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 OPENING BRIEF OF THE APPELLANT

STATE OF DELAWARE
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Date: August 25, 2026

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NATURE OF PROCEEDINGS

On April 7, 2025, during the pendency of discovery in the Delaware District Court matter of *Samuel v. Centene, Corp.*, D. Del. C.A. No. 1:23-cv-01134-GBW, the Plaintiffs' attorney in that case sent a request for documents under the Freedom of Information Act ("FOIA") to the Delaware Department of Justice ("DDOJ"). The request contained six separate requests for different and distinct documents related to attorney billing records from Saul Ewing, the private legal counsel engaged to represent the Department of Correction ("DOC") employee defendants in *Samuel*. The DDOJ released some of the documents requested, but did not release the attorney invoices specifically incurred in *Samuel*, because under 29 *Del. C.* § 10002(a)(9) these records are exempt from the definition of a "public document" subject to FOIA as they are documents "pertaining to pending . . . litigation which are not records of any court." Intent on collecting documents he could not obtain through discovery, the Plaintiffs' attorney challenged this decision in the Superior Court. On June 11, 2026, the Superior Court held that the Department of Justice had not met a burden of proving on the record that the Plaintiffs' attorney was purposefully circumventing discovery in *Samuel*, and could not further prove to the Court's satisfaction what specific litigation advantage the Plaintiffs' attorney would gain in the *Samuel* litigation from the documents requested. Because the Department of Justice could not meet these new burdens the Superior Court created, judgment was entered for the ACLU-DE. This appeal followed.

SUMMARY OF ARGUMENT

1. The Plaintiffs' attorney in the Delaware District Court case of *Samuel* attempted to obtain the billing records of his opposing counsel by filing a Freedom of Information Act request with the Delaware Department of Justice, the public body responsible for ensuring payment of legal bills incurred by Delaware state agencies. These bills would not be available to Plaintiffs' counsel through discovery, and the option of utilizing FOIA was available to Plaintiffs in *Samuel*, but was not available to the defense. If the defense wanted to obtain documents from the Plaintiffs' attorney, the defense was limited to the court regulated discovery as the Plaintiffs' attorney did not work for a public body.

2. Plaintiffs' attorney's attempt at using FOIA as a court assisted trial discovery technique not available to the other side is precisely why the FOIA recognizes an exemption for documents pertaining to "pending litigation." On appeal to the Superior Court, the Superior Court incorrectly held that in order for a public body to invoke the pending litigation exemption, the public body must prove on the record that the requestor was purposefully attempting to circumvent discovery, and that the requested records will give the requestor a litigation advantage. The Superior Court is wrong.

3. Finally, even if this Court accepts the Superior Court's new standard, it has been met here.

STATEMENT OF FACTS

On October 11, 2023 an attorney with the ACLU-DE ("Plaintiffs' attorney") filed a class action lawsuit in the United States District Court for the District of Delaware on behalf of incarcerated individuals against the Delaware Department of Correction and its contracted private healthcare agencies. *Samuel v. Centene, Corp.*, D. Del. C.A. No. 1:23-cv-01134-GBW-SRF. The DOC is represented by Saul Ewing in that litigation. On December 27, 2024, the *Samuel* Plaintiffs' attorney served a Request for Production on the Defendants in that case. *Samuel* Docket No. 115-116. In the midst of ongoing discovery, on April 7, 2025, the Plaintiffs' attorney submitted a FOIA request to the Delaware Department of Justice seeking copies of the legal bills generated by Saul Ewing in *Samuel*. *Am. Civil Liberties Union of Del. v. Del. Dep't of Justice*, 2026 WL 1707290, *1 (Del. Super. June 11, 2026).

On May 9, 2025 the DDOJ sent their response to the FOIA request. *Id.* The response included a letter articulating DDOJ's position on each item requested, and enclosed responsive *public* records. *Id.*

As to the Plaintiffs' attorney's request for all invoices that Saul Ewing had presented in the *Samuel* litigation from 2023 to the time of the request (paragraph five), the DDOJ asserted 29 *Del. C.* § 10002(o)(9), the pending litigation exemption, and denied the request for these invoices. *Id.*

The Plaintiffs' attorney's FOIA request also sought Saul Ewing's invoices in the case *Adger v. Coupe*, D. Del. C.A. No. 1:18-cv-02048-GBW ("*Adger*"). *Am. Civil Liberties Union of Del. v. Del. Dep't of Justice*, 2026 WL 1707290 at *1. The *Adger* litigation involves claims by 107 individually named Plaintiffs against 52 different Defendants. One of the defendants is the DOC and the State also retained Saul Ewing to represent the DOC. But the Plaintiffs' attorney in *Samuel* is not representing any party in the *Adger* litigation. The DDOJ provided copies of the *Adger* invoices, relying on the Superior Court caselaw holding that when the pending litigation exemption applies, the test used by the courts is whether a FOIA requestor is attempting to obtain documents they could not get through discovery.

The sole issue in this appeal is the DDOJ's invocation of the pending litigation exemption to deny the Plaintiffs' attorney's FOIA request for copies of invoices of opposing counsel in the *Samuel* litigation. The determination that the counsel invoices pertaining to the *Samuel* litigation are exempt pursuant to 29 *Del. C.* § 10002(o)(9) is correct and the decision of the Superior Court should be reversed.

