is insufficient to say that a defendant's action "exposed" the plaintiff to invasions of their privacy. *Id.* If the defendant's action merely "draw[s] unwanted public attention" to the plaintiff, the plaintiff has not stated a claim for this tort. *Id.* Instead, the tort is satisfied only when the defendant invades a private seclusion that the plaintiff has "thrown about

[themselves]." *Id.* Here, disclosing resumes via a FOIA request does nothing to intrude on DSP officers' privacy. Resumes are documents that a person sends to multiple potential employers and are therefore not documents that one throws a veil of privacy on. As such, disclosing them would not constitute a tort.

Similar logic applies to the publication of private matters tort. Most of the information in a resume consists of an officer's prior education and job experience. It is not "highly offensive to the reasonable person" to have such information disclosed to the public.

Further, over the past decade, the Superior Court and AG have routinely held that the public interest in knowing the resume of a successful applicant for a public job exceeds any privacy interests that public employees might have in their resumes. *See, e.g.*, *Grimaldi v. New Castle Cnty.*, C.A. No: 15C-12-096 (ESB), 2016 WL 4411329 at *9 (Del. Super. Aug. 18, 2016); *Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262 at *2 (July 20, 2018); *Del. Op. Att'y Gen. 22-IB20*, 2022 WL 1731488 at *3 (May 17, 2022). These opinions, while not creating a *per se* rule, demonstrate that an individualized analysis should be done to determine whether a resume contains information that could invade personal privacy. *See Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262 at *2 n. 19. By denying all trooper resumes *carte blanche* instead of engaging in any individualized analysis of trooper resumes, DSP violated FOIA.

In declining to follow these opinions, the Superior Court expressed concern that resumes typically contain information such as "home address[es], personal phone number[s], and email address[es]." Attch. 1 at 26. The solution to this concern is simple: DSP must redact the information that offends personal privacy while releasing the remainder of the resume so that the public can judge the qualifications of the employees hired for public jobs. DSP cannot simply deny the request for resumes wholesale when they can easily redact them, which Plaintiff-Appellant specifically invited if necessary.

The Superior Court appears to have erroneously believed that it could not order DSP to redact the resumes because "Delaware FOIA has no explicit segregability requirement." Attch. 1 at 26. However, FOIA contains two sections that clearly contemplate a requirement to segregate/redact records that are nondisclosable from those that are. *See* 29 *Del. C.* § 10003(h)(1) ("The public body shall respond to a FOIA request . . . by providing access to the requested records, denying access to the records *or parts of them*, or by advising . . ."") (emphasis added); *Id.* § 10003(k) ("Prior to disclosure, records may be reviewed by the public body to ensure that those records *or portions of records deemed nonpublic* may be removed pursuant to § 10002 of this title or any other applicable provision of law") (emphasis added). Furthermore, in the AG opinions mentioned *supra*, the AG routinely ordered the disclosure of resumes with appropriate redactions to material

that infringes upon personal privacy. *See Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262 at *2, *2 n.19; *Del. Op. Att'y Gen. 22-IB20*, 2022 WL 1731488 at *3. If public records could be entirely withheld where a single, easily redactable, data point falls within a FOIA exemption, it would egregiously violate the letter and spirit of FOIA's command that, "citizens have easy access to public records in order that the society remain free and democratic." 29 *Del. C.* § 10001.

Finally, the Superior Court cited to the vague notion that "the personal privacy of law enforcement officers who serves [sic] undercover duty or in other highly sensitive roles are often heightened in comparison to those of many other public employees" to justify why trooper resumes are exempt. Attch. 1 at 26-27. The Superior Court did not cite any legal or factual authority for this position. Presumably, resume information, such as education and experience, are precisely the kind of information an undercover officer might fabricate to create an undercover persona. As such, disclosure of resumes to the public, with no reference to or connection with an undercover "identity," does nothing that would impact or identify an undercover officer. Plaintiff-Appellant did not ask for DSP to identify which officers are undercover, so releasing their resumes will not specifically identify them.

