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Case No. K25A-01-001 RLG

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
FOR KENT COUNTY

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE, *Petitioner Below – Appellant,* v. TIM MARTIN, in his official capacity as FOIA Coordinator for the DELAWRE DEPARTMENT OF CORRECTIONS, *Respondent Below – Appellee.*	C.A. No. K25A-01-001 RLG Appeal from Attorney General Opinions No. 24-IB50 and 24-IB52

APPELLANT'S OPENING BRIEF IN SUPPORT OF THEIR
APPEAL FROM ATTORNEY GENERAL OPINIONS 24-IB50 and 24-IB52

Dated: March 31, 2025

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PRELIMINARY STATEMENT

The Delaware Freedom of Information Act ("FOIA") is a critical tool to facilitate public awareness and government accountability. Overbroad applications of FOIA's statutory exemptions frustrate the statute's core objective of making public records easily accessible so "that society remain free and democratic." 29 *Del. C.* § 10001. This principle is particularly applicable in the context of prisons, where the state is entrusted with the custody of individuals whose freedoms are already restricted.

At its core, this dispute is about whether the state of Delaware can hinder outside organizations from assisting incarcerated people in accessing their civil rights. Appellant, American Civil Liberties Union of Delaware, ("ACLU-DE" or "Appellant") sought, in two separate FOIA requests, information that the Delaware Department of Correction ("DOC" or "Appellee") requires to contact incarcerated individuals. The information ACLU-DE sought is not confidential nor does it pose a security risk or privacy concern for DOC or incarcerated individuals. Despite this, both requests were denied. The Attorney General ("AG") upheld both denials, leaving ACLU-DE unable to contact subpopulations of incarcerated individuals.

Therefore, ACLU-DE appeals the AG's November 26, 2024, Opinion No. 24-IB50 ("The Eligible Voter Data Opinion") upholding DOC's denial of ACLU-DE's August 19, 2024, Request ("The Eligible Voter Data Request") for public documents

under FOIA. 29 *Del. C.* §§ 10001-10007. ACLU-DE also challenges the AG's December 20, 2024, Opinion No. 24-IB52 ("The Elderly Incarcerated Data Opinion") upholding DOC's denial of ACLU-DE's September 19, 2024, Request ("The Elderly Incarcerated Data Request") for public documents under FOIA. *Id*.

For the reasons stated herein, Appellant respectfully requests that this Court reverse legal errors contained in the Opinions and underlying denials, and order DOC to disclose all responsive public records.

NATURE AND STAGE OF PROCEEDINGS

On January 27, 2025, Appellant filed the Notice of Appeal in this action, seeking reversal of the AG Opinions and DOC's underlying denial of records pursuant to 29 Del. C. § 10005(b), along with a praecipe and citation. Super. Ct. Civ. R. 3; Super. Ct. Civ. R. 72. This Court sent a letter to counsel setting out the briefing schedule on March 10, 2025, setting the date for this Opening Brief for March 31, 2025.

QUESTIONS PRESENTED

1. Does FOIA require a public body to provide responsive information in its possession when the underlying data can be produced through extraction from computer files?

2. Does the Litigation Exemption to FOIA apply when a request does not seek information created specifically for use in litigation and litigation is no longer reasonably foreseeable?

3. Do statutory prohibitions on the dissemination of case records and criminal history record information exempt the requested information from

disclosure when compliance with the request would not pose safety or privacy concerns?

4. Does the Criminal Files and Records Exemption to FOIA apply when a request does not implicate personal privacy concerns?

STATEMENT OF FACTS

I. The FOIA Statute

FOIA requires public bodies to provide access to public records. 29 Del. C. § 10003(a). FOIA's declaration of policy indicates that access to such records is "vital in a democratic society ... in order that the society remain free and democratic." *Id*. § 10001. The definition of "public record" is broad, including information: "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 Del. C. § 10002(o).

FOIA recognizes limited and narrow enumerated exceptions to its definition of a public record. *See Id*. These enumerated exceptions "create a barrier to the public's right to access information and must be narrowly construed." *Vanella on Behalf of Delaware Call v. Duran*, 2024 WL 5201305, at *4 (Del. Super. Ct. Dec. 23, 2024). The statutory exemptions at issue in the present matter are:

1. 29 *Del*. *C*. § 10002(o)(9) which exempts records "pertaining to pending or potential litigation which are not records of any court," (the "Litigation Exemption");
2. 29 *Del*. *C*. § 10002(o)(6) which exempts records "specifically exempted from public disclosure under statute or common law," (the "Statute or Common Law Exemption"); and
3. 29 *Del*. *C*. § 10002(o)(4) which exempts criminal files and records "the disclosure of which would constitute an invasion of personal privacy," (the "Criminal Files and Records Exemption").

Also at issue is whether and to what degree FOIA requires the creation of a "new" record in response to a request. *See, e.g.*, *Vanella*, 2024 WL 5201305, at *6.