ARGUMENT

The Delaware Freedom of Information Act ("FOIA") ensures transparency in government by giving Delaware citizens the opportunity to observe public officials, monitor decisions made by the government, and obtain access to public records. 29 *Del. C.* § 10001. While the purpose of FOIA is governmental transparency, there are limits to what the government must produce to a requestor. The General Assembly recognized that certain documents held by a public body may not be "public records" and are exempt from FOIA's requirement of production to Delaware citizens. 29 *Del. C.* §§ 10002(o)(1)–(19). At issue here is the pending litigation exemption in 29 *Del. C.* § 10002(o)(9) which exempts from the definition of a public record subject to FOIA "[a]ny records pertaining to pending . . . litigation which are not records of any court."

Attorneys employed by the Appellee represent the Plaintiffs in the pending District Court's *Samuel* case. Saul Ewing is defense counsel representing the Department of Correction in *Samuel*. The *Samuel* Plaintiffs' attorney used a FOIA request as an attempt to obtain Saul Ewing's billing records in that case, because he could not obtain them through discovery. The ACLU-DE's attempt to utilize a document request mechanism—the Freedom of Information Act—that is not similarly available to opposing counsel is fundamentally unfair. The General Assembly mitigated this procedural unfairness by exempting from the definition of public records those records pertaining to pending litigation. The Superior Court's creation of additional standards a public body must meet before the pending litigation exemption will be recognized violates the clear language of the statute, creating a no-win situation for many government agencies. Finally, even if the Superior Court's new test is upheld, the ACLU-DE attorney is clearly attempting to use the FOIA to obtain documents he knows he can't get in discovery and that he knows he himself will never have to produce in the *Samuel* litigation. The DDOJ correctly applied 29 *Del. C.* § 10002(o)(9) when it denied the ACLU-DE's April 7, 2025 FOIA request on the basis that the request sought records pertaining to pending litigation that are not records of any court.

I. Delaware Courts Will Not Abide Discovery Advantages Favoring One Side.

Question Presented

Whether this Honorable Court should permit a citizen to utilize the Freedom of Information Act during pending litigation when such a request is a clearly self-serving discovery advantage. (App. to Op. Br. at 47-54)

Scope of Review

On appeal from an administrative decision where the Superior Court did not receive any evidence other than that presented to the agency, this Court does not review the Superior Court's decision directly but instead examines the agency's decision to determine whether the agency's ruling is supported by substantial evidence and free from legal error. *Gala v. Bullock*, 250 A.3d 52 (Del. 2021). Questions of law are reviewed *de novo*. *Prunckun v. Del. Dep't of Health & Soc. Servs.*, 201 A.3d 525, 539–40 (Del. 2019).

Merits of Argument

The Plaintiffs' attorney in *Samuel* attempted to utilize the Freedom of Information Act to request documents from the State during the pendency of litigation, an option unavailable to the State's defense attorneys, Saul Ewing. That is, while the Delaware Department of Correction and the Department of Justice are both statutorily obligated to make public records available upon request, the ACLU-DE is not subject to this same transparency requirement. *See generally*, 29 *Del. C.*

§ 10002(k) (defining a "public body" subject to FOIA). Delaware citizens are entitled to review the public records of Delaware state agencies, but not similarly entitled to view records of the ACLU-DE. The Plaintiffs' attorney in *Samuel* had a mechanism for requesting records from the defense that was not equally available to the defense attorneys. By exploiting the State's statutory requirement for transparency, the Plaintiffs' attorney sought records the defense attorneys could not have obtained in return. Delaware courts have recognized, across multiple contexts, that one party to litigation may hold a structural discovery advantage that the opposing side cannot replicate. And time and again, Delaware courts have leveled the playing field by limiting a party to litigation (usually the State) to the discovery processes available to all parties in that litigation, recognizing that taking advantage of processes available to one side and not the other is fundamentally unfair.

Delaware trial courts have identified and eradicated discovery imbalances consistently across a wide range of litigation types. The Superior Court and the Court of Chancery have rebalanced the scales in criminal prosecutions, parallel civil and criminal proceedings, and administrative subpoena enforcement. In each context, Delaware courts have fashioned remedies; *i.e.*, quashing subpoenas or issuing discovery stays, to prevent a structural advantage one side has over the other from becoming an instrument of unfairness. The result should be no different here.

A. Delaware Courts Have Recognized the Unfair Advantage the Delaware Department of Justice has in Criminal Discovery.

Pursuant to its enabling statute, the Department of Justice has the power "to subpoena witnesses and evidence" outside of litigation. 29 *Del. C.* § 2504(4). However, the Superior Court has made clear that this power cannot be used as a discovery advantage. *In re Pennell*, 583 A.2d 971 (Del. Super. 1989). During the murder trial of Pennell, the Department of Justice issued subpoenas under its statutory authority to three individuals who had already been interviewed by law enforcement, and who were listed as potential defense witnesses. *Pennell*, 583 A.2d at 973. The Superior Court granted the witnesses' motion to quash these subpoenas. In so doing, the Superior Court emphasized that "fundamental fairness dictates that the Court not be called upon to provide an unfair advantage to the prosecution or the defense in a criminal trial. To implement trial discovery for the State while denying it to the defense would be a denial of that fundamental fairness." *Pennell*, 583 A.2d at 974. The Court noted that the subpoenas appeared designed to use the Department's statutory power as a "Court-assisted trial discovery technique, and one that would be unavailable to the defense." *Pennell*, 583 A.2d at 974. Fairness dictates that a party's extra-judicial document collection power, however legitimate in its proper context, cannot be weaponized as a discovery tool during litigation, especially where, as here, the opposing party has no equivalent access.