All told, releasing the resumes of former officers does not impermissibly infringe on an officer's personal privacy. Therefore, to the extent that DSP has resumes of its officers, it must release them to Plaintiff-Appellant.[6]

ii. Demographic Information is Not Part of a "Personnel File," and even if it is, Releasing Demographic Information with an Anonymous Number Does Not Constitute an Invasion of Personal Privacy

Because a "personnel file" consists only of the information that an employer uses in hiring, firing, and other similar types of employment decisions, demographic information must not be, indeed *cannot* be, considered part of a "personnel file." Plaintiff-Appellant sought the age, sex, and race of all DSP officers. A11. Under both state and federal law, it is illegal for an employer to make hiring, firing, or any similar decisions based on this requested information. *See Prohibited Employment Policies/Practices*, U.S. EEOC https://www.eeoc.gov/prohibited-employment-policiespractices (last visited Jan. 13, 2026) ; *Del. Const.* art. I, § 21. DSP is not exempt from these state and federal anti-discrimination laws. Although demographics may need to be considered when deciding which officer(s) to place in an undercover role, such information cannot be considered in hiring, firing, promotions, etc., which means that said information is not part of a "personnel file" under FOIA. It is irrelevant that DSP's Human

[6] Again, DSP did not raise LEOBOR as a defense to the release of resumes, A13, so that argument has been waived. *See Mammarella*, 93 A.3d at 636.

Resources Director treats demographic information as "personally identifiable information." A17 at ¶ 6. What matters is whether the records requested fall within the objective and undisputed definition of a "personnel file." They do not.

Even if demographic information is considered part of a personnel file, DSP still has not met its burden to prove that disclosure of such information constitutes an invasion of personal privacy. As stated *supra* Part III.B.i, the appropriate standard for this inquiry is equivalent to the common law invasion of privacy torts. Here, Plaintiff-Appellant is not "intruding" on any solitude or seclusion of DSP officers. Any Delaware citizen can often discern much demographic information of DSP officers by mere observation, so there is no legitimate claim that such information is private. Plaintiff-Appellant's position is further belied by the fact that he was willing to accept demographic information via a randomly generated unique ID number that would mask trooper names.[7] A46. The Superior Court has previously held that, while not *per se* required under FOIA, creation of such numbers reduces personal privacy concerns under FOIA. *Bd. of Managers of Del. Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453, 460 (Del. Super. 2002), *rev'd on*

[7] Essentially, then, Plaintiff-Appellant's FOIA request asked for two separate lists of current troopers. List 1 would contain trooper names, salaries, and ranks – all the information that the Superior Court held must be disclosed. List 2 would contain a list of demographic information individualized by trooper, but each data field would contain a randomly generated unique ID number rather than trooper names.

other grounds but largely aff'd in relevant part sub nom, *Gannett Co., Inc. v. Bd. of Managers of the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232 (Del. 2003). An officer cannot possibly throw a blanket of private seclusion over a number that has no meaning, is generated solely for the purposes of this FOIA request, and cannot possibly be tied back to the officer to identify them in any way.

As for the publication of private facts tort, first, the publication of a person's demographic information cannot be considered "highly offensive to a reasonable person," especially when such information is anonymized. Demographic information is not "highly offensive" because it is not "highly intimate or embarrassing." *King v. Paxton*, 576 S.W.3d 881, 901 (Tex. App. 2019). Interpreting the personnel files exemption to be far broader than the privacy torts would allow the exception to swallow the rule of disclosure. *Id.* at 901-02. This is especially the case where, again, given the Plaintiff-Appellant's suggestion for anonymous ID numbers, there is no way to tie the information provided back to the individual officer. Furthermore, the publicity tort can be satisfied only if the published information "is not of legitimate concern to the public." *Barker*, 610 A.2d at 1350. As stated *supra* Part III.B.i, there is a legitimate public interest in knowing who the state employs to enforce the law. *Cf. Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262 at *2 (July 20, 2018). Therefore, disclosing the records of DSP officers' demographic information through an anonymized ID number does

not constitute an invasion of their personal privacy via the publication of private facts tort.