II. The Parties

Appellant, ACLU-DE, is a private, nonprofit membership corporation with the mission of preserving and protecting fundamental constitutional rights. ACLU-DE has worked for years to protect and expand the civil rights of incarcerated individuals in Delaware.[1]

[1] *See* Delaware Voting Rights Coalition, *2025 Legislative Priorities: What we Support*,https://www.aclu-de.org/en/coalitions/delaware-voting-rights-coalition; *see also* Verified Complaint for Injunctive Relief with Jury Demand, *Flores et al v. Emig et al*, No. 1:25-cv-00100-GBW (D. Del. Jan. 23, 2025, ECF No. 1) (seeking a preliminary injunction and damages in response to an unconstitutional raid perpetrated against incarcerated individuals at James T. Vaughn Correctional Center); Complaint with Jury Demand, *Samuel et al v. Centene Corporation et al*,

Appellee, DOC, is a Delaware executive branch agency which is statutorily vested with complete responsibility for "the maintenance, supervision and administration of adult detention and correctional services and facilities of the State." 11 *Del. C.* § 6502. DOC is statutorily required to create annual reports including "statistical information concerning the persons committed to [DOC], or under the supervision of [DOC]." 11 *Del. C.* § 6560. DOC's most recent annual report includes information regarding the age of sub-populations of incarcerated individuals and the lead charges of incarcerated individuals.[2]

BACKGROUND

I. The Eligible Incarcerated Voter Data Request, Petition, and Attorney General Opinion.

ACLU-DE sent The Eligible Voter Data Request to DOC on August 19, 2024, seeking information about Delaware's eligible incarcerated voters to advance voter education for these eligible voters. Certified Record at 2-4. Specifically, ACLU-DE requested data on the number of people incarcerated with lead charges of misdemeanors and the number of people incarcerated on pre-trial detention. *Id*. For both groups, ACLU-DE also requested each individual's name, State Bureau of Identification ("SBI") number, and date of incarceration. *Id*.

No. 1:23-cv-01134-JLH-SRF (D. Del. Oct. 11, 2023, ECF No. 1) (seeking an injunction and damages in response to deliberate indifference regarding denying or delaying access to medical care within Delaware carceral facilities).

[2] *See* Delaware Department of Correction, *Delaware Department of Correction Annual Report [2023]*, June 30, 2024, at 23-24, 28-29, 38-39.

Under Delaware law, people on pre-trial detention and people convicted of misdemeanor offenses are, with limited exceptions, eligible to vote.[3] To contact an incarcerated individual via mail or other means, DOC requires the person seeking contact to provide the incarcerated individual's name and SBI number. *Id*. at 174. So, ACLU-DE sought from DOC the very information necessary to contact eligible incarcerated individuals for the purpose of voter education.[4]

Unrelatedly, ACLU-DE represented the Prisoners Legal Advocacy Network ("PLAN") in a lawsuit filed on December 7, 2023, ("*PLAN v. Carney, et. al*") against DOC and the Delaware Department of Elections ("DOE"). Certified Record at 71-93. Plaintiff sought in-person machine voting opportunities for eligible incarcerated individuals. *Id* at 92. The case was dismissed on August 23, 2024, and ACLU-DE informed DOC on August 30, 2024, that it did "not intend to appeal the dismissal," of the litigation. Exhibit 3, at 21. Nevertheless, on September 18, 2024, DOC denied the Eligible Voter Data Request under the Litigation Exemption to FOIA. Certified Record at 5-6. That same day, DOC, ACLU-DE, and other parties, including DOE, met and discussed a plan wherein officials from DOE would help eligible

[3] The Delaware Constitution only disenfranchises people convicted of felony offenses until the expiration of their sentences, including probation and parole. People convicted of a small list of particularized felonies are subject to permanent disenfranchisement. Del. Const. Art. 5 § 2.

[4] ACLU-DE resorted to FOIA to seek this information because there is no publicly available list of all people incarcerated in Delaware.

incarcerated voters cast absentee ballots from DOC's facilities. *Id*. at 25-27. As part of this plan, DOE and DOC would attempt to identify all eligible incarcerated voters. ACLU-DE was under the impression that the list of identified eligible voters would be shared to facilitate ACLU-DE interest in assisting eligible incarcerated voters with voting. *See Id.* at 22-23, 25.

Shortly thereafter, DOC informed ACLU-DE that they would not share these eligible voters' contact information, explaining that they believed that sharing identification of eligible and registered voters would raise "confidentiality concerns," potentially disclosing personally identifying information that is not considered public information. *Id*. at 20-21. However, all the requested information is published to the public. A member of the public who knows either the name or SBI number of an incarcerated individual can use that information to look up the name, age, and SBI number of the incarcerated person.[5] Additionally, names of registered voters are public information by statute and many stages of criminal prosecutions, including initial appearances, preliminary hearings, trials, and convictions are public information.[6] So, ACLU-DE unsuccessfully and repeatedly

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[5] *See* Delaware Department of Correction, *Offender Info, Locate an Inmate*, https://doc.delaware.gov/views/inmate_locator.blade.shtml.