The Freedom of Information Act is not a litigation discovery mechanism; it ensures citizens can review the actions of state government to monitor operations and how tax dollars are spent. *See generally* 29 *Del. C.* § 10001. Plaintiffs' attorney's attempt at weaponizing FOIA as a discovery tool is as an unfair an advantage as one side utilizing subpoena power only it holds. The target of the Plaintiffs' attorney's FOIA request, the Department of Justice, could in turn exercise its statutory authority to demand records from the ACLU-DE pertaining to the hours spent on the *Samuel* litigation and the ACLU-DE's inevitable attorneys' fee petition,[1] forcing the ACLU-DE to turn over unredacted records regarding the Plaintiffs' attorney's conduct in the midst of litigation. But that would be unfair. As is this. Plaintiffs' attorney should not be permitted to weaponize an avenue of discovery outside of the court process that is only available to one side.

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[1] The ACLU's attempts to collect attorneys' fees from the public fisc are rampant. *See, e.g., Am. Civil Liberties Union of Del. v. Hudson, et al.*, 2026 WL 2098070 (Del. Super. July 21, 2026); *Kelly v. Del. Dep't of Justice,* 2026 WL 1648794 (Del. Super. May 29, 2026); *Vanella on behalf of Del. Call v. Duran*, 2025 WL 2549424 (Del. Super. Sept. 4, 2025); *NAACP Del. v. Wilmington*, 2025 WL 1927620 (D. Del. July 14, 2025); *In re Delaware Pub. Schs. Litig.*, 317 A.3d 251 (Del. Ch. 2024); *Overington v. Fisher*, 733 F. Supp. 3d 339 (D. Del. 2024).

B. Delaware Courts Have Recognized the Unfair Discovery Advantage a Criminal Defendant has in Parallel Proceedings.

Converse to the discovery advantage mitigated in *Pennell,* Delaware courts have also recognized the problem on the flip side: a criminal Defendant who is simultaneously a party in a related civil action will not be permitted to exploit the more liberal civil discovery rules to obtain information that would be unavailable under the Delaware Rules of Criminal Procedure. This is a structural advantage that runs in the opposite direction from *Pennell* as it is the Defendant, not the State, who holds the potential advantage. And again, the Superior Court has been clear that the discovery mechanism inequity must not stand.

In *State v. Spicer*, Spicer faced criminal drug charges arising from a search of his residence. In a parallel civil forfeiture matter, he deposed a police officer under the liberal civil discovery rules and then attempted to use this deposition testimony in a criminal suppression motion. 1999 WL 463548 (Del. Super. Mar. 31, 1999). The Superior Court granted the State's motion to stay civil discovery, finding that the facts of the criminal and civil matters were inextricably interwoven and that allowing civil discovery to proceed would give Spicer information he was not otherwise entitled to under the Delaware Rules of Criminal Procedure (including the power to depose a confidential source). *Spicer*, 1999 WL 463548 at *2. Once again, the Superior Court recognized "the inherent unfairness that is presenting itself by Spicer having information that he is not otherwise entitled to through the discovery allowed by Super. Ct. Crim. R. 16 needs to be prevented by this stay of the civil proceedings. A criminal Defendant should not be allowed to use the liberal civil discovery process to abuse the criminal system of the protection offered by the criminal rules." 1999 WL 463548 at *3 (Del. Super. Mar. 31, 1999); *reargument denied*, 1999 WL 458771 (Del. Super. May 11, 1999).

The Delaware Court of Chancery addressed the same issue in *A. Schulman, Inc. v. Citadel Plastic Holdings, LLC*, 2017 WL 5035497 (Del. Ch. Nov. 2, 2017). In *Schulman*, Defendants sought a stay of civil discovery pending a federal criminal investigation. 2017 WL 5035497, at *2. The Court of Chancery adopted the federal multi-factor balancing test, identifying two overarching considerations: (i) the status of the criminal case, including whether the Defendants have been indicted, and (ii) the extent to which the issues in the criminal and civil cases overlap. *Id.* The court recognized that parallel proceedings risk expanding the scope of criminal discovery beyond the limits of Rule 16(b) of the Federal Rules of Criminal Procedure, and exposing the basis of the defense to the prosecution in advance of trial.[2] *Id.*

Criminal defendants are entitled to discovery only as set forth in Rule 16(b). Civil Defendants are entitled to a much broader range and scope of discovery. A

[2] Ultimately, because no indictment had issued, the court denied the stay, noting that stays generally are not granted before an indictment has issued and that granting a pre-indictment stay would effectively reward individuals who engaged in more serious wrongdoing by enabling them to use a threatened criminal proceeding as a shield against a longstanding civil case.

criminal defendant involved in parallel criminal and civil proceedings is, taking each case separately without regard of the other, entitled to discovery in both cases. But because the availability of discovery in the civil case creates a fundamental unfairness in the criminal proceedings, the courts have balanced this inequity by staying discovery in civil litigation until the resolution of the criminal case. The result here should be the same. The Plaintiffs' attorney's FOIA request for opposing counsel's legal bills was denied due to the pending litigation involving both parties. Once that litigation has concluded, there will be no more "pending" litigation and the exemption will no longer apply. The DDOJ's denial of this FOIA request on the basis of pending litigation would not be available once the *Samuel* case has resolved, in the same way civil discovery would be no longer stayed upon the resolution of a parallel criminal proceeding.