Because disclosure of demographic information about DSP officers via an anonymous ID number does not constitute either of the applicable invasion of privacy torts, FOIA's personnel files exemption does not bar its disclosure. In addition, the public interest in knowing the demographic information about public police officers outweighs the limited privacy interest that DSP officers have in observable demographic information. *Cf. Gannett*, 840 A.2d at 1239 (Del. 2003) ("Which officer conducted an arrest is a matter of public record"). Therefore, DSP must disclose records containing the demographic information of its officers under FOIA.

C. LEOBOR Does Not Bar Disclosure of Officer's Demographic Information

The Superior Court did not reach the question of whether LEOBOR, applied through 29 *Del. C.* § 10002(o)(6), bars disclosure of demographic information. Attch. 1 at 12-13. "[T]his Court may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995). Because this issue was fully briefed to the Superior Court and it is a pure question of law, Plaintiff-Appellant seeks this Court's resolution of this issue now rather than remanding it to the Superior Court.

LEOBOR, 11 *Del. C.* § 9200 *et. seq.*, has two parallel provisions that are meant to protect the privacy of police officers in Delaware. The first, § 9200(c)(12), applies only in "law enforcement disciplinary proceedings," and is therefore inapplicable here. *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). The second, § 9200(d)(1), states that "[u]nless otherwise required by this chapter, no law-enforcement agency shall be required to disclose in any civil proceeding . . . [an officer's] [p]ersonnel file."

First, as stated *supra* Part III.B.ii, demographic information is not part of an officer's "personnel file," and so LEOBOR does not bar the release of that information.

Regardless, LEOBOR is inapplicable because a FOIA *request* is not a "civil proceeding."[8] A civil proceeding is "[a] judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies." *Civil Proceeding*, *Black's Law Dictionary* (12th ed. 2024). The key word is "judicial." Because there is nothing "judicial" about an ordinary FOIA *request* to a public body, LEOBOR does not apply to FOIA.

By way of analogy, government benefits, such as Social Security, are not akin to a "civil action" when they are initially granted to a beneficiary, but a "civil action" can later occur if the beneficiary challenges the administration's decision in court *See generally Sullivan v. Hudson*, 490 U.S. 877 (1989) (under the Equal Access to Justice Act, attorneys' fees are not available for time spent before the Social Security Administration because that administrative proceeding is not a "civil action," but are available for a party that prevails in appealing the SSA's decision to court because that is a "civil action"). Likewise, making a FOIA request and the administrative proceedings that may follow via a petition to the AG do not constitute a "civil proceeding." It is irrelevant that the subsequent litigation has turned this case into a "civil proceeding" because the underlying question is still whether LEOBOR applies to a FOIA *request*. It does not.

[8] A FOIA *request* is not a "civil proceeding," but as discussed *infra* Part III.D, an OTRA of a FOIA request is a civil action for which attorneys' fees can be recovered.

Plaintiff-Appellant's position is further belied by the general structure of LEOBOR. As this Court has recognized, the purpose of LEOBOR is "to provide uniform procedural rights to officers under investigation by their own departments," not to provide sweeping confidentiality rights to individual officers and their departments. *Brittingham v. Town of Georgetown*, 113 A.3d 519, 525 (Del. 2015). Plus, LEOBOR itself states that it applies to "all law-enforcement disciplinary proceedings throughout the State" and does not mention that the statute extends beyond that narrow application. 11 *Del. C.* § 9209.

Under that framework, while analyzing § 9200(c)(12), the AG has concluded that the rights contained in LEOBOR are limited in their applicability *only* to law enforcement disciplinary proceedings, not to FOIA. *Del. Op. Att'y Gen. 17-IB19*, 2017 WL 3426259 at *4 (July 12, 2017); *Del. Op. Att'y Gen. 12-IIB10*, 2012 WL 3535600 at *3 (July 27, 2012). As the Superior Court recently recognized, applying LEOBOR broadly to other types of proceedings would give police officers immunity from disclosure "afforded to no other class of citizen anywhere." *MacColl*, 2022 WL 2388397 at *9. The General Assembly was aware of these decisions when it amended LEOBOR in 2023 and yet chose to further *reduce* the non-disclosure protection that § 9200(c)(12) provides to officers. 84 *Del. Laws* c. 148, § 1 (2023).

