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Case No. N25A-07-002 CLS

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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

# ANSWERING BRIEF OF THE APPELLEE

**STATE OF DELAWARE**
**DEPARTMENT OF JUSTICE**
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Date: October 29, 2025

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On July 8, 2025, Appellant American Civil Liberties Union of Delaware ("ACLU-DE") filed a Citation and Notice of Appeal with this Court, challenging the Delaware Department of Justice's ("DOJ") responses to two Freedom of Information Act requests under 29 *Del. C*. Chapter 100 ("FOIA"). The ACLU-DE's first FOIA request directed to the DOJ, dated April 7, 2025, contained six paragraphs each seeking different and distinct documents related to attorney invoices from Saul Ewing, the outside legal counsel engaged by the DOJ to represent employees of the Delaware Department of Correction in litigation. The DOJ did not release these attorney invoices, asserting that under 29 *Del. C.* § 10002(a)(9), these records are exempt from the definition of a "public document" subject to production under FOIA.

The ACLU-DE's second FOIA request, dated May 15, 2025, also sought records related to Saul Ewing's billing, specifically the firm's 2017 competitive bid submission to the DOJ. Following communication between the ACLU and undersigned counsel since the time of the filing of the Notice of Appeal, the parties agree the DOJ does not possess responsive records to the May 15, 2025 request, and the ACLU is no longer challenging the DOJ's response to that request. *See* OB at 2 footnote 2.

The sole issue remaining on appeal is the DOJ's denial of the ACLU's April 7, 2025 FOIA request, seeking invoices from Saul Ewing arising out of their representation of the state defendants in the on-going district court case *Samuel, Desmond, and Goven v. Centene Corp., Centurion of Delaware, LLC, Vitalcore Health Strategies, Acting Comm'n Terra Taylor, Former Comm'n Claire M. DeMatteis, former Comm'n Monroe B. Hudson, Jr., Medical Director Dr. Awele Maduka-Ezeh and Bureau Chief Medical Records*, De. Del. C.A. No. 1:23-cv-01134-GBW-SRF ("*Samuel*").

The ACLU-DE filed its Opening Brief on October 9, 2025. This is DOJ's Answering Brief.

## FACTUAL BACKGROUND

On October 11, 2023 the ACLU-DE filed a class action lawsuit in the United States District Court for the District of Delaware on behalf of incarcerated individuals against the Delaware Department of Corrections and its contracted private healthcare agencies. *Samuel v. Centene, Corp.,* D. Del. C.A. No. 1:23-cv-01134-GBW-SRF ("*Samuel*"). The ACLU-DE alleges that inmates were denied their civil rights under the Eighth and Fourteenth Amendment. The DDOC is represented by outside counsel, Saul Ewing.

A review of the 25-page docket shows that after the Court ruled on the defenses' Motion to Dismiss on September 27, 2024, granting in part and denying in part the Motion, the Court ordered an Order Setting a Rule 16(b) Conference and required each party to confer on all matters under Rule 16. (D. 91). Following the scheduling conference the Court issued a scheduling Order on November 4, 2024. (D 99). On December 27, 2024, ACLU-DE served its Requests for Production on the defendants. (D. 115-116).

On May 15, 2025 the ACLU-DE filed a Motion for a Discovery Dispute Teleconference (D. 154). The District Court scheduled the Discovery Dispute Teleconference for June 10, 2025 and required the parties to follow the Discovery Matters and Dispute procedure and set a moving submission deadline of June 2, 2025. (D. 155). After the Court did not receive a moving submission from the

ACLU-DE on June 2, 2025, the Court denied their Motion for a Discovery Dispute Teleconference. Discovery is still ongoing in the matter with a deadline of August 1, 2026. (D. 99).

In this midst of this discovery dispute, on April 7, 2025, the ACLU-DE submitted a FOIA request to the Delaware Department of Justice seeking copies of the legal bills generated by Saul Ewing in *Samuel*, as well as other outside counsel related documents. C.R. at 000001-000004.

On May 9, 2025 the DOJ sent their response to the ACLU-DE. C.R. at 00010-000222. The response included a letter articulating DOJ's position on each item requested, and enclosed responsive *public* records. *See Id*. and ACLU-DE OB Exhibit A.

