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Case No. N25A-07-002 CLS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
FOR NEW CASTLE COUNTY

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE; Plaintiff-Appellant, v. DELAWARE DEPARTMENT OF JUSTICE; Defendant-Appellee.	:	C.A. No. N25A-07-002 CLS

PLAINTIFF-APPELLANT'S OPENING BRIEF

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PRELIMINARY STATEMENT

The Delaware Freedom of Information Act ("FOIA") exists to ensure transparency in government and accountability to the public. It is vital in a democratic society that public business be performed in an open and public manner." 29 *Del. C.* § 10001. In this case, the Delaware Department of Justice ("DDOJ") undermined that statutory purpose by denying requests for invoices paid to outside counsel in ongoing litigation. This case presents the question of whether Delaware's citizens can rely on FOIA to meaningfully monitor government expenditures and hold public officials accountable. By improperly withholding invoices and refusing to account for its records, DDOJ violated FOIA's core purpose. Invoices documenting payments to outside counsel are quintessential public records. They are administrative in nature, reflecting financial expenditures of taxpayer funds, and do not reveal privileged communications or litigation strategy. Therefore, DDOJ's denials were improper, frustrating FOIA's intent.

For these reasons, Appellant American Civil Liberties Union of Delaware ("ACLU-DE") respectfully asks this Court to order DDOJ to disclose all responsive records.

NATURE AND STAGE OF THE PROCEEDINGS

On April 7, 2025, ACLU-DE requested copies of all invoices that the law firm Saul Ewing has charged to DDOJ in the case *Samuel v. Centene Corp*., De. Del. C.A. No. 1:23-cv-01134-GBW-SRF ("*Samuel*") and all invoices that Saul Ewing charged to DDOJ in the case *Adger v. Coupe*, D. Del. C.A. No. 1:18-cv-02048-GBW ("*Adger*"). Certified Record ("C.R.") at 000004. On May 9, 2025, DDOJ denied that request.[1] Because this FOIA request was directed to the DDOJ, the Chief Deputy reviewed the request and FOIA's administrative remedy was exhausted. C.R. at 000227-000228. On July 8, 2025, Appellant filed the Notice of Appeal in this action, seeking a reversal of the DDOJ's denial of records pursuant to 29 *Del. C.* § 10005(b) and (e),[2] along with a praecipe and citation.

[1] Defendant-Appellee's Counsel did not transmit the letter sent to the ACLU-DE stating that the *Samuel* invoices were being denied pursuant to the "pending or potential litigation" exemption in the record of this appeal. A copy of that letter is attached as Exhibit A.

[2] The Notice of Appeal also sought a declaration that Defendant-Appellee violated FOIA in its June 4, 2025, response that it had no "responsive records" to a separate May 15, 2025, request for bidding materials. DDOJ initially denied the request without any explanation of efforts taken to identify the records (or a sworn affidavit), as required by *Judicial Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1012 (Del. 2021). DDOJ later attempted to detail the efforts taken to identify said records in an email sent on August 25, 2025. A copy of this email is attached as Exhibit B. While Plaintiff asserts that an attorney's unsworn email is legally deficient under *Judicial Watch*, Plaintiff's counsel is presently satisfied with Defendant's explanation that no records exist and needs no further information regarding this request or DDOJ's efforts to identify those records.

QUESTION PRESENTED

1. Does FOIA's Litigation Exemption apply to documents that are not the subject of litigation, attorney work-product, or privileged attorney-client communications?

STATEMENT OF THE CASE

I. The FOIA Statute

FOIA requires public bodies to provide access to public records. 29 *Del. C.* § 10003(a). Delaware's General Assembly has declared that access to such records is "vital in a democratic society" so that "our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials." 29 *Del. C.* § 10001.

The definition of "public record" is broad, encompassing information "of any kind" that is "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business." 29 *Del. C.* § 10002(o). FOIA's exemptions are narrow, and the public body bears the burden of proving that an exemption applies. 29 *Del. C.* §10005(c); *Vanella on Behalf of Delaware Call v. Duran*, C.A. No. K24A-02-002, 2024 WL 5201305 at *4 (Del. Super. Ct. Dec. 23, 2024). The litigation exemption cited by DDOJ is one of these narrow exemptions, and it exempts from FOIA

"[a]ny records pertaining to pending or potential litigation which are not records of any court." 29 *Del. C.* § 10002(o)(9).