Therefore, LEOBOR does not bar disclosure of individualized demographic information for DSP officers, and so DSP must disclose said information to Plaintiff-Appellant under FOIA.

D. FOIA Authorizes Recovery of Attorneys' Fees and Costs in an On the Record Appeal

i. The Plain Meaning and Previous Interpretation by this Court of the Relevant Terms in FOIA Unambiguously Provide for Recovery of Attorneys' Fees and Costs in Any Action, Including Actions Against State-Entities

The Superior Court wrongfully concluded that Plaintiff-Appellant, although undeniably successful in securing a court order requiring production of some of the requested documents following an OTRA, was not entitled to attorneys' fees pursuant to 29 *Del. C.* § 10005(d) ("Subsection 10005(d)"). Attch. 2 at 28. For the first time since the adoption of the attorneys' fee provision in 1988, the Court's September 4 Fees Opinion holds that Subsection 10005(d) is ambiguous regarding whether an *appellant*, rather than a *plaintiff*, can recover attorneys' fees in FOIA actions against State bodies. Attch. 2 at 21. Subsection 10005(d) broadly provides for attorneys' fees in "any action brought under this section." 29 *Del. C.* § 10005(d). This unambiguous authorization of attorneys' fees in the statute is bolstered when read in conjunction with the rest of the FOIA statute. The Superior Court's interpretation of Subsection 10005(d) would lead to an absurd result, contradicting the very purpose of FOIA and the role of courts in resolving disputes. Therefore, the Superior Court's holding that attorneys' fees are not available in OTRAs, and as a result unavailable in all actions involving State bodies, should be reversed.

In statutory interpretation disputes, "the most important consideration for a court" is the language of the statute, and a "clear and unambiguous" statute's plain meaning controls. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1214 (Del. 2021) (internal quotations and citations omitted). A court should find ambiguity only where the statute is "reasonably susceptible to different interpretations" or where "a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." *Id*. (internal quotations and citations omitted). Here, the FOIA Statute and Subsection 10005(d) are unambiguous and clear that judicial remedies, explicitly including attorneys' fees, are authorized in any action brought under Section 10005.

Subsection 10005(d) reads as follows:

> Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. *The court may award attorney fees and costs* to a successful plaintiff of *any action brought under this section*. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.

29 *Del*. *C*. § 10005(d) (emphasis added).

The use of the word "action" in Subsection 10005(d) is clear evidence that attorneys' fees are authorized any time a dispute reaches a court, regardless of whether it originated through the FOIA petition process or a lawsuit. As correctly recognized in the Fees Opinion, an action is defined as "'[a] civil or criminal

judicial proceeding,'" and an OTRA is a "judicial proceeding[] … that qualif[ies] as an 'action.'" Attch. 2 at 20 (citing *Action*, *Black's Law Dictionary* (12th ed. 2024).

This Court has already explained that "any action brought under this section" includes non-suit enforcements of FOIA. In *Judicial Watch I*, this Court considered 29 *Del. C.* § 10005(c) ("Subsection 10005(c)") of the FOIA statute, which concerns the burden of proof for "*any action* brought under this section." 267 A.3d at 1010 (emphasis added). This Court wrote that Subsection 10005(c) "creates a statutory burden of proof that requires a public body to establish facts on the record that justify its denial of a FOIA request. It is from those facts that the *Chief Deputy Attorney General* and the courts must determine whether the public body has met its burden." *Id*. (emphasis added). By explicitly recognizing that the CDAG can determine whether a public body has met its burden under Subsection 10005(c), this Court has already found that "any action brought under this section" includes administrative actions, because it is only the CDAG that can render decisions through the administrative petition process. *See supra* pages 6-7. So, a cabined reading of "any action" that only includes FOIA disputes which *originate* in the courts has already been rejected by this Court. Under the "presumption of consistent usage" cannon of statutory interpretation, the word "action" should be read to have the same meaning in both Subsections 10005(c) and (d). *JJS, Ltd. v.*

Steelpoint CP Holdings, LLC, C.A. No. 2019-0072-KSJM, 2019 WL 5092896 at *6 (Del. Ch. Oct. 11, 2019) (internal citations omitted). Therefore, "any action brought under this section," as used in the FOIA statute, contemplates disputes originating through lawsuits *and* disputes originating through the petition process, with each action having the same burdens of proof and remedies permitted.

