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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 REPLY BRIEF IN SUPPORT OF THEIR
APPEAL FROM ATTORNEY GENERAL OPINIONS 24-IB50 and 24-IB52

Dated: May 2, 2025

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iv**

QUESTIONS PRESENTED **1**

ARGUMENT **1**

I. DOC is Required to Disclose Public Records it Certainly Possesses **2**

II. 29 Del. C. § 10002(o)(6) Does not Prohibit Disclosure of the Records Requested..... **10**

III. The Litigation Exemption Does Not Prohibit Disclosure of the Records Requested..... **14**

CONCLUSION **17**

TABLE OF AUTHORITIES

Cases

ACLU v. Danberg, C.A. No. 06C–08–067–JRS, 2007 WL 901592 (Del. Super. Ct. Mar. 15, 2007)..... 3, 15, 16

Bd. Of Educ. Of Town of Ridgefield v. Freedom of Information Comm'n, 585 A.2d 82 (Conn.1991) 15

Claxton Enter. v. Evans Cnty. Bd. Of Comm'rs, 549 S.E.2d 830 (Ga. Ct. App. 2001) 15, 16

IMO Estate of Nastatos, 2023 WL 8269833 (Del. Ch. Nov. 30, 2023) 1

Judicial Watch, Inc. v. Univ. of Del., 2022 WL 2037923 (Del. Super. Jun. 7, 2022) 5, 6

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

Nat'l Sec. Couns. v. C.I.A., 898 F. Supp. 2d 233 (D.D.C. 2012), aff'd, 969 F.3d 406 (D.C. Cir. 2020) 9

Newsom v. Biden, C.A. No. 5247–VCS, 2011 WL 835135 (Del. Ch. Feb. 28, 2011) 13

Shapiro v. United States Dep't of Just., 507 F. Supp. 3d 283 (D.D.C. 2020) 9

Vanella on Behalf of Delaware Call v. Duran, C.A. No. K24A-02-002, 2024 WL 5201305 (Del. Super. Ct. Dec. 23, 2024), appeal dismissed as untimely, 2025 WL 733246 (Del. Mar. 7, 2025) ..... passim

Statutes

11 *Del. C.* § 4322(a) 13, 14

11 *Del. C.* § 6502(a) 2

11 *Del. C.* § 8501(a) 12

11 *Del. C.* § 8502(4) 12

11 *Del. C.* § 8502(4)(a)-(f) 10, 11

11 *Del. C.* § 8502(4)(c) 11, 12

11 *Del. C.* § 8513(d) 10, 11, 12

29 *Del. C.* § 10001 5

29 *Del. C.* § 10002(o) 8

29 *Del. C.* § 10002(o)(4) 1

29 *Del. C.* § 10002(o)(6) 10

29 *Del. C.* § 10002(o)(9) 14

29 *Del. C.* § 10003(g)(2) 5

29 *Del. C.* § 10005(c) 5

Other Authorities

Del. Op. Att'y Gen 18-IB34, 2018 WL 3947262 (2018) 12, 16

Del. Op. Att'y Gen. 25-IB13, 2025 WL 818782 (2025).....7

Del. Op. Atty. Gen. 06–IB09, 2006 WL 1779490 (2006).....4

Delaware Department of Correction, *DOC Announces Inmate Death*,

https://doc.delaware.gov/views/newsroom.blade.shtml, April 28, 2025. 8

Constitutional Provisions

Del. Const. art. I, § 9.....11

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. 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?

3. 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?[1]

ARGUMENT

Delaware's Freedom of Information Act ("FOIA") is a critical mechanism to promote democracy and transparency by providing public access to the work and performance of taxpayer-funded public bodies. Delaware's Department of Correction ("DOC") is tasked by the Delaware General Assembly with complete responsibility for "the maintenance, supervision and administration of adult

[1] The Opening Brief (hereinafter "OB") Included a fourth question presented: "Does the Criminal Files and Records Exemption to FOIA apply when a request does not implicate personal privacy concerns?" OB. 3 (referring to 29 *Del. C.* § 10002(o)(4)). Petitioner raised this question because DOC presented this argument in response to ACLU-DE's petition to the Attorney General. Record (hereinafter "R"). 173-74. The Respondent has now decided not to present this argument to this Court. Answering Brief (hereinafter "AB"). 4 n.2. Because Respondent has failed to present an argument regarding 29 *Del. C.* § 10002(o)(4), this Court should find that any further invocation of this FOIA exemption made by DOC in this matter has been waived. *IMO Estate of Nastatos*, 2023 WL 8269833, n.85 (Del. Ch. Nov. 30, 2023) (finding a claim to have been waived when the Respondent failed to brief the issue).