As to the ACLU-DE's request for all invoices that Saul Ewing has charged in the *Samuel* litigation from 2023 to the time of their request (paragraph five), the DOJ asserted 29 *Del. C.* § 100002(o)(9), the litigation exemption, and denied the ACLU-DE request for these invoices pertaining to their own client's litigation.

The ACLU-DE's FOIA request also sought invoices Saul Ewing's invoices in the case *Adger v. Coupe*, D. Del. C.A. No. 1:18-cv-02048-GBW ("*Adger*"). The *Adger* litigation involves claims by 107 individually named plaintiffs against 52 different defendants. One of the defendants is the DOC and the State retained Saul Ewing to represent the DOC.

The ACLU-DE is not representing anyone in the *Adger* litigation. Accordingly, the DOJ provided heavily redacted copies of the requested invoices.

The sole issue in this appeal is the DOJ's invocation of the litigation exemption to deny the ACLU-DE's FOIA request for copies of the *Samuel* invoices pertaining to their own client's litigation. The determination that the outside counsel invoices pertaining to the *Samuel* litigation are exempt pursuant to 29 *Del. C.* § 10002 (o)(9) is correct and should be affirmed.

## QUESTION PRESENTED

Whether this Court should overturn binding precedent to permit the ACLU-DE to circumvent discovery in District of Delaware litigation and use FOIA to obtain billing records of its opposing counsel?

## ARGUMENT

The Delaware Freedom of Information Act ensures transparency in government by giving Delaware citizens the opportunity to observe public officials, monitor decisions made by public officials, and requiring easy access to public records. 29 *Del. C.* § 10001. This Court has made clear that FOIA's purpose is to advance the public's right to know, it is not to advance a litigator's own personal stake in the litigation. *Am. Civil Liberties Union of Del. v. Danberg*, 2007 WL 901592, *4 (Del. Super. Mar. 15, 2007) (citing *Mell v. New Castle Cnty*., 835 A.2d 141,147 (Del. Super. 2003)). FOIA is not intended, as the ACLU-DE attempts here, to provide a "circuitous route around normal discovery channels . . . ." *Koyste v. Del. State Police*, 2001 WL 1198950, *3 (Del. Super. Sept. 18, 2001). The ACLU-DE's involvement in the *Samuel* litigation divests them of standing to seek records under FOIA, as they are for these purposes, not a "citizen" under FOIA because their request does not serve FOIA's purpose.

While the purpose of FOIA is governmental transparency, there are limits to what the government must produce to a requestor. FOIA provides that certain records held by a public body may not be "public records" and are exempt from FOIA's requirement of production to Delaware citizens. 29 *Del. C.* §§ 10002(o)(1) –(19). At issue here is the litigation exemption in 29 *Del. C.* § 10002(o)(9) which

exempts from the definition of a public record subject to FOIA "[a]ny records pertaining to pending or potential litigation which are not records of any court . . . ."

The ACLU-DE is the plaintiff's attorney in the pending District Court's *Samuel* case. Saul Ewing is defense counsel representing the state Defendants in *Samuel*. The ACLU-DE used a FOIA request as an attempt to obtain Saul Ewing's billing records in the *Samuel* case. The DOJ correctly applied 29 *Del. C.* § 10002(o)(9) when it denied the ACLU-DE's April 7, 2025 FOIA request on the basis the request sought records pertain to pending litigation which are not records of any court. The Opening Brief argues this Court should overturn binding precedent and permit the ACLU-DE to use FOIA to circumvent discovery. The ACLU-DE is wrong.

## I. The Opening Brief Does Not Provide a Compelling Argument for Overturning this Court's decision in *Danberg*.

In *Am. Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592,*4 (Del. Super. Mar. 15, 2007), the ACLU-DE requested records from the Delaware Department of Corrections regarding the Department's provision of medical care to inmates through FOIA. The Department of Corrections denied the request, citing the "pending or potential litigation" exemption in Section 10002 of FOIA, asserting the ACLU-DE was requesting these records to bolster potential litigation against the Department of Corrections. In analyzing the use of the "pending or potential

litigation" exemption, this Court adopted a two-pronged test to determine if the exemption applies. The first prong of the test requires the public body to demonstrate that the litigation be "likely or reasonably foreseeable." The second prong requires the public body demonstrate that there is a "clear nexus" between the requested documents and the subject matter of the litigation. *Id.* This Court held that this test "strikes a balance between the need to construe the exceptions in FOIA narrowly and the need to give effect to the actual words of the statute…" *Id*.