C. Delaware Courts Have Recognized the Unfair Discovery Advantage of State Agencies with Subpoena Power.

Delaware courts have also stopped administrative agencies from using their statutory subpoena power to obtain information from civil litigation adversaries outside the normal discovery framework. In *First Jersey Securities, Inc. v. Bruton*, the then-Delaware Securities Commission issued an administrative subpoena to examine an employee of First Jersey Securities in connection with a continuing administrative investigation, while a parallel civil action was pending in the Court of Chancery. 1980 WL 273547 (Del. Ch. May 8, 1980). The Court of Chancery quashed the administrative subpoena and held that once the opposing contentions of the parties are drawn into the Court of Chancery for decision, the discovery rules of the court must apply. 1980 WL 273547, at *2 (citing 10 *Del. C.* § 361(d) ("Any inconsistency or conflict between any rule of court promulgated under the authority of this section or prior law, and any of the provisions of this Code or other statute of this State, dealing with practice and procedure in the Court of Chancery, shall be resolved in favor of such rule of court")). The Court held that the Securities Commissioner's statutory investigatory power may not be used for discovery as both parties must be bound by the court's discovery rules. *See also Dep't of Fin. v. AT&T Inc.*, 253 A.3d 537, 552 (Del. 2021) (upholding the Court of Chancery's quashing of a subpoena, in part, because the subpoena sought "vast amount of irrelevant data" to the administrative investigation, but could be useful to the State's vendor's work with other states).

Delaware courts will police structural discovery imbalances regardless of which party holds the advantage. The available remedies are context specific: motions to quash are the primary tool when a party misuses a statutory subpoena or administrative process; stays of civil discovery are used when a criminal Defendant seeks to exploit parallel civil proceedings. Delaware courts will not permit a party attempting to convert extra-judicial access to books and records into a litigation discovery technique unavailable to the opposing party. It is fundamentally unfair.

But the Court need not, as the Superior Court did below, fashion a remedy from whole cloth to address the fundamental unfairness created by litigants who attempt to weaponize the Freedom of Information Act. The General Assembly provided for a playing field leveler: exempting from the definition of a "public record" subject to FOIA any record pertaining to pending litigation that is not otherwise a record of a court. 29 *Del. C.* § 10002(o)(9). While litigation is pending between citizen plaintiffs and a state agency, the Plaintiffs' attorney sending FOIA requests for documents pertaining to the litigation when he will never be on the receiving end of such a request is *per se* unfair. In all other areas of discovery inequity, no court has asked the party on the receiving end to prove the party with the extra-judicial discovery mechanism available to them is purposefully circumventing discovery and seeking documents that will advance their litigation position. That is presumed by the one-sidedness of the advantage. The defense witnesses were not required to prove the DDOJ was seeking to circumvent discovery and further prove the DDOJ was seeking to advance its litigation position in *Pennell*. The police officer cross-examined by a criminal defendant with access to civil discovery was not required to prove that defendant circumvented discovery to advance his criminal defense strategy in *Spicer.* There was no burden placed on the target of the administrative subpoena to prove the data sought by administrative subpoena would advance the trial strategy of the regulatory agency in *First Jersey*

Securities. All of these instances were presumed unfair simply because a mechanism for gathering information was available to one side and not the other.

The Plaintiffs' attorney in *Samuel* should not be permitted to exploit the State's statutory commitment to transparency for his own litigation interests. The State properly withheld the records relating to the *Samuel* pending litigation. The Superior Court's requirement that the Department of Justice prove the Plaintiffs' attorney was purposefully attempting to circumvent FOIA in *Samuel* and further prove that the documents would advance the Plaintiffs' attorney's litigation position was inappropriate. As discussed herein, the Superior Court's imposition of a new burden of proof on agencies in receipt of FOIA requests pertaining to pending litigation is in direct contrast to the clear language of the statute, places the DDOJ and many other public bodies in an untenable situation, and should be reversed.

II. THE CLEAR LANGUAGE OF FOIA'S PENDING LITIGATION EXEMPTION PROTECTS PUBLIC BODIES FROM THE EXACT UNFAIR ADVANTAGE THE PLAINTIFFS' ATTORNEY SEEKS TO EXPLOIT HERE.

Question Presented

Whether this Honorable Court should affirm the Superior Court's decision that the DDOJ must prove both that the FOIA requestor is purposefully circumventing discovery in his civil action, and also prove the litigation advantage the FOIA requestor will attain in the records requested before using the pending litigation exemption in FOIA; or if the State need only meet the clear language of the statute. (App. to Op. Br. at 45-47)

Scope of Review

On appeal from an administrative decision where the Superior Court did not receive any evidence other than that presented to the agency, this Court does not review the Superior Court's decision directly but instead examines the agency's decision to determine whether the agency's ruling is supported by substantial evidence and free from legal error. *Gala v. Bullock*, 250 A.3d 52 (Del. 2021). Questions of law are reviewed *de novo*. *Prunckun v. Del. Dep't. of Health & Soc. Servs.*, 201 A.3d 525, 539–40 (Del. 2019).

Merits of Argument

Delaware trial courts have long recognized that a private attorney sending a FOIA request during the pendency of litigation is presumed to be acting unfairly.

The Superior Court's imposition of additional proof requirements places the DDOJ in an untenable position. Specifically, requiring that the target of the request show (1) the request is a purposeful attempt to circumvent discovery in his civil litigation; and (2) the documents will benefit the Plaintiffs' attorney's litigation position in that case—runs counter to the clear language of the exemption. Instead, this Court should adopt the rationale of the majority of trial decisions below that interpret the language of the pending litigation exemption narrowly, and presume that self-interested FOIA requests are just that, without placing a burden on the responding agency to prove the intentions of the requestor before enforcing the clear language of the Code.