detention and correctional services." 11 *Del. C.* § 6502(a). Despite its tremendous responsibility, DOC claims not to possess fundamental information necessary to execute its serious objectives. Further, DOC asks that limited exceptions to FOIA be expanded beyond the scope of their language and the intent of the legislature. DOC's interpretation of FOIA's requirements would provide public bodies with wide latitude to withhold public data where it is convenient, fatally undermining the very purpose of FOIA.

For the reasons set forth in Appellant's Opening Brief and argued below, this Court should reverse legal errors below and find that the basic information contained in DOC's public records regarding incarcerated people, requested by the American Civil Liberties Union of Delaware ("ACLU-DE"), should be disclosed.

I. DOC is Required to Disclose Public Records it Certainly Possesses.

The Respondent misstates the facts and misapplies the law regarding its duty to produce information responsive to ACLU-DE's August 19, 2024, FOIA request seeking information ACLU-DE could use to determine the voter eligibility of incarcerated individuals. Instead of considering the actual request put forth by ACLU-DE, Respondent has conjured from thin air a strawman request that does not faithfully describe the request submitted by ACLU-DE, dancing around the fact that DOC indeed has responsive records that are required to be disclosed under FOIA.

A. DOC has Blatantly Mischaracterized ACLU-DE's Request.

The Respondent insists in its argument that ACLU-DE is asking it to "create" a record delineating voter eligibility. AB. 6 ("[p]etitioner's request for information about the voter eligibility of individuals"), 7 ("a request to provide information about the voter eligibility of DDOC's incarcerated population"). This is unequivocally false. In actuality, ACLU-DE "requested … the **names**, Delaware State Bureau of Identification number ("**SBI #**"), and **dates of incarceration** for individuals currently incarcerated within DOC level 5 facilities with a lead charge of misdemeanor and the same information with respect to individuals incarcerated within DOC Level 5 Facilities on a pre-trial detention basis." AB. 1. While true that the ACLU-DE's transparent purpose for seeking this information was related to determining voter eligibility, this is wholly irrelevant to the two dispositive questions an agency must answer with regard to a FOIA request: 1) Does the agency have the record(s) requested, and 2) are those records "public." *See Vanella on Behalf of Delaware Call v. Duran*, C.A. No. K24A-02-002, 2024 WL 5201305, at *6 (Del. Super. Ct. Dec. 23, 2024), appeal dismissed as untimely, 2025 WL 733246 (Del. Mar. 7, 2025). Here, because the answer is undoubtedly "yes" to both questions, the records ought to be disclosed.

Delaware legal authorities instruct public bodies to pay no regard to the motive behind a FOIA request. *ACLU v. Danberg*, C.A. No. 06C–08–067–JRS, 2007 WL 901592 at *3 (Del. Super. Ct. Mar. 15, 2007); *Del. Op. Atty. Gen.* 06–IB09,

2006 WL 1779490 at *5 (2006) ("[t]o inquire into a requestor's purpose would turn FOIA into a battleground for disputes"). And Respondent's wayward characterization of ACLU-DE's request is a perfect example of the very dangers inherent in ignoring this instruction. Instead of looking to fulfill the request based on the actual language contained therein, DOC has looked to the purpose behind ACLU-DE's request, leading it to make irrelevant arguments to this Court regarding DOC's statutory purpose, encroachment upon the functions of Department of Elections and State Election Commissioner, and accuracy of requested records. AB. 6-8. Further, and most importantly, using this strawman request allows Respondent to make absurd statements such as DOC "simply cannot produce the requested records," right after indicating that DOC's data infrastructure system ("DACS") "is designed to facilitate DDOC's main functions relating to the care and treatment of incarcerated persons." AB. 7. ACLU-DE asked in its August 19, 2024, FOIA request for certain information (names, SBI numbers, and dates of incarceration) pertaining to two populations of incarcerated individuals. DOC cannot skirt its obligation by pretending that ACLU-DE has asked it for a verified list of eligible voters.