II. The Parties

Appellant, the American Civil Liberties Union of Delaware ("ACLU-DE"), is a nonprofit membership corporation dedicated to protecting constitutional rights and ensuring government transparency. ACLU-DE regularly submits FOIA requests to monitor the performance of Delaware agencies and to promote public accountability.

Appellee, the Delaware Department of Justice ("DDOJ"), is the State's chief law enforcement office. Among other duties, DDOJ retains and compensates outside counsel to represent the State and its agencies in litigation.

III. The FOIA Request and Denial

On April 7, 2025, ACLU-DE submitted a FOIA request to DDOJ seeking records related to outside counsel retained by the State. C.R. at 000001-000004. Specifically, ACLU-DE requested "information about the DOJ's procurement of special counsel and invoices paid to special counsel in some legal matters." C.R. at 000001-000004. Among other items, ACLU-DE requested invoices reflecting what a private for-profit law firm, Saul Ewing, charged for representing the State in two separate prison-related cases pending in federal court: *Samuel* and *Adger*.

DDOJ first sought additional time to collect and review the voluminous records at issue. C.R. at 000005-000007. On May 9, 2025, DDOJ produced the requested *Adger* invoices but withheld the *Samuel* invoices under FOIA's "pending or potential litigation" exemption, 29 *Del. C.* § 10002(o)(9). Exhibit A.

DDOJ did not explain why the litigation exemption applied to *Samuel* but not to *Adger*. The withheld *Samuel* invoices are ordinary billing records documenting fees and expenses. They are not privileged communications or attorney work product. Although some of the information contained within the billing records may be shielded under FOIA exemptions, DDOJ appropriately redacted such information from the *Adger* invoices and did not initially explain why it could not similarly redact the *Samuel* invoices. *See* C.R. at 000035-000036; Exhibit A at 2. In a subsequent email sent on August 25, 2025, Defendant's Counsel explained that the exemption's application to *Samuel* was based on ACLU-DE's representation of the *Samuel* plaintiffs. Exhibit B at 2.

ARGUMENT

DDOJ improperly denied ACLU-DE's requests for public information regarding the expenditure of taxpayer dollars when it invoked FOIA's narrow litigation exemption. In doing so, it has blocked access to quintessential public records that are necessary to ensure that the government is accountable to the citizens it serves. DDOJ's invocation of the litigation exemption relied upon a nonprecedential test, rarely examined by any other court for nearly 20 years, which violates the text, purpose, and statutory scheme of FOIA while also presenting constitutional issues. *See Am. Civil Liberties Union of Delaware v. Danberg*, C.A. No. 06C–08–067–JRS, 2007 WL 901592 at *4 (Del. Super. Ct. Mar. 15, 2007) ("the *Danberg* test"). This court should reject the *Danberg* test and instead adopt a brightline rule which better aligns with the narrow exemption and the FOIA statute. However, even if this court were to accept the *Danberg* test, it should still order disclosure of the disputed records because the litigation exemption was improperly invoked even under the *Danberg* test. Because DDOJ improperly invoked the litigation exemption, this Court should reverse DDOJ's legal errors and order disclosure of the *Samuel* invoices.