A. Exploiting a Method of Document Collection Available to Only One Side is *per se* Unfair and Self-Interested.

An issue of first impression before this Court, the Superior Court has long recognized the "practical realities that 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." *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, *9 (Del. Super. Aug. 18, 2016) (recognizing the self-serving attestation of a FOIA requestor that the request is for altruistic reasons must be heavily scrutinized in light of the requestor's role in related litigation against the public body).

In the same way the use of statutory subpoena power, parallel proceedings, and administrative subpoenas have been curbed by the trial courts to eliminate one party's discovery advantage, Delaware trial courts (before the instant decision below) soundly rejected the use of FOIA by litigants to obtain discovery. *See, e.g.*, *Mell v. New Castle Cnty*., 835 A.2d 141, 147 (Del. Super. 2003) (holding "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"); *Grimaldi*, at *9 (Del. Super. Aug. 18, 2016) (adopting the holding in *Mell*); *Office of Pub. Def. v. Del. State Police*, 2003 WL 1769758, *2 (Del. Super. Mar. 31, 2003) (holding that FOIA serves to advance the public's 'right to know'; and is not "about litigators and litigants looking for materials that might help them in court. And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts' rules of discovery"); *Koyste v. Del. State Police*, 2001 WL 1198950, at *3 (Del. Super. Sept. 18, 2001) (holding Kyoste's FOIA request was "attempting a circuitous route around the normal discovery channels." And that "[a]llowing such a bypass could interfere with or render meaningless the criminal discovery rules").

In the *Office of the Public Defender* opinion, the Superior Court used a functional analysis to determine the requestor was so self-interested it should not qualify as a "citizen" entitled to request documents under FOIA. 2003 WL1769758 at *2. In that case, the Office of the Public Defender ("OPD") sent a FOIA request to the Delaware State Police seeking manuals of operation. The Delaware State Police denied the request, citing several exemptions to FOIA. The OPD appealed, and the Superior Court agreed that while the records sought were "public records," OPD could not use FOIA to request them. The Court noted that the OPD, like the Appellee here, represents individual, criminal defendants. The Court found that the OPD is not concerned about governmental operations and efficiency, beyond their office's own internal workings. *Id.* The Court opined that the OPD's interest in the materials requested may directly or indirectly help their office's clients in court. Because this clear self-interest motive does not align with FOIA's purpose, the Superior Court concluded the OPD is not a citizen entitled to request records under FOIA. *Id.* at *3.

The DDOJ's reliance on the pending litigation exemption here is proper because there is active, pending litigation and the requested Saul Ewing invoices are solely those incurred in that case, demonstrating a clear nexus between the records sought and the litigation. This approach accords with Delaware courts' insistence that FOIA exemptions be construed narrowly yet given effect to their text, ensuring requesters do not leverage FOIA to gain a discovery advantage unrelated to the public's right to know. As the *Grimaldi* Court recognized, when litigants seek records tied to their own suits, their asserted public-interest motives warrant heavy scrutiny; and Delaware trial courts have repeatedly rejected attempts to use FOIA as an end-run around discovery rules, including in *Mell, Office of Public Defender,* and *Koyste*. But in the instant matter, the Court presumed that the Plaintiffs' attorney had a sudden altruistic interest in getting his hands on opposing counsel's legal bills. This is not a FOIA request to monitor the total amount the State spent on private counsel over the past year; it was not a request for all legal services contracts executed by the State; it was not a request for bills from Saul Ewing's representation of every state agency in any litigation. This is a targeted request for opposing counsel's bills in the exact litigation where Plaintiffs' attorney is opposing counsel to Saul Ewing. If the Saul Ewing bills are not for the purpose of aiding in the litigation, what is the harm of requiring Plaintiffs' attorney to make his request after the litigation has ended, and is no longer "pending" as the statute contemplates? It is the express intent of the legislature that public bodies be permitted to hold onto documents pertaining to litigation ***while*** the litigation is pending. What is the actual prejudice to delaying their clearly self-interested inquest into "government oversight" until the end of their litigation, and why must the public body prove an attempt to circumvent discovery and further prove resultant litigation advantage when in every other context it has been presumed?

The Plaintiffs' attorney has a self-interested motive in seeking the billing records of opposing counsel. The assertion below, that he just happened to ask for these records during the pendency of litigation "in the interest of government transparency" is unbelievable, at best.[3] He should not be permitted to supplant the court-supervised discovery process. As the trial courts have long recognized, that is *per se* fundamentally unfair. The Superior Court's creation of two new proof burdens on the public body runs counter to the Delaware courts' long-standing history of presuming that discovery techniques available to one side and not the other are fundamentally unfair, and it is in direct conflict with the clear language of FOIA.

B. The Clear Language of the Freedom of Information Act Controls.

Delaware courts have consistently and emphatically held that when statutory language is clear and unambiguous, courts must apply the plain meaning of that language as written and may not tack on additional requirements, conditions, or restrictions that the General Assembly did not include. Simply stated, where the language of the statute "contains no other condition or exception, express or implied . . . it is impermissible judicial legislation to engraft any such prerequisite on the statute." *Giuricich v. Emtrol Corp*., 449 A.2d 232 (Del. 1982).