B. DOC has Confirmed Possession of Responsive Records.

"FOIA aims to guarantee that Delaware citizens 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." *Judicial Watch,*

Inc. v. Univ. of Delaware, 267 A.3d 996, 1004 (Del. 2021) (citing 29 *Del. C.* § 10001). Therefore, while DOC is not required to create records that did not previously exist for the purpose of responding to a FOIA request, it cannot use this excuse to fail to isolate and produce information it has "ready access to" and relies upon. *Vanella*, 2024 WL 5201305 at *6. Further, to meet FOIA's burden of proof under 29 *Del. C.* § 10005(c), the public body must outline the "efforts taken to determine whether there are responsive records and the results of those efforts" and "[g]eneralized statements … do not meet the burden." *Judicial Watch*, 267 A.3d 996 at 996; *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Del. Super. Jun. 7, 2022). Simply put, the starting and end point for a FOIA request is whether the agency has responsive public records and the agency is required to help a requestor identify such records. 29 *Del. C.* § 10003(g)(2). Here, the Respondent insufficiently claims that the requested records do not exist, and that therefore DOC cannot be expected to respond to the request.

ACLU-DE asked for records that DOC unquestionably relies upon in its August 19, 2024, FOIA request seeking information ACLU-DE could use to determine the voter eligibility of incarcerated individuals. Indeed, it is undisputed, as discussed in Petitioner's Opening Brief, that DOC worked to create a list of eligible voters which would have required DOC to collect, at the very least, **names and lead charges**. R. 65. The accuracy of that list has no bearing on whether it's a

public record. Further, the record shows that DOC maintains "sentencing information" and "sentencing status information." R. 65. And there is no question that DOC has the SBI # of each incarcerated person, since they require those sending mail to incarcerated people to either provide the recipient's date of SBI # or date of birth. R. 174.

DOC has never denied that they have the records requested by ACLU-DE. Respondent claims that the October 31, 2024, affidavit of Deputy Chief Jessica Cline indicates that DOC "simply cannot produce the requested records." AB. 7. But this is a deceptive overstatement of the affidavit. The affidavit only speaks to DACS lacking a search function for extracting the information and the potential for inaccuracies in their database. R. 125. The affidavit: 1) does not say that DACS fails to track the requested data, 2) does not say that the requested information is impossible to produce, 3) specifically indicates that the underlying data in the DACS system has been used in attempts to "produce similar information," and 4) does not specify any efforts that were undertaken following ACLU-DE's request to produce any responsive records. *Id*. Therefore, the affidavit does not speak with the specificity required under *Judicial Watch*. *Judicial Watch*, 2022 WL 2037923, at *3. And, if there is any "simple" conclusion to draw from the affidavit, it is that DOC has data relevant to ACLU-DE's request that DOC is statutorily required to disclose.

The Respondent makes ACLU-DE's point when describing the *Vanella* case. To prevail under the FOIA excuse that responsive records do not exist, a public body must "demonstrate that the responsive records did not exist and could not be made." If the affidavit details how the public body "maintains computer systems" that include the requested information, it has obviously not met its burden. AB. 11 (citing *Vanella*, 2024 WL 5201305 at *9). Here, the Respondent has not demonstrated in any manner that the actual records requested are non-existent, and the record demonstrates that DOC does, in fact, have access to computer systems with the requested records.

This is also consistent with the Attorney General Opinion cited by the Respondent. In that instance, the Attorney General correctly upheld a denial of a FOIA request where the public body swore that it "ha[d] no records responsive to the FOIA request because the databases and their respective metadata which house Department data are owned, managed, and operated by third parties." *Del. Op. Att'y Gen.* 25-IB13, 2025 WL 818782 at *2 (2025). Here, DOC has never stated that they have no records responsive to the request for the names, SBI #s, and dates of incarceration for potentially eligible voters, nor that the DACS database is owned, managed, or operated by third parties. Again, all they have stated is that a single reservoir where it stores some data (DACS) is not readily equipped with a search function to produce the requested data and that they may need to verify their own

data with Delaware Criminal Justice Information System ("DELJIS") data to provide an "accurate" response. R. 125.

