



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;

Defendants-Appellees.

C.A. No.

NOTICE OF APPEAL

NATURE OF THE ACTION

This action seeks compliance with the Delaware Freedom of Information Act (“FOIA” or “the Act”). 29 Del. C. §§ 10001 *et seq.* Pursuant to the Act, the American Civil Liberties Union of Delaware (“Plaintiff,” “Appellant,” or “ACLU-DE”) requested that the Delaware Department of Justice (“Defendant,” “Appellee,” or “DDOJ”) disclose invoices that it paid to special counsel among other documents relating to special counsel. DDOJ disclosed some invoices but refused to disclose others, citing to FOIA’s litigation exception, 29 Del. C. § 10002(o)(9). In a follow up FOIA request, ACLU-DE requested further information about one of the legal service agreements (“LSA”) disclosed in the first FOIA request. DDOJ simply responded that they had no responsive records.

Plaintiff-Appellant hereby appeals in part DDOJ's denials pursuant to 29 *Del. C.* § 10005(b) and (e). In its responsive letters, DDOJ indicated that all administrative remedies had been exhausted, making this case ripe for appeal. Plaintiff-Appellant respectfully asks this Court to order Defendant-Appellee to disclose the documents requested.

JURISDICTION AND VENUE

1. This complaint is timely filed within 60 days of DDOJ's first FOIA denial, pursuant to 29 *Del. C.* § 10005(b); Super. Ct. Civ. R. 3(c). Although ordinarily litigants must first petition a FOIA denial by a state agency to the Chief Deputy Attorney General, DDOJ's letters indicated that ACLU-DE has already exhausted all administrative remedies, making this case ripe for appeal.
2. This Court has jurisdiction over this action pursuant to 10 *Del C.* § 541 and venue is proper under 29 *Del. C.* § 10005(b). The statute allows for venue to be located in the County where the plaintiff resides. *Id.* ACLU-DE's address is 100 W. 10th St., Wilmington, DE, 19801, in New Castle County.

PARTIES

3. Plaintiff-Appellant is a private, nonprofit membership corporation founded in 1961 as an affiliate of the national American Civil Liberties Union. ACLU-DE has over 4,000 members within the State of Delaware. The

mission of ACLU-DE and the common interest of its members are to preserve and protect fundamental constitutional rights. To promote public accountability, ACLU-DE submits FOIA requests to various state agencies that relate to ACLU-DE's other work. *See, e.g., Vanella on Behalf of Delaware Call v. Duran*, C.A. No. K24A-02-002, 2024 WL 5201305 (Del. Super. Dec. 23, 2024).

4. Defendant-Appellee DDOJ is Delaware's chief law enforcement officer. As relevant here, DDOJ is responsible for hiring special counsel to represent state agencies when certain conditions are satisfied, for entertaining competitive bids for said counsel, and for payment arrangements with said counsel. *See* Ex. A; Ex. B.

FACTS

The FOIA Statute

5. The core purpose of FOIA is to make the records of public bodies open to public view. *See 29 Del. C. § 10001* ("It is vital in a democratic society that public business be performed in an open and public manner 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 in formulating and executing public policy; and further, it is vital that citizens

have easy access to public records in order that the society remain free and democratic.”)

6. FOIA defines a “public body” as “any regulatory, administrative, advisory, executive, appointive or legislative body of the State . . . which: (1) Is supported in whole or in part by any public funds” *Id.* § 10002(k).
7. FOIA defines a public record as “information of any kind, 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).
8. FOIA provides that “[a]ll public records shall be open to inspection and copying” and “[r]easonable access to . . . these records shall not be denied to any citizen.” *Id.* § 10003(a).
9. FOIA makes an exception to disclosure for “[a]ny records pertaining to pending or potential litigation which are not records of any court.” *Id.* § 10002(o)(9). FOIA places the burden to prove that the exception applies on the public body. *Id.* § 10005(c).
10. If a public body claims that it does not have any responsive records to a request, FOIA requires the public body to submit an affidavit under oath

detailing the efforts that they undertook to locate potentially responsive records. *Judicial Watch, Inc. v. Univ of Del.*, 267 A.3d 996, 1012 (Del. 2021).

11. DDOJ is a public body, its records are public, and it has the burden of proof to justify the denials.

Background

The First FOIA Request and Response

12. On April 7, 2025, ACLU-DE submitted a FOIA request to DDOJ seeking various records and documents including, among other items, all invoices showing what the private law firm Saul Ewing has charged DDOJ for representation as special counsel in the cases of *Samuel v. Centene, Corp.* (*Samuel* invoices), and *Adger v. Coupe* (*Adger* invoices).
13. On April 29, DDOJ responded via email requesting an extension of time due to voluminous records.
14. On May 9, DDOJ responded that the litigation exception applied to the requested *Samuel* invoices. DDOJ disclosed the requested *Adger* invoices.
15. Although both the *Samuel* and *Adger* cases are currently pending before the same court, DDOJ did not explain why the litigation exception prohibited

the disclosure of all the *Samuel* invoices but did not prohibit disclosure of those identical types of records regarding the *Adger* litigation.¹

16. Invoices do not fall within the litigation exception simply because they have some relation to pending litigation. The exception is best understood as only applying to documents that are privileged and/or attorney work product. Invoices do not fit either of those categories. Even if this Court believes a broader interpretation is warranted, DDOJ must show that the FOIA request implicates the same legal issues as the litigation in question. *ACLU DE v. Danberg*, C.A. No. 06C-08-067-JRS, 2007 WL 901592 at *5 (Del. Super. Mar. 15, 2007). The *Samuel* invoices do not implicate the same legal issues present in *Samuel* itself.
17. ACLU-DE now asks this Court to order DDOJ to disclose the *Samuel* invoices.

The Second FOIA Request and Response

18. After receiving information in the first FOIA request about an omnibus LSA between DDOJ and Saul Ewing that was signed in 2017, *see* Ex. C., ACLU-DE submitted a second FOIA request to DDOJ on May 15.
19. This request sought 1) written materials submitted by Saul Ewing as part of the 2017 competitive bid, 2) any and all internal written discussions

¹ ACLU-DE represents the plaintiffs in *Samuel* but not in *Adger*.

evaluating the competitive bid, 3) if no competitive bid was submitted, all internal discussions of what exception to the competitive bidding process applied, and 4) all addendums to the 2017 agreement. *See* Ex. A (DDOJ’s competitive bidding policy).

20. On June 4, DDOJ responded to the request by simply stating that they had “no responsive records.” DDOJ did not permit ACLU-DE to petition to challenge the DDOJ’s denial of the FOIA request. *See* Ex. D.
21. DDOJ must state under oath the efforts that it took to determine whether responsive records exist. *Judicial Watch*, 267 A.3d at 1012. DDOJ did not satisfy this burden.
22. DDOJ’s response is inadequate and inaccurate. DDOJ’s representation that it has “no responsive records” cannot be reconciled with the fact that some of the requested records not only exist but also have been disclosed in prior FOIA requests. *See* Ex. E.

CLAIMS FOR RELIEF

WHEREFORE, Plaintiff-Appellant respectfully requests that this Court:

1. Declare that Defendant-Appellee violated FOIA in its invocation of the litigation exception, 29 *Del. C.* § 10002(o)(9), and in its statement that it had “no responsive records”;
2. Order Defendant-Appellee to disclose the requested documents;
3. Award Plaintiff-Appellant attorneys’ fees and costs pursuant to § 10005(d);
and
4. Grant all other appropriate relief as the Court deems just and proper.

Dated: July 8, 2025

**The American Civil Liberties Union
of Delaware**

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