Here, the ACLU-DE is once again requesting records pertaining to the Department of Correction's provision of medical care to inmates. The Department has once again denied access to these records citing the "pending or potential litigation" exemption to FOIA. The first prong of the *Danberg* test—is there potential or pending litigation—is unequivocally met. Unlike in *Danberg* where the State was asserting potential litigation, here the documents requested pertain to active pending litigation, *Samuel v. Centene Corp*., De. Del. C.A. No. 1:23-cv-01134-GBW-SRF. The second prong of *Danberg* requires a "clear nexus" between the requested documents and the subject matter of the litigation. Once again, the records requested here clearly relate to the pending litigation. The Saul Ewing invoices requested are specifically incurred in the *Samuel* litigation showing a clear nexus.

Because binding precedent compels this Court to use a two-pronged analysis the ACLU-DE will clearly fail, it has no other option but to urge this Court to throw out the *Danberg* test and replace it with a test invented by the ACLU-DE that allows it more access to the records of opposing counsel than permitted by the rules of discovery of either the state or federal courts. *See* Op.B. at xx (asserting only attorney work product in pending litigation should be exempted under Section 10002(o)(9) and all other records of opposing counsel in the possession of a state agency are fair game). The ACLU-DE implores this Court to dispose of the two-pronged test that provides for a narrowly tailored, straight-forward and meaningful analysis that takes into account the "practical realities that when parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance 'the public's right to know,' but rather to advance their own personal stake in the litigation." *Grimaldi v. New Castle Cnty.,* 2016 WL 4411329, *9 (Del. Super. Aug. 18, 2016) (recognizing the self-serving attestation of a FOIA requestor that the request is for altruistic reasons must be heavily scrutinized in light of the requestor's role in related litigation against the public body). Contrary to the ACLU-DE's argument, the *Danberg* test embraces the purpose of FOIA, the plain meaning of the words of FOIA's litigation exemption and reconciles the litigation exemption with the structure of the FOIA statute. As the plain meaning of the FOIA litigation exemption is clear, the Court

must apply it as written and not, as the ACLU-DE suggests, resort to outside sources such as legislative intent. *See Borden, Inc. v. City of Lewes,* 1989 WL 147366, *2 (Del. Super. Nov. 13, 1989) ("If the language of a statute is clear and unequivocal, there is no room for statutory construction and judicial inquiry should come to an end.")

Disregarding the *Danberg* test in favor of the ACLU-DE's recommended "brightline rule that the litigation exemption only applies to attorney-work product" (OB at 13) would render the courts' rules of discovery meaningless. Delaware courts have soundly rejected the use of FOIA by litigants to obtain discovery. *See Mell v. New Castle Cnty*., 835 A.2d 141,147 (Del. Super. 2003) (holding "Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure."); *Grimaldi*, at *9 (Del. Super. Aug. 18, 2016) (adopting the holding in *Mell*); *Office of Pub. Def. v. Del. State Police*, 2003 WL 1769758, *2 (Del. Super. Mar. 31, 2003) (holding that FOIA serves to advance the public's 'right to know'; and is not "about litigators and litigants looking for materials that might help them in court. And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts' rules of discovery."); *Koyste v. Del. State Police*, 2001 WL 1198950, at *3 (Del. Super. Sept. 18, 2001) (holding Kyoste's FOIA request was "attempting a circuitous route around

the normal discovery channels." And that "[a]llowing such a bypass could interfere with or render meaningless the criminal discovery rules.").