Even applying extreme deference to the assertions of the Answering Brief, Respondent asks this Court to accept that DOC somehow has no records pertaining to the names, SBI numbers, and dates of incarceration for the very individuals it is entrusted to incarcerate.[2] This borders on the absurd and demands intense judicial scrutiny.[3]

C. FOIA Requires a Public Agency to Manipulate Computer Systems or Otherwise Produce Large Subsets of Data in Response to FOIA Requests.

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). The *Vanella* court faithfully applied this clear instruction when it wrote:

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[2] This very week, DOC put out a press release in which it announced the deaths of two people they had been incarcerating. This release included the names and charges of the deceased. Delaware Department of Correction, *DOC Announces Inmate Death*, https://doc.delaware.gov/views/newsroom.blade.shtml, April 28, 2025.

[3] Tellingly, the argument that requested records do not exist has only been presented to stymie the FOIA request seeking information ACLU-DE could use to determine the voter eligibility of incarcerated individuals. It was not presented in the November 11, 2024, request for records, even though the requests seek similar information. The November 26, 2024, affidavit of Jessica Cline does not include any discussion of a DACS limitation in producing the requested data regarding the elderly incarcerated. R. 177.

> It 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. FOIA makes no "distinction between records maintained in manual and computer storage systems." Producing easily disclosable information stored in a computer system does not require the creation of a new record.

Vanella, 2024 WL 5201305 at *9. To embody this requirement, *Vanella* cites to *Shapiro v. United States Dep't of Just*., 507 F. Supp. 3d 283 (D.D.C. 2020). Like DOC here, the public body's computer system in *Shapiro* "did not permit it to search" for certain subsets of records. *Shapiro*, 507 F. Supp. 3d. at 328. However, instead of declining the request, the public body produced a printout of the entire requested file. *Id*. at 327-28. The contemporary understanding of FOIA statutes is that "searching and sorting an electronic database is clearly not the creation of a record under the FOIA," and that "entire fields of data" from databases can be required in response to a FOIA request. *Nat'l Sec. Couns. v. C.I.A.*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012), aff'd, 969 F.3d 406 (D.C. Cir. 2020); *see also*, OB. 15-16 n. 12.

Therefore, the Respondent is simply incorrect in its statement that "FOIA does not even require a public agency to manipulate its own electronic systems to create responsive records when the system is not equipped to handle that type of record generation." AB. 8. FOIA requires DOC to search and sort its electronic database or provide a printout of a large subset of information, appropriately redacted, from which ACLU-DE can sort out the public information it requested.

II. 29 *Del. C.* § 10002(o)(6) Does not Prohibit Disclosure of the Records Requested.

The Respondent wrongly reads statutes which were written to preserve privacy, safety, and security in Delaware prisons as tools to prevent the disclosure of public information that DOC possesses. In fact, the Respondent fails to consider the full text of the statutes they rely upon and ignores judicial constructions of the statutes raised by the Petitioner in its Opening Brief. While 29 *Del. C.* § 10002(o)(6), does require agencies to consider whether other statutes conflict with FOIA's general disclosure requirements, those FOIA exemptions must be read narrowly with attention to their precise text and purpose. *Vanella*, 2024 WL 5201305 at *4. Here, Respondent has not met its burden and cannot invoke the cited statutes to skirt its FOIA obligations.

A. 11 *Del. C.* § 8513(d) Carves out the Requested Information and is Generally Inapplicable to Requests Seeking Public Information.

While 11 *Del. C.* § 8513(d) prohibits the dissemination of "criminal history record information," the requested records are not criminal history record information under the statute.

The definition of criminal history record information under 11 *Del. C.* § 8513(d) is found at 11 *Del. C.* § 8502(4)(a)-(f) and provided in part in the Respondent's Answering Brief. AB. 14. Missing from the Respondent's recitation of 11 *Del. C.* § 8502(4)(a)-(f), though, is this important carveout: "Nor shall the term

include information contained in … [c]ourt records of public judicial proceedings." 11 *Del. C.* § 8502(4)(c). Delaware's Constitution mandates open courts. Del. Const. art. I, § 9. As such, many court proceedings, such as initial appearances, preliminary hearings, trials, and convictions, are open to the public. OB. 7. The "information contained in" records of these "public judicial proceedings" include much, if not all, of the information requested from DOC. And, the November 26, 2024, Cline affidavit explicitly says that a source of DACS's criminal record data is obtained by "exchanging information with the courts." R. 177. Therefore, information from public judicial proceedings that are uploaded to DACS are specifically excluded from the prohibition on dissemination of criminal history record information found in 11 *Del. C.* § 8513(d).