Additionally, the plain meaning of Subsection 10005(d) provides clarity by indicating that "*any* action brought under" the enforcement section of the FOIA statute is subject to "attorney fees and costs." 29 *Del. C.* § 10005(d) (emphasis added). The plain meaning of the term "any" is "one or some indiscriminately *of whatever kind*." *Any*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/any (last visited Jan. 14, 2026) (emphasis added). Thus, the plain meaning of the text of Subsection 10005(d) contemplates that each kind of enforcement action that FOIA permits (petitions and suits) is subject to the remedies permitted by this section. [9]

[9] Of course, as argued *supra* Part III.C, a FOIA request itself and the administrative process that follows are not "civil or criminal judicial proceedings" that fall within the definition of an "action." Therefore, Plaintiff-Appellant does not argue that Subsection 10005(d) makes attorneys' fees available for the time spent submitting a FOIA request to a public body and/or the time spent petitioning a denial of a FOIA request to the AG's office. It is only once the CDAG's opinion is appealed to the Superior Court that an "action" commences and attorneys' fees become available.

The Superior Court wrongfully concluded that the presence of the words "plaintiff" and "defendant" provided "what could reasonably be a purposeful distinction regarding who may recover attorneys' fees upon success." Attch. 2 at 21. However, the ordinary meaning of these terms and this Court's prior use of the term "plaintiff" to refer to a FOIA appellant demonstrate that these words do not create newfound ambiguity regarding an otherwise clear provision. *Judicial Watch I*, 267 A.3d at 1008-09 (consistently referring to the party using the OTRA process in *Flowers* as a "Plaintiff"). Without citing any authority for the General Assembly distinguishing between remedies generally available to an appellant versus remedies available to a plaintiff, the Superior Court invented such a distinction.[10]

The Superior Court's reading of Subsection 10005(d) also impermissibly leads to an absurd result whereby courts can issue only hollow advisory opinions in FOIA disputes involving state agencies. The Superior Court confusingly indicated that all non-fee remedies specifically listed in Subsection 10005(d) are "available only in lawsuits, not in on-the-record appeals." Attch. 2 at 21. However, an OTRA is the only judicial review available when a state agency has violated FOIA. *See*

[10] Plaintiff-Appellant's counsel has identified Delaware statutes that require a party to exhaust their administrative remedies before going to Superior Court where attorneys' fees are then available as a remedy. *See, e.g.*, 19 *Del. C.* §§ 712, 715. However, counsel has not identified any Delaware statute that completely cuts off the availability of attorneys' fees simply because a party pursued an administrative remedy before going to Superior Court.

supra pages 6-7. If it were in fact true that the Superior Court has no remedial authority in an OTRA, it follows that the Superior Court is merely issuing advisory opinions to the AG's office when ruling on FOIA disputes concerning state agencies.[11] Delaware courts "will not entertain suits seeking an advisory opinion or an adjudication of hypothetical questions." *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973). Where a court decides a legal issue that has "no practical impact or effect on the status quo," that "is tantamount to issuing an advisory opinion." *In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464, 495 (Del. Super. 2023), *aff'd*, 326 A.3d 626 (Del. 2024). Here, the Superior Court's interpretation of Subsection 10005(d), that all specified remedies, including attorneys' fees, are available only through lawsuits, removes all practical impacts of Superior Court OTRA decisions, making those decisions impermissibly advisory.