[6] 15 Del. C. § 304(g); Delaware Department of Justice, *Steps in a Trial*, https://attorneygeneral.delaware.gov/criminal/stepsintrial/; Delaware Department of Justice, *Charging Methods*, https://attorneygeneral.delaware.gov/criminal/charging_methods/; *see also* Del. Const. Art. 1 § 9.

sought clarification from DOC about what information it sought was not public. Certified Record at 13-14, 19. Without disclosing the requested information, DOE informed ACLU-DE that a collaboration effort with DOC determined that there were 990 incarcerated, registered voters. *Id*. at 17.

ACLU-DE sent a petition, pursuant to 29 *Del. C.* § 10005, to the AG on October 24, 2024, alleging a violation of FOIA (The "Eligible Voter Data Petition") when DOC erroneously withheld the requested public records. *Id*. at 8-10. In response, DOC argued that disclosure was not required under the Litigation Exemption and the Statute or Common Law Exemption. *Id*. at 63-67 (The "Eligible Voter Data Petition Response"). Specifically, DOC argued that litigation was still likely or reasonably foreseeable because an appeal in *PLAN v. Carney et. al*. had not been foreclosed at the time that ACLU-DE sent the Eligible Voter Data Request and that, because "[v]oter eligibility is predicated upon one's felony record and past convictions," 11 *Del. C.* § 4322(a)[7] and 11 *Del. C.* § 8513(d)[8] prevented disclosure.

[7] The relevant portion of 11 *Del.* C. § 4322(a) states: "The presentence report (other than a presentence report prepared for the Superior Court or the Court of Common Pleas), the preparole report, the supervision history and all other case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged and shall not be disclosed directly or indirectly to anyone other than the courts as defined in § 4302 of this title, the Board of Parole, the Board of Pardons, the AG and the Deputies AG or others entitled by this chapter to receive such information"

[8] 11 *Del.* C. § 8513(d) states: "[d]issemination of criminal history record information, by any person or agency other than the Bureau or its designee is

Id. Additionally, based on an affidavit, DOC raised for the first time that it "does not keep the requested records in a manner that would provide accurate information concerning voter eligibility" and that FOIA does not require public bodies to compile and create programming in response to FOIA requests. *Id*. at 65-66, 125.

On November 26, 2024, the AG determined that DOC did not violate FOIA by denying access to all responsive records (the "Eligible Voter Data Opinion"). *Id*. at 131-134. The AG determined that DOC met its burden under FOIA because it provided a sworn statement attesting that it did not have the requested records. *Id*. at 133. The AG reasoned that, because FOIA does not require a public body to create programming or compile information from different sources to create a new record, DOC had no obligation to produce the requested responsive records. *Id*. In support, rather than relying upon language within the FOIA statute itself or legal authority from a Delaware court, the AG merely cited prior FOIA petition determinations from the AG's office. *Id*. The Eligible Voter Data Opinion did not address DOC's arguments regarding the Litigation Exemption, nor did it address the Statute or Common Law Exemption.

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prohibited. Notwithstanding this prohibition, the dissemination of criminal history record information by any criminal justice agency is authorized:

(1) In those cases in which time is of the essence and the Bureau is technologically incapable of responding within the necessary time period, or

(2) Whenever dissemination of arrest data to members of the public is authorized by this chapter."

II. The Elderly Incarcerated Data Request, Petition, and Attorney General Opinion.

On September 19, 2024, ACLU-DE sent a separate FOIA request ("The Elderly Incarcerated Data Request") to DOC seeking the number of incarcerated individuals within certain age ranges above 60.[9] Certified Record at 135-138, 143-145. For each age range, ACLU-DE sought the names, SBI numbers, and dates of incarceration for each individual. *Id*. at 145.

On October 11, 2024, DOC provided snapshot data for the total number of elderly incarcerated individuals by each age range but stated that it "does not provide personal identification information to parties outside of the department." *Id*. at 140-142. On October 14, ACLU-DE asked DOC to justify its denial. *Id*. at 140. In response, DOC claimed that names, dates of incarceration, and SBI numbers were not public records under the Criminal Files and Records Exemption and the Statute or Common Law Exemption, even though, as previously mentioned, names and ages of incarcerated individuals can be found through a tool provided on DOC's website.[10] *Id*. at 139.

On November 14, 2024, ACLU-DE sent a petition (the "Elderly Incarcerated Data Petition"), pursuant to 29 *Del. C.* § 10005, regarding the denial of The Elderly

[9] The age ranges were: 76 and older, 71-75, 66-70, and 61-65.
[10] *See* Delaware Department of Correction, *Offender Info, Locate an Inmate*, https://doc.delaware.gov/views/inmate_locator.blade.shtml.

Incarcerated Data Request to the AG. *Id*. at 135-138. On November 25, 2024, DOC responded to The Elderly Incarcerated Data Petition (the "Elderly Incarcerated Data Petition Response"). *Id*. at 171-176. DOC argued that the Criminal Files and Records Exemption applied because DOC would have to use criminal records housed in their case management system to answer the request and therefore the request was for a criminal record. *Id*. at 173-174. Further, DOC argued that disclosing the information would amount to an invasion of privacy similar to the tort of "intrusion on the plaintiff's physical solitude." *Id*. Additionally, DOC argued that because the request sought information that is part of DOC case records and because the definition of criminal history information[11] used for 11 *Del. C.* § 8513(d) includes "identifiable descriptors," 11 *Del.* C. § 4322(a) and 11 *Del. C.* § 8513(d) prevented disclosure. *Id*. at 174-175.