The Superior Court below inappropriately imposed two new requirements on the DDOJ that are not in the statutory language of FOIA. Specifically, the Superior Court held that it is not enough that the DDOJ demonstrate the records requested pertain to pending litigation and are not records of any court, the only statutory requirements. Instead, the Superior Court required the DDOJ to further prove that

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[3] *See* FN 1.

"the ACLU-DE would be advantaged by the *Samuel* invoices" in that litigation. *Am. Civil Liberties Union of Del. v. Del. Dep't of Justice,* 2026 WL 1707290, *4 (June 11, 2026). The Court expressly quotes the language of FOIA, including its own new additional standard, when articulating the test: "[T]he Court applies the pending litigation test from *Mell v. New Castle County* to determine whether, on the record, the ACLU-DE is seeking information that relates to the subject matter of the litigation ***to advance its position and circumvent discovery*** in the *Samuel* litigation." *Id*, at *3 (additional requirements not found in the statute emphasized). The Court went onto hold that because the DDOJ could not prove the Plaintiffs' attorney was seeking to circumvent discovery and could not further prove that these documents would advance Plaintiffs' position in the *Samuel* litigation, the State could not invoke the pending litigation exemption. *Id,* at *4. But the Superior Court is wrong.

When invoking the pending litigation exemption, the FOIA statute requires only that the records pertain to pending litigation and not otherwise be a record of the court. 29 *Del. C.* § 10002(o)(9). In the absence of any specifically articulated additional restriction, the Superior Court should not "engraft a requirement that creates a further bar" to implementing clear statutory language. *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560 (Del. 2002) (citing *HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 306 (Del. Ch. 1999) (holding the court should be chary about reading words into a statute that the General Assembly could have easily added itself, but did not)).[4]

Here, the Plaintiffs' attorney directed his FOIA request not to the opposing party in the *Samuel* litigation, the Department of Correction, who could speak to the status of discovery and the advantage Plaintiffs' attorneys likely sought under the Superior Court's new standard. Instead, he directed his request to the DDOJ, a non-party to *Samuel* with no involvement in that case outside of handling the financials. This decision exemplifies the underhandedness of the requestor, and the fallacy of the Superior Court's new additional requirements. When a public body receives a FOIA request for documents that clearly pertain to pending litigation, precisely how is that agency to prove "on the record" that the requestor has the *mens rea* of circumventing discovery in a case if they are not a party, and further prove the documents would advance the requestor's litigation strategy when they are not privy to the arguments made on either side? *See ACLU-DE,* 2026 WL 1707290 at *4

[4] The ACLU-DE's argument below, that the term "pertaining to pending litigation" should be limited to legal advice is equally unavailing. *ACLU-DE*, 2026 WL 1707290 at *2 ("Instead, the ACLU asks the Court to adopt a brightline rule that the litigation exception only applies to attorney work product"); *but see Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) ("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"); *see also* 29 *Del. C.* § 10004(b)(4).

("Therefore, on this record, the DOJ has not properly invoked the pending litigation exception under FOIA").

It is imminently reasonable to require a public body to determine whether litigation is pending and the documents pertain to that litigation. But it is next to impossible for that public body to prove the intent of the requestor *vis a vis* his discovery obligations in unrelated litigation, and further prove how the documents will advance his litigation position. Especially where, as here, the target of the FOIA request is not a party to the litigation and the judicial review process established in FOIA does not provide for the creation of an administrative record. 29 *Del. C.* § 10005. The FOIA exemption for documents pertaining to pending litigation is unambiguous and the court's role is limited to an application of the literal meaning of the words. *Kelty v. State Farm Mut. Auto. Ins. Co*., 73 A.3d 926, 929 (Del. 2013) (unambiguous statutory language must be given its plain meaning unless the result is so absurd that it cannot be reasonably attributed to the legislature); *Taylor v. State*, 679 A.2d 449, 454 (Del. 1996) (where the meaning is plain, the language of the statute must be given effect); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd*., 492 A.2d 1242, 1246 (Del. 1985) (If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words).

The Superior Court's holding that meeting the entirety of the statutory requirements is not enough, and creating the additional requirements that a public body prove that the (1) FOIA requestor is seeking to circumvent discovery and (2) requested documents will advance his litigation position is wrong. The language of the statute is clear, and while room for judicial interpretation exists within the meaning of the words "pertaining to,"[5] the addition of two new requirements of proof was impermissible judicial legislating and should be reversed.

C. Most Public Bodies Will Never be Able to Meet the Superior Court's New Standards for the Pending Litigation Exemption.

Below, the Superior Court indicated it was relying on the "pending litigation test from *Mell*" in requiring the DDOJ prove the malicious intent of the requestor, and further requiring the DDOJ prove the precise litigation advantage Plaintiffs' attorney would attain in *Samuel*. *ACLU-DE,* 2026 WL 1707290 at *3 (citing *Mell*, 835 A.2d at 147). But the *Mell* Court required no such thing. Following the 2002 election, the federal government conducted an investigation into the actions of certain county employees. *Mell,* 835 A.2d at 142. Mell filed an action against New

[5] Here, it is respectfully requested that the *Danberg* test created by the Superior Court is appropriate, and state agencies should be required to demonstrate that documents are pertaining to litigation where there is a "clear nexus" between the document requested and the litigation. *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007). Once it can be shown the litigation is pending and the documents requested have a clear nexus to the pending litigation, the *Danberg* Court's rationale that the examination ends and the exemption applies should control.