Further, because actions against state-entities can never be brought as lawsuits, the Fees Opinion would create a situation where no specified remedies, such as but not limited to attorneys' fees, can be granted in disputes involving

[11] The Superior Court noted that the reference to "other appropriate relief … could reasonably include appellate remedies." Attch. 2 at 22. However, the Court cited no authority for limiting the specified remedies in Subsection 10005(d) to FOIA lawsuits and did not indicate what "appellate remedies" would be included under "other appropriate relief" nor explain why attorneys' fees are not an appellate remedy. *Id*.

state-entities.[12] Limiting the availability of attorneys' fees in Subsection 10005(d) to only disputes involving non-State public bodies contradicts the purpose of the FOIA statute. *See* 29 Del. C. § 10001 (speaking to the importance of holding *all* public officials accountable to the citizens of Delaware). The FOIA statute speaks to the "vital" importance of easy access to public records, and Delaware Courts have taken this instruction into account when interpreting the statute's provisions. *See Am. Civil Liberties Union of Del. v. Danberg*, C.A. No. 06C–08–067–JRS, 2007 WL 901592 at *3 (Del. Super. Mar. 15, 2007) ("The enumerated statutory exceptions to FOIA … pose a barrier to the public's right to access and are,

[12] The Superior Court likely did not intend this result, wrongfully believing that "if the chief deputy finds that there has been a violation of FOIA, the prevailing citizen may move the challenge to the lawsuit track … [a]t that point, the right for potential fee recovery would be triggered for a citizen who files the lawsuit." Attch. 2 at 14-15 n. 53. However, the statute states that "[r]egardless of the finding of the Chief Deputy, the petitioner or the public body may appeal the matter on the record to Superior Court," and does not indicate that a citizen maintains a right to file a lawsuit. 29 *Del. C.* § 10005(e). It appears that the Superior Court was under the impression that remedies would be available in actions against state-entities, so long as the Chief Deputy found a violation of FOIA in the first instance, allowing for the dispute to move to the lawsuit track. However, because it is not the case that actions against state-entities can ever be moved to the lawsuit track, the Superior Court appears to have inadvertently created a situation where no specified remedies can ever be issued against state-entities. Furthermore, even if the Superior Court were correct on this point, the Superior Court's broader holding would still limit the specified remedies in their entirety if the CDAG finds that no violation occurred, even where the Superior Court then reverses that decision on appeal. In addition to creating a problem with advisory opinions, such a reality would also create a perverse incentive for the CDAG to never find that an agency that the AG is obligated to represent violated FOIA so that no specified remedy is ever available. The General Assembly could not have intended such a result.

therefore, narrowly construed.") (internal citation omitted). Similarly, this Court should favor an interpretation of Subsection 10005(d) that advances the public's rights under FOIA, including recovering attorneys' fees, which would ensure that citizens can continue to hold state public bodies accountable for their transparency obligations under FOIA.

Further, a contrary holding would not only limit the remedies available to FOIA requestors but would also limit the ability of state-entities to secure remedies. *See* 29 *Del. C.* § 10005(d) (authorizing attorneys' fees and costs to a successful defendant where a FOIA action was frivolous or brought to harass). If attorneys' fees cannot be issued in an OTRA, then state agencies cannot avail themselves to the protection of this provision, as actions against them will always be brought through the OTRA process. *See* 29 Del. C. § 10005(e) (limiting both petitioner and public body appeals of CDAG decisions regarding state agencies to OTRAs). It is nonsensical to presume that the General Assembly, when creating a provision to allow public bodies to protect themselves against frivolous litigators, implicitly denied state agencies, the primary public bodies likely subject to the lion's share of FOIA requests and actions, such protection.