On December 20, 2024, the AG issued its decision, finding that DOC did not violate FOIA by denying access to the request for names, SBI Numbers, and dates

[11] The definition for "criminal history record information" for 11 *Del*. *C*. § 8513(d) is found in 11 *Del C.* § 8502(4), and the relevant portion of the definition is as follows: "information collected by state or federal criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision and release. 'Criminal history record information' shall include the names and identification numbers of police, probation, and parole officers, and such information shall not be within the definition of a 'public record' for purposes of the Freedom of Information Act, Chapter 100 of Title 29."

of incarceration in the Elderly Incarcerated Data Request. ("The Elderly Incarcerated Data Opinion"). *Id*. at 180-184. The AG determined that DOC sufficiently demonstrated its burden under FOIA to deny the requests through the Statute or Common Law Exemption. *Id*. at 182-184. Specifically, the Opinion looked to 11 Del. C. § 4322(a)'s prohibition on disclosure of "supervision history and all other case records obtained in discharge of official duty," and focused on DOC's Chief of Planning's attestation that DOC's electronic database is populated by records from the courts, the Delaware Criminal Justice Information System, and the inmate's interview, and that this data either becomes the criminal record or enhances a criminal record. *Id*. at 182-183 Therefore, the request sought data that is available in a criminal record, and the AG reasoned that this data was therefore a criminal record itself exempt from disclosure. *Id*. at 183. The AG also determined that 11 Del. C. § 8513(d)'s prohibition on disclosing "criminal history record information," applied because names, SBI numbers, and incarceration dates are "identifiable descriptions." *Id*. at 183-184. Like the Eligible Voter Data Opinion, the Elderly Incarcerated Data Opinion solely relied upon prior FOIA petition determinations from the AG's office and no case law from Delaware or any other jurisdiction. It did not address DOC's argument regarding the Criminal Files and Records Exemption.

ARGUMENT

DOC erroneously denied ACLU-DE's requests for public information by improperly invoking narrow exemptions to FOIA, undermining the purpose of FOIA, and failing to harmonize those exemptions with the statutory scheme. *See Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1004 (Del. 2021). FOIA is meant to maintain a "free and democratic" society, and the exemptions to FOIA's requirements must be "narrowly construed" because of the "barrier" they create "to the public's right to access information." *Vanella*, 2024 WL 5201305, at *4.

Here, DOC has invoked one judicially created exemption and three statutory exemptions to FOIA to deny access to information sought by ACLU-DE. The non-statutory exemption recognizes that public bodies do not need to "create a new record" in response to a FOIA request but is improperly invoked here because the record demonstrates that DOC has responsive information and FOIA requires the disclosure of public records in its possession "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." *Id.* at *6; 29 *Del. C.* § 10002(o).

All of the statutory exemptions are also inapplicable. Analysis of the legislative history of the Litigation Exemption and interpretations of similarly-worded exemptions to FOIA-equivalent statutes in other jurisdictions support finding that this exemption should only apply to attorney work product. Further, the

Criminal Files and Records and the Statute or Common Law Exemptions do not apply because DOC has failed to articulate specific safety and privacy concerns associated with disclosure.

ACLU-DE has requested public information to facilitate outreach to incarcerated individuals. DOC's denials of these requests results in unnecessary barriers to contacting subpopulations of individuals. Considering the clear language and purpose of FOIA, this Court should order DOC to produce responsive information.

I. FOIA Requires DOC to Disclose Responsive Information in its Possession Regardless of The Form by Which the Information is Stored.

ACLU-DE sought public information in DOC's possession. FOIA requires access to public records "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 *Del*. *C*. § 10002(o). Despite this statutory instruction, and without citing any Delaware case law, the Eligible Voter Data Opinion wrongly concludes that DOC was not required to produce information in its possession if doing so would require DOC to create programming or compile information.

However, the Eligible Voter Data Opinion cannot be reconciled with Delaware case law rejecting this interpretation of FOIA's mandate. *See Vanella*, 2024 WL 5201305. In *Vanella*, the FOIA requester sought, among other

information, the names of all certified law enforcement officers from the Delaware State Police ("DSP"). *Id*. at *9. DSP rebuked the request because "it fail[ed] to maintain a roster with the names of its troopers" and argued "that it need not create one." *Id*. at *9. DSP stated via affidavit that it had records containing the names of all officers, but it did not have an independent report stating only the names without other information attached. *Id.* The *Vanella C*ourt recognized that public bodies cannot be expected to create a new record or produce records outside of their possession in response to a FOIA request. *Id*. at *6, 9. However, the *Vanella* Court found that DSP "did not satisfy its burden of demonstrating that it need not produce the names simply because it does not maintain a separately dedicated roster containing them," because the affidavit produced by DSP to support its argument "acknowledge[d] that the records exist." *Id*. at *9. Crucially, the *Vanella* Court reasoned that "[i]t would defeat the letter and spirit of FOIA to not use a computer system in a manner that can isolate and produce only the troopers' names." *Id*. at *9 (citing *Shapiro v. United States Dep't of Just.*, 507 F. Supp. 3d 283, 333 (D.D.C. 2020).[12]

