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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB46**

**November 29, 2022**

**VIA EMAIL**

Xerxes Wilson
The News Journal
xwilson@delawareonline.com

**RE: FOIA Petition Regarding the University of Delaware**

Dear Mr. Wilson:

We write regarding your correspondence alleging that the University of Delaware violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we conclude that the University did not violate FOIA, as it met its burden of proof to demonstrate that it has no public records responsive to your request.

## BACKGROUND

On August 22, 2022, you submitted a request to the University seeking "any and all settlement agreements (defined as a legal agreement resulting from a lawsuit or a threat of a lawsuit) between the University of Delaware (regarding elected officials, officers, staff or employees) and other parties from Jan. 2019 to present."[1] In lieu of producing the responsive documents, you stated that your request could be satisfied with a list with the parties involved, date of settlement, cost, and what prompted the settlement. The University denied your request on September 12, 2022, stating that it has no responsive public records. Only University records relating to the public expenditure of funds are considered public records under FOIA, and the University stated the records you seek do not relate to the expenditure of public funds. The

[1] Petition.

University also stated that the Board of Trustees' meeting materials, which are available online, do not contain any responsive materials to your request.

This Petition followed, challenging the accuracy of the University's representation that it has no public records responsive to your request. As an example, you cite to a recent federal case involving the University, stating that it appears "the facts of that case involve the expenditure of public funds."[2] You believe that the circumstances leading to a case involving the expenditure of public funds should factor into determining whether a University record is a public record under FOIA, and you think the University should not rely on the source of the settlement funds to determine if a record is public. Additionally, you argue that the University FOIA coordinator's unsworn statement in her email is insufficient to justify withholding the documents sought.

The University, through its counsel, responded on November 3, 2022 to the Petition ("Response"). The University's counsel contends that the University's denial was proper and in support, attached her sworn affidavit. FOIA defines public funds as funds of the State of Delaware and its political subdivisions, and thus, the University's public records include only records that relate to the expenditure of State dollars. Citing recent caselaw, the University counsel asserts that a document relates to the public expenditure of funds only when the *content* of that document relates to the expenditure of public funds. The University attests that the State appropriates about $120 million per year through the State budget, which makes up approximately 11% of the University's annual budget; many areas are not supported with State funds. In her affidavit, the University's counsel attests that she has "personal knowledge of all University settlements since January 2019" and "settlements are paid from an account that is not supported with public funds;" further, she verified this fact with the University's Budget Director.[3] She also attests that the referenced case in the Petition did not involve the expenditure of public funds, and to the extent there was a settlement payment, it was not made with public funds. The University's counsel swears that "[b]ased on the foregoing, [she] determined that no State funds were spent by the University in any way on settlements since January 2019 and reported that to [you]."[4] Additionally, she attests that no settlements were discussed in meeting minutes of the full Board of Trustees since January 2019.

## **DISCUSSION**

In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.[5] The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) "requires a public body to establish facts on the record that justify

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2 *Id.*

3 Response.

4 *Id.*

5 29 *Del. C.* § 10005(c).

its denial of a FOIA request."[6] "[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts."[7] The Supreme Court of Delaware remanded this issue to the Superior Court. Proceedings in *Judicial Watch* are still pending; however, the Superior Court has indicated that generalized assertions in the affidavit will not meet the burden.[8]

The activities of the University are not subject to FOIA, but there are two exceptions. First, the University Board of Trustees is a public body, and "each meeting of the full Board of Trustees . . . [is] a 'meeting.'"[9] Second, only the "university documents relating to the expenditure of public funds [are] 'public records.'"[10] Public funds are defined as "those funds derived from the State or any political subdivision of the State."[11] *Judicial Watch* expressly held "that a document relates to the expenditure of public funds, and thus is a 'public record,' when the *content* of that document relates to the expenditure of public funds."[12]

The University's counsel attests that she "reviewed the Board of Trustee[s] meeting materials posted publicly to determine if any of those materials are responsive to FOIA requests" and in this case, she confirmed that "no settlements were discussed in meetings of the full Board of Trustees since January 2019."[13] In addition, the University's counsel swears that she has "personal knowledge of all University settlements since January 2019 and settlements are paid from an account that is not supported with public funds," and before responding to your request,

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[6] 267 A.3d 996, 1010 (Del. 2021).

[7] *Id.* at 1012.

[8] *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (finding "that the generalized statements in the Affidavit do not meet 'the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents'" and asking the University who (identified at least by position) provided the relevant information, when such inquiries were made, and what, if any, documents were reviewed). At the conclusion of this opinion, the Superior Court permitted the University to file a supplemental affidavit. After receiving this affidavit from the University, the Court issued a second opinion determining the supplemental affidavit satisfied the University's burden, which has been appealed to the Supreme Court of Delaware. 2022 WL 10788530 (Oct. 19, 2022) (appeal filed).

[9] 29 *Del. C.* § 10002(l).

[10] *Id.*

[11] 29 *Del. C.* § 10002(m).

[12] 267 A.3d at 1006 (emphasis in original).

[13] Response.

she verified that settlements are paid from nonpublic funds with the University's Budget Director.[14] As such, the content of the settlement agreements do not relate to expenditure of public funds, and the University met its burden to demonstrate it properly denied access to such records, as the settlement agreements are not "public records" as defined by FOIA.

## CONCLUSION

For the foregoing reasons, we determine that the University has not violated FOIA by denying access to the requested records.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Jennifer M. Becnel-Guzzo, Associate Vice President and Deputy General Counsel

[14] *Id.*