Castle County in the Court of Chancery, seeking to enjoin the county from paying the legal bills of these employees during the course of this federal investigation. *Mell*, 835 A.2d at 142. The Chancery action entered into discovery, and Mell sought the production of records pertaining to the county's transfer of $230,000 for "legal fees" that he was convinced were used to pay to defend county employees. *Mell*, 835 A.2d at 143. His attorney also filed a FOIA request with the county seeking an accounting of how the $230,000 was spent. *Mell*, 835 A.2d at 143. The county responded to the FOIA request by providing all of the documents it had regarding this transfer of money, stating that if Mell's attorney was looking for a specific legal invoice, he should amend his FOIA request with more specific information. *Del. Op. Att'y Gen.* 03-IB13, 2003 WL 22669562, *1 (June 3, 2003)

Following a Section 10005 petition, the DDOJ opined that Mell's attorney had been specific enough, and directed the county to provide the records pertaining to how the $230,000 was spent. *Id*, at *4. The County subsequently informed Mell's attorney that it had no other responsive records. *Mell*, 835 A.2d at 143. It similarly told the Chancery Court it had paid no employees' legal bills, but would inform Mell and the Court if that changed. Mell then filed a mandamus action in Superior Court, seeking to have New Castle County ordered to give him the legal bills he requested through FOIA. *Mell*, 835 A.2d at 143-144. The County moved to dismiss the mandamus petition, asserting that the currently pending Chancery Court action provided Mell sufficient relief, and that the pending litigation exemption to FOIA applied to the records sought. *Mell*, 835 A.2d at 144.

The Superior Court in *Mell* was presented with a petition for a writ of mandamus arising out of a FOIA request, both of which involved the same two parties currently before the Court of Chancery in litigation on the same issue. In briefing the motion to dismiss the writ petition, both parties provided record evidence beyond the pleadings "including the FOIA requests, the County's various responses, the Attorney General's opinion, pleadings, a decision of the court from the Chancery litigation, email correspondence between the attorneys involved in the Chancery litigation, and the County's document production in response to the FOIA request." *Mell*, 835 A.2d at 144-145. The record evidence was so extensive, the Superior Court held it must review the motion as a Motion for Summary Judgment. *Mell*, 835 A.2d at 145. But despite all of that record evidence, the Superior Court still held it was "unable to determine on this record whether Mell has sustained his burden of establishing that mandamus relief is his only available remedy, or whether the County has sustained its burden of establishing that the documents [relating to the $230,000] pertain to pending litigation." *Mell*, 835 A.2d at 148-149. The Superior Court required additional factual evidence to determine if the pending litigation exemption applied, including "a verified explanation from the County" regarding certain emails and "a more precise explanation of the Chancellor's June 5 ruling and a better understanding from the parties of the current status of the Chancery litigation." *Mell*, 835 A.2d at 149. With regard to the specific legal invoices requested, the Superior Court relied on the ruling of the Court of Chancery that "such information must be produced in the Chancery litigation if and when the County determines to pay the invoices." *Mell*, 835 A.2d at 149. Faced with this clear ruling of a sister trial court, coupled with the extensive documentary record before it, the Superior Court found it "quite clear" the pending litigation exemption applied to the specific invoices sought. *Mell*, 835 A.2d at 149. The *Mell* Court never articulated a requirement that a public body prove a requestor was seeking information pertaining to pending litigation both "to advance its position" and "circumvent discovery." *ACLU-DE*, 2026 WL 1707290 at *3. This new requirement was created below, in a case exemplar of the impossibility of most public bodies ever meeting that standard.

Here, unlike *Mell*, and as in most FOIA requests, there is no record available to the Superior Court to review. There is no evidence available to the DDOJ, who is now expected to prove the Plaintiffs' attorney's intent was to circumvent discovery ***and*** advance his litigation position in a District Court action "on the record." *See Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, at *3 (Del. Super. Mar. 15, 2007) ("prolonged, involved and expensive discovery would be contrary to the summary process envisioned by the General Assembly when it enacted FOIA"). Here, a FOIA request was made, a statutory exemption was asserted, and an appeal was filed with the Superior Court. There was no opportunity for discovery through related litigation involving the same parties; the DDOJ had no opportunity to develop any record whatsoever.

As a non-party to the *Samuel* litigation, it is impossible for the DDOJ to address, let alone prove, the elements the Superior Court grafted onto the statute without the development of a factual record. It is not surprising the Superior Court below looked "at the record" in this case and determined the DDOJ had not met the new burden. *ACLU-DE,* 2026 WL 1707290 at *3. There is absolutely no factual record in existence. The DDOJ never had a chance of meeting this new test.

The new burden created by the Superior Court, requiring the public body prove a requestor is purposefully attempting to circumvent discovery in litigation, and further prove the requestor is seeking documents that will further their litigation position, is impossible for a public body who is not a party to such litigation to meet. The FOIA statute requires public bodies to respond to FOIA requests within 15 days. 29 *Del. C.* § 10003(h). The statute permits an agency to withhold documents pertaining to pending litigation, so long as those documents pertain to active litigation and are not otherwise records of the court. 29 *Del. C.* § 10002(o)(9). The General Assembly did not account for time a responding agency would need to conduct the kind of research and discovery necessary to prove the new requirements created by the Superior Court below. Requestors may be using FOIA to obtain documents ruled inadmissible or undiscoverable by the trial court; discovery may be stayed, closed, or unavailable; or litigants may be attempting to bypass quashed subpoenas or other discovery rulings. Any number of circumstances may exist in pending litigation where a private party opposing a public body may attempt to use FOIA to their unfair advantage. The FOIA does not contemplate that responding agencies have the time or capability of determining the specific posture of litigation or any rulings contained therein before determining if the pending litigation exemption will apply. The DDOJ is an agency of attorneys, but how is the Department of Human Resources expected to research the current nature of proceedings of pending litigation? How would the Office of the Treasurer be expected to determine if requested payment records will advance a private party's litigation position?