[12] *Vanella* reflects the contemporary understanding of the requirements of FOIA statutes in our age of advanced and powerful computing technology. Jurisdictions across the country that have been confronted with similar questions in recent times have been in alignment with *Vanella*. *See Nat'l Sec. Couns. v. C.I.A.*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020) (recognizing that an agency is not required to make a "new database" or "reorganize its method of

Just as DSP in *Vanella* made clear via affidavit that they had relevant information they could use to respond to the request, DOC has demonstrated through the Eligible Voter Data Petition Response that it has relevant information responsive to the request. DOC does not dispute that it has the requisite data to fulfill the request. Instead, DOC only states that it does not have a "designated search function," and that the data is not maintained in a manner that would "readily create the requested records."[13] Certified Record at 65, 125. The Eligible Voter Data Petition Response

archiving data," but indicating that "if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record"); *ACLU Immigrants' Rts. Project v. U.S. I.C.E*. 58 F.4th 643, 659 (2d Cir. 2023) ("[W]e are satisfied that 'using a query to search for and extract a particular arrangement or subset of data already maintained in an agency's database does not amount to the creation of a new record.'"), quoting *Ctr. for Investigative Reporting v. U.S. D.O.J.*, 14 F.4th 916, 938 (9th Cir. 2021).

[13] The Reply Petition actually says that DOC "does *not* [maintain secondhand sentencing information and sentencing status information] in a way that would *not* readily create the requested records." (emphasis added). ACLU-DE presumes that this double negative was a typo, and that DOC meant to say that it does not maintain that information in a way that would readily create the requested records.

also confirms that DOC already created a list[14] containing substantially the same information as the list requested by ACLU-DE.[15] *Id*. at 65.

Additionally, the Eligible Voter Data Opinion's conclusion that the draft list or the data used to make it cannot be disclosed is contrary to previous guidance issued by the AG's office. In *Del. Op. Att'y Gen.* 05-IB13, 2005 WL 1209243 (May 9, 2005), the requester sought a proposed employment agreement that had been discussed in executive session by the public body, and the public body denied the request because the proposed agreement was still under review. *Id*. at *1. However,

[14] DOC argues that the list they created was only a "test run" during which "public voter registration data" was applied against their data, and that the list they created was later deemed to be inaccurate. *Id*. However, that does not mean that DOC cannot disclose this list or the information they used to create the list. In fact, this would be entirely against the purpose of FOIA which indicates that it is vital in a democratic society that "public business be performed in an open and public manner" and that citizens "shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy." 29 Del. C. § 10001. If Delawareans are prevented from accessing public records when they are inaccurate, their ability to uncover mistakes and abuses and hold their government accountable will be stymied. Thus, disclosure is more crucial when the underlying records are potentially inaccurate.

[15] Further, through a separate FOIA request that was fulfilled on March 7, 2024, ACLU-DE has become aware that DOE used a "poll list" to facilitate absentee voting in Delaware prisons in the November General Election, and that this list was provided to DOE by "DOC [Delaware Criminal Justice System] staff and DAG who had researched each individual's DELJIS record to determine eligibility." The existence of this list proves that DOC either has the capability to provide information needed to contact eligible incarcerated voters or has received sufficient assistance from other Delaware government agencies such that they are now in a position to fulfill the request. Email correspondence proving the existence of this "poll list" is attached as "Exhibit A" to this brief.

the AG reasoned that "once the author of a document presents it to a public body for review, then it becomes a public record even though it is in draft form and may be subject to further change at the direction of the public body." *Id*. at *3. So, "after discussing whether to enter [the agreement] … in executive session" and "vot[ing] in public session to approve [the agreement]," the draft agreement "became a public record." *Id*. at *3.

In the present case, DOC has indicated that the draft list of eligible voters has been presented to a public body for review. *See* Certified Record at 65 ("[u]pon inspection of the list produced by this process"). Therefore, the draft list is not "a working draft which the author is still revising prior to presentation to a public body," and it cannot be withheld from disclosure on this basis. 2005 WL 1209243, at *3.

Therefore, because DOC admitted that it has information regarding the number of pretrial detainees and secondhand sentencing and sentencing status information, not to mention that DOC has attempted to use this information in the past to create a list similar to that sought by ACLU-DE, DOC has shown that it has the information requested by ACLU-DE. Therefore, under *Vanella* and FOIA's requirement that access be given to public records "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced," this Court should require DOC to disclose the requested information.

II. The Litigation Exemption to FOIA is Inapplicable Because The Requested Information Was Not Prepared For Use In Litigation.

DOC asserted that the requested records relate to pending or potential litigation and are therefore excluded as public records under the Litigation Exemption. The Litigation Exemption, however, should only apply to attorney work product, and even a broader interpretation of the exemption has no application here, where objective indicators demonstrate that litigation is not reasonably likely to occur.