Considering the lack of any textual or historical basis to support a regime under which state-entities are immune to the specified remedies and cannot enjoy the protections of Subsection 10005(d), this Court should reverse the Superior

Court's determination regarding the availability of remedies under Subsection 10005(d) for OTRAs. Subsection 10005(d) unambiguously provides for attorneys' fees in actions brought under FOIA, including OTRAs. Any finding otherwise contradicts the plain meaning of the statute, this Court's precedent regarding the definition of terms in the FOIA statute, and the purpose of FOIA. Further, the interpretation of Subsection 10005(d) adopted by the Superior Court creates an absurd and impermissible result whereby courts may be restricted to issuing advisory opinions, and FOIA remedies cannot be issued in disputes involving state-entities. This Court should reverse the Superior Court's holding on Subsection 10005(d) and find that attorneys' fees are available in OTRAs.

ii. The General Assembly Waived State Sovereign Immunity for Attorneys' Fees in 1988 and Never Revoked That Waiver.

If this Court finds that the statutory language is ambiguous, then it must turn to the legislative history of the statute to divine the General Assembly's intent. *In re Port of Wilmington Gantry Crane Litig.*, 238 A.3d 921, 937-38 (Del. Super. 2020). The General Assembly unquestionably waived state sovereign immunity in FOIA actions in 1988 and has not revoked this waiver. The Fees Opinion calls into question this historical understanding and suggests that an implicit revocation of the waiver occurred in 2010. However, there is no explicit acknowledgement by the General Assembly that such revocation occurred, nor is there any legal basis for recognizing an implicit revocation. Therefore, the legislative history of the

FOIA statute and its enforcement section supports the conclusion that state-entities are not immune from attorneys' fees under FOIA.

The General Assembly first permitted an award of attorneys' fees and costs in the 1988 Amendment to Subsection 10005(d). *See* 66 *Del*. *Laws* c. 354 (1988). At that time, no administrative appellate mechanism existed.[13] Instead, FOIA requestors could either file suit or, only if the public body was not an agency that the AG was obligated to represent, petition the AG to resolve a FOIA dispute, and in lieu of an OTRA following a petition, requestors could either file suit or ask the AG to file suit on their behalf. *Id.* Critically, because the OTRA process did not yet exist, state-entities were at that time subject to FOIA lawsuits.[14] *See Gannett Co. v. Del. Criminal Justice Info. Sys.*, 768 A.2d 508, 510 (Del. Super. 1999) (requestor filed an "action for declaratory and mandamus relief against … a [s]tate agency"). Therefore, the 1988 Amendment undisputedly waived sovereign immunity for state-entities by allowing courts to order attorneys' fees following a successful action.[15] Because state-entities were subject to FOIA lawsuits in 1988 and until 2010, and because it is indisputable that fees have been available for FOIA

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[13] The OTRA process was created in 2010. *See* 77 *Del*. *Laws* c. 400 (2010).
[14] In fact, that was the only process available to challenge a state-agency's denial of a FOIA request.
[15] Indeed, that is exactly what happened in the *Gannett* case. *See Gannett*, 840 A.2d at 1239-40 (affirming an award of attorneys' fees in a FOIA case against a state public body).

lawsuits since the 1988 Amendment, the inescapable conclusion is that the General Assembly waived sovereign immunity for state-entities in 1988.

With that explicit waiver, this Court can only find that the waiver was altered (or revoked) if a subsequent act is "conflicting," and "more specific." *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995) (finding that a "more specific … and later enacted" act altered any presumptive waiver of sovereign immunity derived from a prior act). A waiver of sovereign immunity "is to be strictly applied and extends only to the terms of the statute." *Tomei v. Sharp*, 902 A.2d 757, 761-62 (Del. Super. 2006), *aff'd*, 918 A.2d 1171 (Del. 2007) (citing *Raughley v. Dep't of Health & Soc. Services*, 274 A.2d 702, 703 (Del. Super. 1971). No subsequent act of the General Assembly, including the 2010 Amendment to FOIA, specifically conflicts with the explicit waiver language added to Subsection 10005(d) in the 1988 Amendment nor did any act revoke the state's waiver of sovereign immunity in FOIA disputes against state bodies.