I. The *Danberg* Test is Contrary to FOIA's Text, Structure, History, and Purpose and Should be Disregarded.

FOIA's litigation exemption states that "[r]ecords pertaining to pending or potential litigation that are not records of any court" are not public records subject to FOIA. 29 *Del. C.* § 10002(o)(9). In examining how the exemption applies to potential litigation, the two-pronged *Danberg* test was developed, requiring the public body to determine: 1) the foreseeability of litigation, and 2) the nexus between the requested documents and the subject matter of the litigation. *Danberg*, 2007 WL 901592 at *4. While the *Danberg* test was developed as a well-intentioned mechanism to give deference to the text of the exemption, it has instead created a scenario it sought to prevent by "undermin[ing] the purpose of [FOIA]," due to its over-application in "our litigious society" where "a government agency always faces some threat of suit." *Del. Op. Atty. Gen.*, 02–IB12 at 4 (May 21, 2002) (*quoting Claxton Ent. v. Evans County Bd. Of Comm'r*, 549 S.E.2d 830, 834 (Ga .App. 2001)). In addition to undermining the purpose of FOIA, the *Danberg* test is also contrary to the text, structure, and legislative history of FOIA. It also presents worrying constitutional concerns. Therefore, this Court should disregard the *Danberg* test and instead apply a simple rule of preventing access to attorney work product; a rule which is used in other jurisdictions with similar FOIA exemptions.

Danberg undermines FOIA's purpose by greatly restricting access to public records beyond the stated intentions of the General Assembly. FOIA specifically states that "easy access to public records" is a prerequisite to ensuring a "free and democratic society" by way of furthering "*accountability* of government to the citizens of this State." 29 *Del. C.* § 10001 (emphasis added). Despite this stated purpose, *Danberg* has been interpreted recently by public bodies to go so far as preventing requestors from accessing government communications regarding public events and preventing voting rights advocates from accessing information needed to contact eligible voters. *See Del. Op. Atty. Gen.* 24-IB42 (2024); *Del. Op. Atty. Gen*. 24-IB50 (2024). These invocations of the *Danberg* test show that, instead of solely preventing access to information that is sought to "advance [the requesting party's] personal stake" in litigation, the *Danberg* test has aggrandized the litigation exemption to prevent government accountability. *Mell v. New Castle Cnty*., 835 A.2d 141, 147 (Del. Super. Ct. 2003).

The *Danberg* test contradicts the text of FOIA as well. The litigation exemption specifically restricts access to records "*pertaining* to" pending or potential litigation. 29 *Del. C.* § 10002(o)(9) (emphasis added). Black's Law Dictionary defines "pertain" as "to relate directly to; to concern or have to do with." PERTAIN, Black's Law Dictionary (12th ed. 2024). A document can therefore only be said to pertain to pending or potential litigation if it was created

for use in or preparation for litigation. By broadly concerning itself with any document that may have some nexus to potential litigation, regardless of the content or purpose of the document, the *Danberg* test overly expands the exemption beyond its clear text.

Further, the *Danberg* test is contrary to the structure of FOIA. As noted by the *Danberg* court, FOIA analysis generally does not consider the requesting party's motive. *Danberg*, 2007 WL 901592 at *4. FOIA determinations from the Attorney General's office have spelled out the dangers inherent in considering the motives or identity of the requesting party, stating the inherent risks and dangers clearly when writing that:

> "There are strong public policy reasons why a public body should not be allowed to require a person to state the purpose for a FOIA request. Such a requirement could have a chilling effect on persons exercising their rights under FOIA, and gives rise to the potential for discriminatory treatment. Under FOIA, a record is public or it is not … [t]o inquire into a requestor's purpose would turn FOIA into a battleground for disputes."

Del. Op. Atty. Gen. 06–IB09 at *5 (2006); *See also Del. Op. Atty. Gen*. 11–IIB15 at *2 (2011) ("[i]t 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").

Nevertheless, the *Danberg* opinion read an unfounded exception to this general requirement into the litigation exemption, determining that the motive, and

therefore the identity, of a requestor is relevant under the test the court created. *Danberg*, 2007 WL 901592 at *4. Not only does this pose the public policy issues clearly articulated multiple times by the Attorney General's office, it also is contrary to the structure of FOIA because FOIA explicitly states when the identity of a requestor can be considered. For example, records in the possession of the Department of Correction cannot be disclosed to a person in the Department's custody, and only bona fide law-enforcement officers can obtain the identities or addresses of any person holding a permit to carry a concealed deadly weapon. 29 *Del. C.* § 10002(o)(13); 29 *Del. C.* § 10002(o)(11). The clear language of the litigation exemption contains no indication that a public body may consider the identity or motive of a requesting party. So, the *Danberg* test's use of the identity or motive of a requestor is contrary to the structure of FOIA; the General Assembly knew to make clear under which circumstances the identity of a requestor may be relevant and purposefully structured FOIA to provide for government oversight by all Delawareans unless clearly specified. *See also Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1060 (Del. 2011) (identifying that under the statutory canon of construction *expressio unius est exclusio alterius*, when the General Assembly affirmatively makes a reference in one section of a statute, there is an inference that any omissions from other sections were intentional).