A. The Litigation Exemption Only Applies to Attorney Work Product.

Based on relevant legislative history of the FOIA Statute, the Litigation Exemption should only apply to attorney work product. When Representative and co-sponsor for Senate Substitute 2 for Senate Bill 256,[16] James D. McGinnis, brought the bill before the House of Representatives on January 14, 1975, he did so with an amendment to the Litigation Exemption.[17] When Representative McGinnis was asked for the purpose of the amendment, he stated that the intent was to "clarify the definition ... the difference between the records of the court and ... records of

[16] SS 2 for SB 256, "An Act to amend Title 29 of the Delaware Code by adding a New Part relating to Freedom of Information and requiring that Meetings of Public Bodies and Records of Public Bodies be open to Personal Inspection by any Citizen of the State of Delaware," was approved and became the FOIA Statute on January 1, 1977. The Litigation Exemption has not been amended or modified at any time since its original enaction in 1977.

[17] The amendment was successfully adopted and added the phrase "which are not the records of any court" to the exemption.

whomever is going into litigation."[18] Representative Derrickson, an additional sponsor of the amendment to the Litigation Exemption, summarized the Litigation Exemption as "the information prior to taking a case into court are the records that are not deemed to be public records."[19] Therefore, the prevailing understanding of the litigation exemption by the sponsors of the amendment was that it applied to those records which were specifically created for the purpose of litigation, i.e. attorney work product.

This interpretation has been adopted in other jurisdictions with similar statutes and exemptions. For example, under Oregon's FOIA equivalent, there is a conditional exemption for "[r]ecords of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur," and under California's FOIA equivalent statute, disclosure is not required for "[r]ecords pertaining to pending litigation to which the public agency is a party, until the pending litigation has been finally adjudicated or otherwise settled." Or. Rev. Stat. Ann. § 192.345(1); Cal. Government Code § 7927.200. Authorities in both

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[18] *Hearing on SS 2 for SB 256 Before the House of Representatives*, 128th General Assembly, 2:54 – 12:45 (Jan. 14, 1975) https://www.dropbox.com/scl/fo/ltpc03h2tftcrvbafsfq2/AJIQa2WWkTTt8HAYtTGlVGI/Audio/House?preview=SB+256_128th_House+debate+2.mp3&rlkey=4a764xib20mdms1ccxb951jm5&subfolder_nav_tracking=1&st=cenxjrv9&dl=0.

[19] *Id*.

jurisdictions have interpreted these exemptions and found that they apply only to records specifically created for use in litigation. *See* State of Oregon Department of Justice AG's Public Records and Meetings Manual, at 42 (2024), https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/. ("The exemption applies only to records 'compiled or acquired by the public body for use in the litigation,' as distinguished from records compiled or acquired in the ordinary course of business that subsequently become relevant to litigation.") (citing *Lane County Sch. Dist. v. Parks*, 55 Or. App. 416, 420 (1981); *Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1421-22 (Ct. App. 1998) ("The construction we give to 'pending litigation,' which focuses on the purpose of the document, serves to protect documents created by a public entity for its own use in anticipation of litigation, which documents it reasonably has an interest in keeping to itself until litigation is finalized.").

DOC has never alleged that the requested information is attorney work product. DOC worked to create the exact information that ACLU-DE seeks, not for the purpose of defending itself against a lawsuit, but for the purpose of voter outreach efforts in the 2024 General Election. DOC's arguments that active litigation was pending against it when the request was made and that the requested information could potentially further that litigation or future litigation, even if accepted as true,

is of no import unless DOC can show that the requested records were developed or compiled for use in litigation. DOC has not and cannot make such a showing.

Therefore, relevant legislative history and the interpretations of similarly worded FOIA equivalents in other jurisdictions favor a narrow construction of the Litigation Exemption which looks to whether the documents were specifically prepared for use in litigation. This interpretation better serves the public's right to access and the principle of narrow interpretation of statutory exemptions to FOIA, *see Vanella,* 2024 WL 5201305, at *4, and it does so with due respect to the plain meaning of the Litigation Exemption and its legislative history. Under this construction, this Court should require disclosure in the present case because the requested documents were not created for use in litigation.

B. Litigation was Not Reasonably Foreseeable.

Alternatively, this Court should consider the fact that litigation was no longer reasonably foreseeable as grounds to reject DOC's Litigation Exemption argument. In *ACLU v. Danberg* 2007 WL 901592 (Del. Super. Mar. 15, 2007), a two-pronged test was used for the Litigation Exemption: "(1) litigation must be likely or reasonably foreseeable; and (2) there must be a 'clear nexus' between the requested documents and the subject matter of the litigation. *Id*. at *4.