### A. This Court's Decision in *Danberg* is Consistent with FOIA's Purpose of Providing for Government Transparency.

Contrary to the assertion in the Opening Brief, the *Danberg* test in no way restricts access to public records or undermines FOIA's purpose of advancing the Delaware citizens' right to a transparent government. The ACLU-DE points to two Attorney General opinions as exemplar of their argument that this Court overstepped in created the *Danberg* test, arguing the test undermines the purpose of FOIA because it "aggrandized the litigation exemption to prevent government accountability." OB at 8. While both opinions the ACLU-DE relies on cite 29 *Del. C.* § 10002(o)(9), neither support the dramatic conclusion posited in the Opening Brief.

To aggrandize something is to make great or greater, increase or enlarge or enhance the power of something.[1] The Attorney General opinions cited by the ACLU-DE do not increase or enlarge or enhance the power of the litigation exemption with the application of the *Danberg* test. Indeed, one of the two opinions does not even invoke the test.

[1] Merriam-Webster.com, last accessed October 27, 2025.

Attorney General Opinion 24-IB42 (2024) takes a hard look at what would constitute "potential" litigation by scrutinizing the City of Wilmington's invocation of the litigation exemption, 29 *Del. C.* § 10002(o)(9), when it denied the requestor access to records pertaining to a public event over what it characterized as potential litigation. The opinion strictly applied the *Danberg* test and found that there were no clear objective indicators of potential litigation. As the first prong of the *Danberg* test was not met, the opinion concluded the City of Wilmington had violated FOIA by denying the records requested.

Attorney General Opinion 24-IB50 (2024) requires even a greater leap to conclude it has aggrandized the *Danberg* test, as it does not even apply the *Danberg* test. In that opinion, the Department of Corrections denied the requestor records based on multiple FOIA exemptions, including the pending or potential litigation exemption. The Attorney General opinion found that DOC did not violate FOIA on the sole basis that DOC ***did not posses the records requested***. Once that was determined the analysis need not and did not go any further.

The *Danberg* test is consistent with the clear language of FOIA. The ACLU-DE argues that the potential and pending litigation exemption is limited to those records "pertaining to pending or potential litigation . . . ." OB at 8. We agree. The ACLU-DE applies the plain meaning to the words "pertaining to" by citing Black's Law Dictionary (12th ed. 2024), defining "pertain" as "to relate directly to; to

concern or have to do with." OB at 8. Again, we agree. The *Danberg* test embraces the plain meaning of the term "pertaining to" by narrowly construing the litigation exemption to those documents that demonstrate a "clear nexus" between the requested documents and the subject matter of the litigation. *Danberg,* 2007 WL 901592 at *4. To accept the ACLU-DE's position that a document can "only be said to pertain to pending or potential litigation if it was created for use in or preparation for litigation*"* (OB at 8-9) doesn't narrowly construe the litigation exemption but attempts to completely rewrite the General Assembly's chosen language, in direct contradiction to the legal definition of "pertain" cited in the Opening Brief.

### B. The ACLU-DE's Argument that this Court may not Consider the Identity of a FOIA Requestor Misses the Mark.

The ACLU-DE argues without citation that the *Danberg* test was wrongly created by this Court because it is contrary to the notion that a FOIA analysis should not consider the requesting party's motive and "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." OB at 9-10. By once again ignoring controlling case law of this Court, the ACLU-DE's argument fails. This Court's decision in *Danberg* did not cut from whole cloth some "unfounded exception" to a general principle of FOIA analysis. Rather, the *Danberg* test evolved from this Court's

evaluation of the litigation exemption over time. In fact, this Court has recognized that the status of the requestor as a litigant is not only relevant, it may be conclusive to the entire analysis if the requestor's purpose for seeking information is to circumvent the discovery rules. *See Mell*, at 147 (Del. Super. 2003); *see also Kyoste,* at 3; and *Office of Pub. Def.,* at *2.

Clearly ignoring this Court's decisions in *Mell* and *Office of Pub. Def.*, the ACLU-DE argues that because the litigation exemption does not expressly state that the identity of the requestor is required to be considered, agencies are precluded from taking the identity of a requestor into account. This argument fails. The identity of the requestor is intrinsically intertwined with the exemption to establish if the invocation of the litigation exemption is appropriate.