The 2010 Amendment created the OTRA procedure, simply streamlining the dispute-resolution process for FOIA disputes against state-entities and where the DOJ determines that a state agency has violated FOIA. The 2010 Amendment makes no mention of remedies of any kind, including attorneys' fees, and fails to reference, much less revoke, the 1988 waiver of sovereign immunity in actions against state entities. *See* 77 *Del*. *Laws* c. 400 (2010). Nor is it in any way

conflicting with, or more specific regarding, the waiver of state sovereign immunity in FOIA disputes than the 1988 Amendment. Therefore, this Court is required to strictly interpret the most specific and most recently enacted Amendment pertaining to the waiver of state sovereign immunity, the 1988 Amendment, and should find that attorneys' fees are authorized in OTRAs.

In addition to revealing the functional reality that state sovereign immunity has been waived since 1988 and was never explicitly reinstated, the legislative history also reveals that it was never the intent of the General Assembly to differentiate between OTRAs and FOIA lawsuits as it pertains to attorneys' fees, nor to shield state-entities from Subsection 10005(d) remedies. The legislative history supporting Plaintiff-Appellant's argument includes floor debates and legislative synopsis, appropriate sources for legislative history analysis as identified by the Superior Court. Attch. 2 at 22.

The legislative history shows that the General Assembly considered much of the terminology used for FOIA disputes to be interchangeable. Legislators, including the primary sponsor, interchangeably used the terms "lawsuit" and "appeal" when discussing the 2010 Amendment creating the OTRA process, demonstrating that they are both necessarily actions contemplated by Subsection 10005(d). SB283 Floor Debate at 3:03-19 (statement of Sen. Peterson). Additionally, the original synopsis for the 2010 Amendment indicated that it

"permits *a litigant*, after requesting a decision by the Attorney General, to appeal the matter to the Superior Court on the record." 77 *Del. Laws* c. 400 (2010) (emphasis added). This is evidence that the General Assembly considered FOIA appellants to be litigants, meaning the distinction drawn by the Superior Court between a FOIA plaintiff and a FOIA appellant does not conform with the intent of the General Assembly.[16]

Further, the purpose of the 2010 Amendment was to advance FOIA's overall purpose of "easy access to public records" by making said records even easier and less costly to obtain. SB283 Floor Debate at 1:45-2:33; 3:53-4:12 (statement of Sen. Peterson). It would be antithetical to such an enactment to read in a presumption that it had, in fact, made FOIA weaker by eliminating attorneys' fee availability for actions against state-entities. This is especially relevant where these fees have been recognized as crucial to securing FOIA's guarantees. *See Bd. of Managers of Del. Crim. Just. Info. Sys. v. Gannett Co.,* No. Civ. A. 01C–01–039WLW, 2003 WL 1579170 at *3 (Del. Super. Jan. 17, 2003) ("FOIA

[16] The Superior Court points to the fact that the synopsis for and comments of the General Assembly regarding the 1988 Amendment more consistently used the word "suit" when discussing attorneys' fees. Attch. 2 at 24-25. This has a simple explanation: a FOIA suit was the only action a FOIA requestor could bring to a court in 1988. The intent of the General Assembly was to allow for remedies, including attorneys' fees, following a FOIA dispute against public bodies, including state-entities. This intent has not been revoked where an additional administrative appeal process has been added without addressing the remedies section of the statute.

contemplates granting attorneys' fees and costs so that potential plaintiffs would not be deterred from filing suit in order to gain access to information under FOIA").

Therefore, the legislative history demonstrates an explicit waiver of state sovereign immunity in 1988. Further, indiscriminate use of terms in the enforcement provisions of the FOIA statute and an overall purpose of expanding its use do not support a finding that the 2010 Amendment revoked the waiver of sovereign immunity from the 1988 Amendment. In conclusion, this Court should find that, to the extent there is any ambiguity regarding the availability of fees under Subsection 10005(d) for OTRAs, the legislative history indicates that such fees are available.

CONCLUSION

For the foregoing reasons, Robert Vanella respectfully asks this Court to reverse the legal errors below in the Merits Opinion and order DSP to produce all requested records. Further, Mr. Vanella asks this Court to reverse the legal errors below in the Fees Opinion, order that attorneys' fees are available for OTRAs, and remand the case to the Superior Court for determination of a proper fee award.

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