Additionally, as stated in the Opening Brief and ignored by the Respondent, while 11 *Del. C.* § 8502(4)(a)-(f) specifically includes the "names and identification numbers of *police, probation, and parole officers*," it fails to include incarcerated individuals' names and SBI numbers. *Expressio unius est exclusio alterius* instructs that the General Assembly intentionally made this exclusion. OB. 26-27.

Further, when the information requested under FOIA is public, 11 *Del. C.* § 8513(d) should not prohibit disclosure. The purpose of 11 *Del. C.* § 8513(d) and 11 *Del. C.* § 8502(4)(a)-(f) is to "create and maintain an accurate and efficient criminal justice information system" recognizing "the need of criminal justice agencies and

courts of the State for accurate and current criminal history record information, and the right of individuals to be free from improper and unwarranted **intrusions into their privacy**." 11 *Del. C.* § 8501(a) (emphasis added). Therefore, 11 *Del. C.* § 8502(4)'s inclusion of "information 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" in its definition of criminal history record information is best understood as a limitation of what agencies can release which is not already public. (emphasis added). There can be no "improper and unwarranted" intrusion on privacy when the information to be disclosed is already public. *See Del. Op. Att'y Gen 18-IB34*, 2018 WL 3947262 at *2 (2018) ("[T]he Deputy Commissioner has significant portions of her employment history and education publicly available online, and thus, the privacy interest is further diminished").

As discussed in the Opening Brief, the requested information is already available to the public in some form. OB. 7. ACLU-DE has sought information that is specifically carved out from the statute under 11 *Del. C.* § 8502(4)(c) and inferentially excluded from the statute under *expressio unius est exclusio alterius*. Further, the statutory scheme and language make clear that it should not apply to already public information. Therefore, 11 *Del. C.* § 8513(d) does not block

disclosure of the requested records because ACLU-DE has not requested "criminal history record information," as contemplated in the statute.

B. 11 *Del. C.* § 4322(a) is Inapplicable to Requests Seeking Information Already Available to the Public.

While 11 *Del. C.* § 4322(a) prohibits the dissemination of "supervision history and all other case records" obtained in discharge of DOC's official duty, the requested records are not supervision history or other case records as listed in the statute.

11 *Del. C.* § 4322(a) does not define "supervision history" or "case records," and the Respondent cites no definition or any other Delaware authorities for guidance on these terms. *Newsom v. Biden*, C.A. No. 5247–VCS, 2011 WL 835135 (Del. Ch. Feb. 28, 2011), provides relevant guidance. The *Newsom* Court recognized that FOIA is not absolute as the "General Assembly recognized that some information must be kept confidential in order to protect citizens from harm, particularly those citizens who either are employed by, or incarcerated in, our state's prison system." *Id*. at *4. The *Newsom* Court recognized that the General Assembly's intent to recognize "the need for safety and security" in Delaware prisons was effectuated in 11 *Del. C.* § 4322(a). *Id*.

Therefore, 11 *Del. C.* § 4322(a) is best understood as a limited incursion on FOIA's otherwise broad mandate to produce public information. Its prohibitions are properly invoked when a request raises safety or security concerns to those who

work or are incarcerated in Delaware's prisons. Here, no such concern has been raised, and no such concern exists because the request contemplates information already within the public domain: the incarcerated person's name, SBI number, and dates of incarceration. *See* OB. 25, 30.

Therefore, 11 *Del. C.* § 4322(a) does not prevent the disclosure of the requested records because ACLU-DE has not requested "supervision history" or "case records" as contemplated in the statute.

III. The Litigation Exemption Does Not Prohibit Disclosure of the Records Requested.

Respondent fails to grapple with Petitioner's argument that the Litigation Exemption (29 *Del. C.* § 10002(o)(9)) only applies to attorney work product. Additionally, Respondent failed to identify sufficient objective indicators of pending litigation, instead seemingly suggesting that binding agreements to avoid litigation with a public body are necessary before it is required to produce public documents under FOIA. This narrow FOIA exemption does not prevent disclosure of the records sought in the request seeking information ACLU-DE could use to determine the voter eligibility of incarcerated individuals.