When interpreting the applicability of the pending litigation exemption, "the most important consideration is the words the General Assembly used in writing it." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020). Here, the clear language of the statute recognizes that documents pertaining to pending litigation may be exempted from the definition of "public documents" subject to FOIA. The Superior Court's new burdens of proof are counter to the clear language of the Code and for a non-party public body, will be impossible to meet.

III. THE PLAINTIFFS' ATTORNEY IN *SAMUEL* WAS CLEARLY ATTEMPTING TO CIRCUMVENT DISCOVERY FOR LITIGATION ADVANTAGE.

Question Presented

Whether this Honorable Court should permit a private citizen, as here, to utilize the Freedom of Information Act for a litigation advantage. (Ex. A, at *3-*4)

Scope of Review

On appeal from an administrative decision where the Superior Court did not receive any evidence other than that presented to the agency, this Court does not review the Superior Court's decision directly but instead examines the agency's decision to determine whether the agency's ruling is supported by substantial evidence and free from legal error. *Gala v. Bullock*, 250 A.3d 52 (Del. 2021). Questions of law are reviewed *de novo*. *Prunckun v. Del. Dep't. of Health & Soc. Servs.*, 201 A.3d 525, 539–40 (Del. 2019).

Merits of Argument

If the Court determines that the Superior Court's new additional requirements are appropriate when analyzing the pending litigation exemption, the requirements have been met. Plaintiffs in the *Samuel* action would not be entitled to copies of Defendants' attorneys' invoices. Discovery in the District of Delaware, like within this State's courts, is limited to "[a]ny nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case …." Fed. R. Civ.

P. 26(b)(1). Unless and until an award of fees was warranted and appropriate, discovery into the amounts of fees billed, time spent by particular timekeepers and their hourly rates, and the narrative associated with each entry would not be "relevant to any party's claim or defense." The Plaintiffs' attorney has conceded as much by confirming the request for invoices "does not relate to the discovery or claims at-issue in Samuel . . . ," and noting that questions pertaining to attorneys' fees are separate from the merits of litigation. Petitioner's Reply Brief Below, at 10 and n. 5 (citing *Vanella on Behalf of Del. Call v. Duran*, 2025 WL 2549424 (Del. Super. Sept 5, 2025)). As fee shifting in favor of the *Samuel* Defendants is unlikely, it is difficult to imagine a scenario in which Plaintiffs could demonstrate that Defendants' attorneys' invoices are relevant to any of the claims in the litigation.

Recognizing this, Plaintiffs' attorney seeks to circumvent discovery rules by using FOIA to attempt to obtain records relating to the pending litigation that he could not otherwise get through discovery. Plaintiffs' attorney's effort puts the DOC at a significant disadvantage in the litigation. First, discovery is burdensome in civil litigation which is why it is limited to information that is "relevant" and "proportional." But if a plaintiff can circumvent discovery rules by using FOIA, those limitations in Rule 26(b)(3) lose their meaning. Moreover, requiring a party to disclose during active litigation the amount of time spent by which attorneys, and when, risks the disclosure of attorney work product and risks giving the State's opponents a litigation advantage unavailable to private parties. *See, e.g., Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2004 WL 1238443, at *3 (Del. Ch. May 26, 2004) (allowing limited discovery of attorney invoices that were deemed relevant to the case but cautioning, "A detailed review of legal bills, of course, can provide fascinating insights into the conduct of lawyer and client, and it can also give a careful and experienced reader an understanding of the strategies employed by counsel for the benefit of the client"). These are the very risks that the pending litigation exemption in FOIA is designed to prevent. Imagine, for example, in a different case that defense counsel thought it necessary to consult an anti-trust colleague to advise on an issue. Disclosure of the invoice reflecting that consultation (at least before the case on the merits has been resolved) would inform Plaintiffs' counsel of that inquiry and potentially flag an issue or area of inquiry that might not have otherwise been considered. Moreover, unlike records produced in litigation for which a protective order may be in place (as there is in *Samuel*), no restriction on publicity exists under FOIA. One can easily imagine the litigation advantage, settlement leverage, and other effects that may follow a press release, online blog or newspaper headline reading "the State believes it may have violated anti-trust laws" and for which the only source would be an invoice – even with the entries themselves redacted – identifying the consultation.

The Superior Court's creation of two new standards that must be met before the Court will enforce the clear statutory language of FOIA is wrong. Even if this Court adopts this new standard, the *Samuel* Plaintiff's attorney's attempt to obtain billing records he would clearly never get in discovery is an obvious attempt to circumvent the District Court's rules for his own advantage. It is respectfully requested that the decision of the Superior Court be reversed, and the DDOJ's invocation of the pending litigation exemption be affirmed.

CONCLUSION

The DDOJ properly denied the ACLU-DE's FOIA request for opposing counsel invoices related to pending litigation. The DDOJ respectfully requests that the decision of the Superior Court be reversed, and the DDOJ's denial of the FOIA request be affirmed by this Court.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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