If this Court were to decide to use the *Danberg* test, it should find that DOC has failed to meet its burden because it has failed to show that litigation is reasonably

foreseeable. The *Danberg* Court instructed public bodies to look for "objective indicators that litigation is coming," and that a requesting party's motive in seeking information through FOIA is relevant. *Id*. at *4.[20] Here, weeks before DOC denied the Eligible Voter Data Request, ACLU-DE emailed DOC and stated that they would not appeal the prison voting methods lawsuit. Further, ACLU-DE offered to help DOC with efforts related to absentee voting in Delaware prisons, in alignment with the District Court's order in the lawsuit. Therefore, DOC cannot meet its burden in showing that litigation was reasonably foreseeable because objective indicators show that the request was not related to the litigation. *See also Mell v. New Castle Cnty*., 835 A.2d 141 (Del. Super. Ct. 2003) (finding that where stay of discovery was ordered, it was possible that litigation was no longer 'pending' which would make the court "hard-pressed to conceive of a basis upon which [the public body] could invoke the [Litigation Exemption]").

Because the *Danberg* court did not consider the legislative history of the exemption nor the interpretation of equivalent exemptions in other jurisdictions, and

[20] In determining that the requesting party's motive is relevant, the *Danberg* Court departed from typical FOIA analysis which deems this motive irrelevant. *Id*. *See also Del. Op. Atty. Gen. 11-IIB15*, 2011 WL 7637780 at *2 (Dec. 5, 2011) ("It seems untenable to make non-disclosure hinge on the identity of the party making the request: indeed, our view has been that the identity of the requestor is usually irrelevant in a FOIA analysis"). This requirement under *Danberg* to guess a requesting party's motive is an unfounded judicial expansion of a narrow exemption to FOIA and constitutes an additional reason to depart from the *Danberg* analysis.

because a requesting party's motive for seeking information through FOIA is improperly made relevant under the *Danberg* analysis, the test should be disregarded. However, if this Court decides to use this test, it should nonetheless find that disclosure is required here where objective indicators of likely litigation are absent.

III. The Limited Nature of The Requests Do Not Invoke Serious Safety or Privacy Concerns.

In response to both petitions, DOC raised the Statute or Common Law Exemption, citing 11 Del. C. § 4322(a) and 11 Del. C. § 8513(d) as prohibiting disclosure of the requested records. This Court should find these statutes inapplicable because the limited data requested does not implicate safety or security concerns.

DOC argued, and in the Elderly Incarcerated Data Opinion the AG agreed, that statutes 11 Del. C. § 4322(a) and 11 Del. C. § 8513(d) prohibit disclosure of the names, SBI numbers, and incarceration dates of incarcerated people. 11 Del. C. § 4322(a) states that "the supervision history and all other case records obtained in the discharge of official duty by any member or employee of the [Department of Correction] shall be privileged and shall not be disclosed." 11 Del. C. § 8513(d) states that "[d]issemination of criminal history record information, by any person or agency other than the [the state Bureau of Identification] or its designee is prohibited."

The AG, relying on an affidavit submitted with DOC's petition attesting that DOC's electronic database consists of records of the courts, Delaware Criminal Justice Information System, and the inmate's intake interview, concluded that 11 Del. C. § 4322(a) blocked disclosure of the information sought in the Elderly Incarcerated Data Request.

Delaware courts have characterized "Section 4322(a) [as] an effort by the General Assembly to balance the need for safety and security in our State's prisons against an offender's ability to obtain information relevant to his or her incarceration." *Del. Op. Att'y Gen*. 13-IB07, 2013 WL 6593038, at *2 (November 21, 2013) (citing *Newsom v. Biden*, 2011 WL 835135, at *4 (Del. Ch. Feb. 28, 2011). Therefore, while there is no definition or guidance in the statute for "supervision history," the definition is best understood as limited to sensitive information directly related to the confinement and treatment of a particular incarcerated individual the disclosure of which would create safety or security concerns in Delaware prisons. A definition of "supervision history" or "case record" that would capture an incarcerated person's name, SBI number, and date of incarceration would be too broad because that information is unrelated to confinement or treatment of incarcerated individuals and disclosing it does not pose a safety threat in the prisons. In fact, DOC has made no claim that fulfilling the requests would pose such a threat.

Therefore, this Court should find that DOC has not met its burden to deny the request under 11 Del. C. § 4322(a).

Similarly, no case law supports DOC's conclusion that 11 Del. C. § 8513(d) prohibits disclosure of the requested information. Unlike with 11 Del. C. § 4322(a), the statutory scheme in this instance does define the "criminal history record information" that is prohibited from disclosure: "identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision and release." 11 Del. C. § 8502(4). Notably, names and SBI numbers are not included.

Nonetheless, the AG determined that "[i]nmate names, SBI numbers, and incarceration dates qualify as identifiable descriptors and information" under this definition. Importantly, while the statute explicitly states that "'[c]riminal history record information' shall include the names and identification numbers of *police, probation, and parole officers,* and such information shall not be within the definition of a 'public record' for purposes of [FOIA]," no such specification is provided for incarcerated individuals' names and SBI numbers. *Id*. Therefore, the canon of statutory interpretation, "expressio unius est exclusio alterius," is applicable here. The canon instructs that where "the persons and things to which [a statute] refers are affirmatively or negatively designated, there is an inference that

all omissions were intended by the legislature." *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (emphasis removed). Therefore, the General Assembly's intent was most likely to prohibit disclosing information directly related to the conferment or treatment of an incarceration person when disclosure would create an "improper and unwarranted intrusion[] into ... privacy." 11 Del. C. § 8501(a).