The issue with considering the requestor's motive is especially relevant in this case. Both *Samuel* and *Adger* are cases currently pending in the Federal District Court of Delaware relating to issues with the Delaware Department of Corrections. As DDOJ admitted via email (Exhibit B), the reason why they chose to disclose the invoices in the *Adger* case but not the *Samuel* case is because the ACLU-DE, the Plaintiff-Appellant FOIA requestor, also employs some of the attorneys who are representing the plaintiffs in the *Samuel* case, but does not represent any parties in the *Adger* case. This distinction frustrates the very idea behind what a "public record" is. According to the DDOJ's logic, if some other Delaware attorney requested the *Samuel* invoices, DDOJ would provide them. But a record is not "public" if it is disclosable to some but not to all. The FOIA statute does not contain any basis to justify disclosure of *public* records to some Delawareans but not others.

The *Danberg* test is also contrary to legislative intent, as expressed through legislative history, of the litigation exemption. Representative James D. McGinnis, co-sponsor for Senate Substitute 2 for Senate Bill 256,[3] brought the FOIA bill

[3] 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.

before the House of Representatives on January 14, 1975 with an amendment to the litigation exemption.[4] Representative McGinnis stated that the intent of the amendment was to "clarify the definition…the difference between the records of the court and…records of whomever is going into litigation." Hearing on SS 2 for SB 256 Before the House of Representatives, 128th General Assembly, 2:54 – 12:45 (Jan. 14, 1975).[5] Of course, "whomever is going into litigation" is an attorney representing a party in litigation, and *her* "records" are attorney work product. Public records, however, are records of the public.

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." *Id.* The information "prior to taking a case into court," are documents that were created with litigation in mind of an attorney to a case (i.e., attorney work product), not documents that may have only an attenuated nexus to litigation.

The General Assembly's reference to "records of the court," by contrast, is particularly telling. Delaware's Constitution requires open courts, and the records of court proceedings are quintessential public records. Del. Const. Art. 1 § 9. But, under the *Danberg* test, a request for a record from an open court proceeding could

[4] The amendment was successfully adopted and added the phrase "which are not the records of any court" to the exemption.
[5] This audio will be delivered to the Court.

be denied so long as the public body can demonstrate a reasonable fear that disclosure might lead to further litigation. Therefore, *Danberg* is constitutionally untenable with open courts.

Because the *Danberg* test has frustrated FOIA's purpose, is contradictory to the litigation exemption's text, flouts the structure of FOIA, and is contrary to legislative intent, this Court should reject DDOJ's present and continued reliance upon it. Instead, as explained below, it should adopt a simple, brightline rule, interpreting the exemption to only apply to attorney work product.

II. This Court Should Adopt a Brightline Rule that the Litigation Exemption Only Applies to Attorney Work Product.

Interpreting the litigation exemption to only apply to attorney work product harmonizes the exemption with the rest of the statute and is more faithful to the text and purpose of both. Further, other states have interpreted similar exemptions to their public records laws as only applying to attorney work product. Therefore, this Court should use this simple, brightline rule when analyzing the litigation exemption. This Court should then find that under such an interpretation, ACLU-DE is entitled to the records it requested.