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

The Respondent has not addressed Petitioner's argument that *ACLU v. Danberg* was wrongly decided because the *Danberg* court improperly considered the requestor's intent. Further, in light of the text and history of the Litigation

Exemption and the weight of authority from other states' litigation exemptions, the Litigation Exemption should be found to only apply to attorney work product. OB. 19-23.

Respondent's latest reliance on *Danberg* inadvertently bolsters Petitioner's argument. *Danberg*'s analysis of the scope of the Litigation Exemption was largely informed by other courts' analysis of exceptions to their public meetings laws. For example, the Respondent cites multiple lines from *Danberg* which themselves cite *Claxton Enter. v. Evans Cnty. Bd. Of Comm'rs*, 549 S.E.2d 830 (Ga. Ct. App. 2001). AB, 17; *Danberg*, 2007 WL 901592 at *4 (citing *Claxton*, 549 S.E.2d at 834-35). Further, *Danberg* looked to *Bd. Of Educ. Of Town of Ridgefield v. Freedom of Information Comm'n,* 585 A.2d 82 (Conn.1991). *Danberg*, 2007 WL 901592 at *4 (citing *Ridgefield*, 585 A.2d at 86). However, *Ridgefield* affirmed a determination that a public body properly met in executive session under the pending litigation exemption to Connecticut's Freedom of Information Act because it used executive session to "discuss '**strategy and negotiations** with respect to pending claims and litigation to which the public agency … is a party.'" *Ridgefield*, 585 A.2d at 87 (emphasis added). On the other hand, the *Claxton* court made clear that a public meeting was improperly closed under an attorney-client exception to the Georgia Open Meetings Act where "the real substance of the closed meeting" at issue was an issue of fact: whether a public employee "had actually earned 30 years of accrued

leave under current personnel policies." *Claxton*, 549 S.E.2d at 835. Therefore, the very cases *Danberg* relied upon can also be read to endorse interpreting litigation exemptions to public information laws as only pertaining to attorney work product.

Therefore, the Litigation Exemption does not prevent the disclosure of the requested public records because it only applies to privileged attorney work product. To be clear, DOC has never argued that the requested public records are attorney work product.

B. Litigation was Not Reasonably Foreseeable.

Even under *Danberg*, however, the Litigation Exemption does not apply. The *Danberg* test requires that litigation be likely or reasonably foreseeable as evidenced by objective indicators — DOC was simply not confronted with sufficient indicators.

Danberg itself included a recognition that "'[i]n our litigious society, a governmental agency always faces some threat of suit. To construe the term 'potential litigation' to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA].'" *Danberg*, 2007 WL 901592 at *4 (citing *Del. Op. Atty. Gen.,* 02–IB12 at 4). Therefore, the public body is required under *Danberg* "to point to a 'realistic and tangible threat of litigation … characterized with reference to objective factors' before employing the Litigation Exemption. *Id*. As stated in the Opening Brief, ACLU-DE communicated an intention *not* to appeal the dismissal of its Prison Voting lawsuit before DOC denied

the August 19, 2024, FOIA request and had taken actions in alignment with the District Court's order. OB. 23. At that point, any threat of litigation was, quite literally, "idle."

Respondent attempts to read into the litigation exception an unreasonable requirement that a requestor enter into "a binding or enforceable agreement to forego litigation." AB. 18. Such an agreement would unconstitutionally require FOIA requestors to waive their rights to sue each and every time they request records, putting organizations such as ACLU-DE in a corner and forcing them to choose between their right to access public information or their right to hold public bodies accountable in court for violations of the rights of Delawareans. This is a dangerous aggrandizement of a limited exemption to FOIA that should be rejected.

The Litigation Exemption does not block disclosure of the requested records because, even if it does not exclusively apply to attorney work product, litigation was no longer reasonably foreseeable.

CONCLUSION

For the reasons set forth in the Opening Brief and above, DOC has failed to justify its denials of ACLU-DE's FOIA requests for public records. The denial not only deprives ACLU-DE, and the public, of public records, but if upheld, would create a startling precedent allowing public bodies to pretend that public records in their possession are somehow non-existent or otherwise shielded from disclosure

under the narrow exceptions to FOIA. Therefore, the Respondent respectfully requests that this Court reverse the legal errors below and order disclosure of all responsive documents.

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