



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KRISTINA KELLY

*Petitioner Below –  
Appellant,*

v.

DELAWARE DEPARTMENT OF JUSTICE

*Respondent Below –  
Appellee.*

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, Kristina Kelly (“Appellant”) requested that the Delaware Department of Justice (“Appellee” or “DDOJ”) provide certain communications between the DDOJ and the Wilmington Police Department (“WPD”).

On June 24, 2025, DDOJ denied this FOIA request. DDOJ’s written denial determined that the requested records were not public records within the meaning of FOIA and were specifically exempt from public disclosure by 1) statute or common

law,<sup>1</sup> 2) the pending or potential litigation exemption to FOIA,<sup>2</sup> 3) the investigatory files exemption to FOIA,<sup>3</sup> and, 4) the criminal files and records exemption to FOIA.<sup>4</sup> (See “FOIA Request Denial,” attached hereto as Exhibit 1). DDOJ did not provide an explanation as to why these FOIA exemptions applied other than a single line stating that the requested records would be attorney-client privileged communications, attorney work-product materials, or litigation-related records. *Id.* This denial exhausted Appellant’s administrative remedies under 29 *Del. C.* § 10005(b), allowing Appellant to file this appeal.

Appellant hereby appeals the June 24 FOIA request denial pursuant to 29 *Del. C.* § 10005(b). Appellant respectfully asks this Court to reverse legal errors contained in the denial and to order DDOJ to disclose all public records responsive to Appellant’s request.

### **JURISDICTION AND VENUE**

1. This complaint is timely filed within 60 days of the issuance of the 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, the state agency at-issue here is the

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<sup>1</sup> 29 *Del. C.* § 10002(o)(6).

<sup>2</sup> 29 *Del. C.* § 10002(o)(9).

<sup>3</sup> 29 *Del. C.* § 10002(o)(3).

<sup>4</sup> 29 *Del. C.* § 10002(o)(4).

- DDOJ and DDOJ's letter explains that its determination is a final determination, as such, Appellant 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).

### **PARTIES**

3. Plaintiff-Appellant Kristina Kelly is a citizen of Delaware and resides in New Castle County.
4. Defendant-Appellee DDOJ is the chief law enforcement office for the state of Delaware.

### **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.” *Id.* § 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 contains limited exemptions to its broad mandate of disclosure, including, among others, exemptions for records “specifically exempted from public disclosure by statute or common law” records “pertaining to pending or potential litigation which are not records of any court,” “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations,” and “[c]riminal files and criminal records, the disclosure of

which would constitute an invasion of personal privacy.” 29 *Del. C.* § 10002(o).

10. DDOJ is a public body, its records are public, and it has the burden of proof to establish facts on the record to justify its denial of access to records. *Id.* § 10005(c); *Del. Op. Att’y Gen.* 22-IB39, 2022 WL 14960138, at \*2 (Oct. 17, 2022) (citing *Judicial Watch, Inc. v. Univ of Del.*, 267 A.3d 996, 1010 (Del. 2021)).

11. 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*, 267 A.3d at 1012.

#### Appellant’s Protest Actions and Subsequent DDOJ Proceedings Against Appellant

12. Appellant’s First Amendment rights have previously been thwarted by DDOJ.
13. Throughout 2021, Appellant was involved in a series of protest actions against elected officials and DDOJ employees in response to the January 13, 2021, shooting of Lymond Moses by New Castle County Police Officers.
14. These protests led Attorney General Kathleen Jennings (“AG Jennings”) to initiate proceedings in the Court of Chancery against Appellant and an associate on September 5, 2021, seeking a temporary restraining order and

a permanent injunction preventing the Defendants from picketing within 300 feet of the home of one DDOJ employee and requiring the Defendants to provide the New Castle County Police Department with at least twenty-four hours' notice of any such picketing action at the employee's home. (*See* "September 5, 2021, Verified Complaint" attached hereto as Exhibit 2) (Exhibit 2, pg. 5).