As previously stated, the text of FOIA limits access to records "*pertaining* to" pending or potential litigation. 29 *Del. C.* § 10002(o)(9) (emphasis added). Similarly, the attorney work product privilege is understood as applying to documents and tangible things prepared in anticipation of litigation, including

mental impressions, conclusions, opinions, or legal theories of an attorney, i.e. tangible things pertaining to litigation. Fed. R. Civ. P. 26(b)(3)(B). Therefore, analysis of the exemption must consider that the exemption properly applies only to documents which relate directly to, concern, or have to do with litigation. The problem that the *Danberg* test creates by sweeping in all records that may have any nexus to litigation is that any record could potentially become relevant to litigation at some date after its creation. Thus, records that did not contemplate litigation and were created during the regular operation of a public body could fall within *Danberg*'s reach. The clear language of the statute suggests that the record must have a stronger connection to active or clearly signaled litigation; in other words, that the record be made in active contemplation of said litigation. Therefore, a brightline work product rule, which would only apply to records made in contemplation of litigation, is more appropriate given the text of FOIA.

Additionally, the work product rule would better align with FOIA's purpose. FOIA's broad mandate of disclosure of public records requires that its limited exemptions "must be narrowly construed." *Vanella*, 2024 WL 5201305 at *4. As previously referenced, the *Danberg* test has been used in recent times by public bodies to stymie FOIA requests for records with only the faintest connection to potential litigation, and the Attorney General has cited the exemption to resolve FOIA disputes 120 times since 1996. *See* Delaware Department of Justice,

Attorney General's Opinions, https://attorneygeneral.delaware.gov/opinions/ (last (keyword in search bar "litigation exemption") (last visited Oct. 9, 2025). The work product rule is a narrower construction of the litigation exemption which would allow for greater government transparency and accountability; and as it is faithful to the text of the exemption, it should be adopted by this Court under the mandate to construe all exemptions to FOIA narrowly.

The work product rule also furthers the specific intent of the litigation exemption. The intent of the exemption, as recognized by Delaware courts and legislative history, is to make clear that FOIA will not confer any advantages in litigation to parties suing public bodies. *See Office of Pub. Def. v. Delaware State Police*, 2003 WL 1769758, *3 (Del. Super. Ct. Mar. 31, 2003) ("[FOIA] is not intended to supplant, nor even to augment the courts' rules of discovery"). While the *Danberg* test accomplishes this aim, it also sweeps in records which would not confer an advantage in pending or hypothetical litigation. The work product rule, on the other hand, would be a narrower means by which to ensure that public bodies are not disadvantaged by FOIA, as it makes clear that public bodies maintain the protections afforded to them under the normal rules of discovery.

Furthermore, other states with similar exemptions to their public records laws have found the work product rule sensible. For example, under Oregon's FOIA-equivalent statute, 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 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/attorneygenerals-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); *see also 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.").

Therefore, because the work product rule is not only more workable but is also more closely aligned with the text and purpose of both the litigation exemption and the FOIA statute more broadly, this Court should adopt the work product rule. Applying this rule, the Court should find that the invocation of the exemption to deny access to the *Samuel* invoices was improper. The *Samuel* invoices are not attorney work product as they do not reveal mental impressions, conclusions, opinions, or legal theories of an attorney. *See* Fed. R. Civ. P. 26(b)(3)(B). The *Samuel* invoices are instead routine financial records created in the ordinary course of business that are entirely unrelated to litigation strategy or attorney thought processes. Therefore, under the brightline work product test, this Court should find that the litigation exemption was improperly invoked and order DDOJ to disclose the requested documents.

III. Even under the *Danberg* Test, the Litigation Exemption was Improperly Invoked Because no Nexus was Shown Between the Documents and any Potential Litigation.

Even if this Court were to apply the *Danberg* test here, it should still find that it was improperly invoked and order disclosure of the *Samuel* invoices because there is no nexus between the requested documents and the *subject matter* of any reasonably foreseeable, potential litigation.

In *Danberg*, the requestor, the ACLU of Delaware, was denied documents detailing healthcare services within Delawares prison facilities. *Danberg*, 2007 WL

901592 at *1. The requestor sought five categories of documents that all related to the medical care given to people while they were in the custody of the Delaware Department of Correction ("DDOC"). *Id*. The public body denied these documents, citing the litigation exemption. *Id*.