To assert that a public body may never invoke the litigation exemption if it considers who the requestor is or the motive for their FOIA request results in an exemption with no way of limiting its application. The litigation exemption states that "any records pertaining to pending or potential litigation which are not records of any court" are not public. 29 *Del. C.* § 10002(o)(9). If this Court ignores Delaware precedent, and adopts the ACLU-DE's argument, it will open the floodgates allowing litigants opposing the state to weaponize the FOIA to bypass discovery, including discovery rulings of the courts.

Stated another way, if the ACLU-DE wants the billing records of its opposing counsel in *Samuel*, why ask for them in discovery? Surely the District Court would order Saul Ewing to produce their billing records if, as the ACLU-DE asserts, it is "in the public's interest." It has been long held and always accepted that FOIA cannot be used to circumvent the court's discovery rules. The DOJ releasing the redacted *Adger* outside counsel invoices in response to the ACLU-DE's FOIA request is consistent with this Court's oft affirmed analysis.[2] The ACLU-DE does not represent the plaintiffs in the *Adger* litigation. It has no opportunity to utilize the discovery rules of the court to obtain records in *Adger* and producing records under FOIA to a non-party in that case does not deprive the *Adger* court of the opportunity to adjudicate the request.

Here, the ACLU-DE seeks attorney invoices of their opposing counsel in the pending *Samuel* litigation. The DOJ properly denied the request pursuant to the litigation exemption. This Court's decision in *Danberg* controls, it narrowly construes the litigation exemption, and should not be overturned. The records requested by the ACLU-DE fit squarely within the exemption when using the *Danberg* test. The DOJ properly denied the ACLU-DE's request for records. The ACLU-DE has provided no compelling argument for overturning *Danberg.* The appeal should be denied.

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[2] *Adger v. Coupe*, D. Del. C.A. No. 1:18-cv-02048-GBW.

## II. The ACLU-DE is not a "citizen" under 29 *Del. C.* 10003(a).

Should this Court overturn *Danberg* and adopt the "bright line rule" created by the ACLU-DE, the appeal nonetheless fails as the ACLU-DE is not a "citizen" for purposes of FOIA. FOIA provides that no citizen shall be denied the right to inspect or copy public records. 29 *Del. C.* § 10003(a). There is no provision in the statute giving anyone other than Delaware citizens access to public records. *Office of Pub. Def.,* 2003 WL1769758 at *1.

In the *Office of the Public Defender* opinion, the Court used a functional analysis to define the term citizen as it is used in FOIA. *Id.* at *2. This functional analysis applies the purpose of FOIA, Delaware citizens' right to know, with whether the FOIA requestor is seeking to further that purpose. *Id.* In that case, the Office of the Public Defender ("OPD") sent a FOIA request to the Delaware State Police seeking manuals of operation. The Delaware State Police denied the request, citing potential litigation as exempting those manuals from the definition of a "public document" subject to FOIA. The OPD appealed, and this Court agreed with the State Police's analysis. First, the noted that the OPD represents individual, criminal defendants. The Court found that the OPD is not concerned about governmental operations and efficiency, beyond their office's own internal workings. *Id.* Next, the opined that the OPD's interest in the materials requested may directly or indirectly help their office's clients in court. This does not align with FOIA's

purpose and the Court concluded the OPD is therefore not a citizen entitled to request records under FOIA. *Id.* at *3.

Here, the ACLU-DE, like the OPD, cannot claim the status of "citizen" for purposes of their FOIA request for attorney invoices that establish the amount of hours their opposing counsel has dedicated to representation of the State in the pending *Samuel* litigation. "The mission of the ACLU of Delaware is to preserve and advance civil liberties and civil rights in the State of Delaware as enshrined in the United States and Delaware Constitutions through education and advocacy without consideration of political association."[3] It is disingenuous to state the ACLU-DE has standing as a citizen to request legal invoices to monitor financial expenditures of taxpayers' funds where, as here, the request directly pertains to their own client's litigation and not their historical or current mission.

[3] https://www.aclu-de.org, last accessed October 24, 2025.

## CONCLUSION

The DOJ properly denied the ACLU-DE's FOIA request for opposing counsel invoices related to their client's pending litigation. The DOJ respectfully requests that the DOJ's decision in this matter be affirmed.

**STATE OF DELAWARE**
**DEPARTMENT OF JUSTICE**

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