15. AG Jennings sought these broad impositions on Appellant's First Amendment rights on an expedited basis, and the temporary restraining order was denied by Chancellor Kathaleen McCormick who found that "notice or a showing that notice is impossible" needed to be shown before "basic freedoms granted by the First Amendment" could be restricted. (*See* "September 7, 2021, Chancery Court Hearing Transcript" attached hereto as Exhibit 3) (Exhibit 3, pg. 17-19).
16. Defendants and AG Jennings settled the case by joint stipulation and AG Jennings agreed to dismiss the action with prejudice. (*See* "September 23, 2021, Stipulation" attached hereto as Exhibit 4).
17. This prior litigation against Appellant has informed Appellant's belief that she may be the target of retaliatory action for subsequent First Amendment protected activity.

The ACLU of Delaware Townhall

18. On June 3, 2025, the American Civil Liberties of Delaware (“ACLU-DE”) hosted a townhall event with AG Jennings (“the Townhall”).
19. Appellant posted multiple times on her personal Facebook account regarding her intention to attend the Townhall and ask the Attorney General questions.
20. Appellant was ultimately unable to attend the Townhall.
21. WPD officers were present at the Townhall.
22. Attendees informed Appellant that these officers were overheard explaining that their presence was to prevent disruption by Appellant, leading Appellant to believe that there was communication between the WPD and DDOJ concerning her.

#### The FOIA Request

23. On June 5, 2025, Appellant submitted a FOIA request to DDOJ seeking “all communications electronic or otherwise from May 27th, 2025 till June 5th, 2025 from DOJ, Kathleen Jennings or any other State agents to the Wilmington Police Department and/or the Carney administration that include the names Kristina Kelly and/or Keandra McDole and/or in reference to the ACLU townhall held June 3rd, 2025.” (Exhibit 1, pg. 1).
24. On June 24, 2025, DDOJ denied the request, stating “[t]o the extent the DOJ might have these records they would be attorney-client privileged

communications, attorney work product materials, or records pertaining to pending or potential litigation,” and indicating that “[a]ny such records are considered exempt from FOIA as records specifically exempted from public disclosure by statute or common law pursuant to 29 *Del. C.* § 10002(o)(6), records pertaining to pending or potential litigation pursuant to 29 *Del. C.* § 10002(o)(9), investigatory files compiled for civil or criminal law-enforcement purposes pursuant to 29 *Del. C.* § 10002(o)(3) or criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy pursuant to 29 *Del. C.* § 10002(o)(4).” (Exhibit 1, pg. 1) (internal quotation marks removed).

25. DDOJ failed to provide an explanation as to why these particular communications between the Wilmington Police Department and/or Mayor Carney would fall under attorney-client or attorney work product protections and has not articulated any pending, ongoing, or even contemplated lawsuit, investigation, or criminal offense that could merit the invocation of the FOIA exemptions cited in their denial. *Id.*

26. Unless it is clear from the face of a FOIA request that requested records are not subject to FOIA, the public body is required to provide sufficient facts on the record to justify the invocation of a FOIA exemption,



otherwise a reviewing court cannot base its determination on competent, reliable evidence. *Judicial Watch*, 267 A.3d at 1010-11.

27. DDOJ failed to meet this burden in the present instance because it is not clear from the face of the FOIA request why the cited exemptions would apply and DDOJ only provided a single, conclusory sentence to explain why it invoked the FOIA exemptions at issue. (Exhibit 1, pg. 1).

### **CLAIMS FOR RELIEF**

WHEREFORE, Appellant respectfully requests that this Court:

1. Declare that Appellee's failure to disclose the requested records violates 29 *Del. C.* § 10003 and is unlawful;
2. Order Appellee to make the requested records available to Appellant;
3. Award Appellant attorneys' fees and costs pursuant to § 10005(d); and
4. Grant all other appropriate relief as the Court deems just and proper.

Dated: August 21, 2025

**The American Civil Liberties Union  
of Delaware**

/s/ Andrew Bernstein

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