In support of this denial, the DDOC produced correspondence from the requestor that showed a nexus between the subject matter of reasonably foreseeable potential litigation and the requested documents. Specifically, the requestor sent letters to individuals incarcerated by the DDOC which showed that the requestor intended to initiate litigation against DDOC regarding their provision of medical care to incarcerated individuals. *Id.* at *5. In one letter an attorney for the requestor informed an incarcerated individual that the requestor was, "in the initial stages of collecting and analyzing information from Delaware inmates who suffer from inadequately treated medical conditions, and we are conferring with colleagues about the feasibility of collective legal action." *Id*. Another letter stated, "[w]e will seriously consider bringing a class action lawsuit on behalf of Delaware prisoners seeking improvements in the medical and mental care systems in the State's prisons and jails." *Id*.

According to the *Danberg* Court, these letters were sufficient to find that DDOC had at least established that there was "more in the works than 'unrealized and idle threats of litigation.'" *Id*. It also found that there was indicia of a nexus

between the records requested (documents related to the medical care of incarcerated individuals) and the subject matter of reasonably foreseeable, potential litigation (the subject matter of which was medical care in Delaware prisons). *Id.* citing *Del. Op. Atty. Gen.* 02–I812 at 4 (May 21, 2002). It is worth noting, however, that even with that nexus established, the *Danberg* Court only went so far as to allow limited discovery against the requestor so that DDOC could further support its invocation of the litigation exemption, and the Court stated that the letters were "perhaps inadequate to carry DOC's ultimate burden to prove the potential litigation defense." *Id*. Indeed, the Court found that a verified statement could be ordered to determine whether or not, in fact, the motivation for the requests was to further the purposes of contemplated litigation. *Id*.

Here, DDOJ has not shown any nexus between the requested documents and the subject matter of any reasonably foreseeable litigation. ACLU-DE's request for the *Samuel* invoices only relates to the legal fees expended by the State of Delaware for a case in active litigation regarding the provision of healthcare services in Delaware prisons. The litigation in *Samuel* is concerned with alleged violations of incarcerated individuals' Eighth and Fourteenth Amendment rights when defendants VitalCore, Centurion, Centene, and the DDOC allegedly delayed and denied adequate medical care. The requested records, invoices charged by a private law firm to the DDOC in that case, are billing statements that identify

hours, dates, rates, and amounts billed for services rendered in the normal status of the law firm's accounting process. These records have *nothing* to do with the provision of adequate medical care, the subject matter of the *Samuel* litigation, nor has DDOJ explained how they would touch upon the subject matter of any other potential litigation that the ACLU-DE could bring against them. Plaintiff's counsel will not receive any sort of "strategic advantage" in the *Samuel* litigation by knowing how many hours defendant's counsel has billed, the dates it billed, or its hourly rates and other amounts expended on the case.[6] Therefore, DDOJ is far short of the nexus DDOC was able to establish in *Danberg*, a nexus that even in that case was potentially short of the burden required by the litigation exemption. The simple fact that these are invoices charged by attorneys in litigation does not automatically satisfy the *Danberg* test and subject them to the litigation exemption.

Therefore, because DDOJ has not established a nexus between the requested documents and the subject matter of the *Samuel* litigation, this Court should find that DDOJ has not met its burden under the *Danberg* test and order disclosure of the *Samuel* invoices.

[6] Indeed, no strategic advantage was received by the *Adger* plaintiffs when these precise documents were made public pursuant to ACLU-DE's request.

Conclusion

For the foregoing reasons, DDOJ's invocation of the litigation exemption to withhold ordinary billing invoices was improper. DDOJ's denial undermines the text, purpose, and structure of FOIA and allows public agencies to evade scrutiny from taxpayers who should know how their tax dollars are spent. ACLU-DE respectfully requests that this Court reverse DDOJ's legal errors and order disclosure of all responsive records.

Dated: October 9, 2025

/s/ Dwayne Bensing
Dwayne Bensing (#6754)
ACLU of Delaware
100 W. 10th Street, Suite 706
Wilmington, DE 19801
dbensing@aclu.org
(302) 295-2113

/s/ Andrew Bernstein
Andrew Bernstein (#7161)
ACLU of Delaware
100 W. 10th Street, Suite 706
Wilmington, DE 19801
abernstein@aclu-de.org
(302) 551-6809 ext. 119

Attorneys for Plaintiff-Appellant