Neither request seeks information related to the confinement or treatment of an individual and the information would not result in an "improper and unwarranted intrusion" on the privacy of incarcerated individuals. First, as previously stated in this brief, information like the names, ages, and SBI numbers of incarcerated people and whether someone is a registered voter is already publicly available in various forums. If requested information has already been released to the public, privacy interests are significantly lowered and frequently do not justify denials of FOIA requests. *See Del. Op. Att'y Gen. 18-IB34*, 2018 WL 3947262 at *2 (July 20, 2018). Second, if both requests were fully met, ACLU-DE would receive 1) a list bracketed by age ranges of incarcerated individuals' names, dates of incarceration, and SBI numbers, 2) a list of people incarcerated with a lead charge of a misdemeanor and those individuals' names, dates of incarceration, and SBI numbers, and 3) a list of people incarcerated on pre-trial detention and those individuals' names, dates of incarceration, and SBI numbers. Importantly, ACLU-DE would not know what exact charges any specific individual faces. Because no individual's exact charges

or history would be revealed to ACLU-DE, and because ACLU-DE is attempting only to ask for the most rudimentary public information needed to contact populations of incarcerated individuals, 11 Del. C. § 8513(d) does not preclude the fulfillment of the requests.

Therefore, because DOC has not shown that the requests implicate serious safety or privacy concerns, this Court should order disclosure of the requested information.

IV. The Criminal Files and Records Exemption is Inapplicable Because The Request is for Public Information.

Lastly, in the Elderly Incarcerated Data Petition Response, DOC raised the Criminal Files and Records Exemption which exempts criminal files and records "the disclosure of which would constitute an invasion of personal privacy." 29 *Del. C.* § 10002(o)(4). Addressing the first portion of this exemption, DOC argued that this exemption applies to "information and documents contained in criminal files and records" and explained that electronic criminal records from other agencies and offender interviews are used to create and verify the information in DOC's case management system. DOC then took on the "personal privacy" portion of the exemption and argued that the analysis used in Delaware for the tort of invasion of privacy should be applied. DOC found one of the types of invasion of privacy claims to apply, "intrusion on physical solitude," because the information requested is the

information required to communicate with an incarcerated individual, "analogous to involuntarily placing them on a mailing list." Certified Record at 174.

DOC's argument is strikingly novel and broad. In suggesting this novel approach, DOC does not cite caselaw nor look to legislative purpose or interpretations adopted in other jurisdictions. DOC has not pointed to any authority for the proposition that the equivalent of "placing someone on a mailing list" is an invasion of privacy. Instead, DOC uses a slippery slope argument, suggesting incarcerated people would face a "barrage" of unsolicited and unwanted communications if their interpretation is not adopted. Certified Record at 174. The AG correctly did not adopt this interpretation in the Elderly Incarcerated Data Opinion.

In *Vanella*, a public body argued that the FOIA exemption for personnel, medical, and pupil files,[21] which exempts these documents when disclosure would constitute "an invasion of personal privacy," prevented the disclosure of information requested via FOIA on Delaware State Police officers. *Vanella*, 2024 WL 5201305, at *6. As this exemption uses similar language as the Criminal Files and Records Exemption, the *Vanella* Court's analysis is relevant here.

First, the *Vanella* Court stated that a record's "content rather than mere location" determined whether it was a personnel record and that public bodies cannot

[21] 29 Del. C. § 10002(o)(1).

"restrict access to records otherwise disclosable under FOIA," by placing them in a personnel file. *Id*. at *11. Similarly, DOC cannot claim that information is a criminal record just because it is located in a criminal file, especially when DOC can segregate data and doing so does not constitute the creation of a new record. Here, the information sought is public information that DOC cannot be allowed to restrict access to just because some of the information may also be included in criminal files.

Second, the *Vanella* Court held that the public body must show that "disclosure [of the records] would constitute an invasion of personal privacy." *Id*. at *7, 10. Other than the unfounded slippery slope proposition suggested by DOC, no such showing has been made. In analyzing the second prong, the *Vanella* Court looked at whether disclosure would lead to harassment or a threat to safety. *Id*. at *13 n. 104. Under this analysis, the *Vanella* Court found that officer names were not subject to the personnel files exemption. *Id*. at *8-12.

Here, there is no invasion of personal privacy because the information requested - ages, names, charges, dates of incarceration, and SBI numbers - is public information. ACLU-DE did not seek private information which could facilitate harassment such as "the home address, personal phone number, and email address" of incarcerated people *Id*. at *13. As such, there is no reason for this public information to be withheld.

Therefore, this Court should reject DOC's unsupported interpretation of the Criminal Files and Records Exemption and instead use the established analogue of the personnel files exemption to guide its analysis. Using this analysis, this Court should find that DOC has not met its burden and order disclosure.

CONCLUSION

For the foregoing reasons, DOC and the AG erroneously applied narrow, exemptions to FOIA, depriving ACLU-DE access to public records to which they are legally entitled. ACLU-DE respectfully requests that this Court reverse the legal errors below and order disclosure of all responsive records.