LEGAL RESEARCH MEMORANDUM

Why a Successful Delaware FOIA Requester Should Recover Attorney Fees

A focused analysis of the fee issue in Vanella v. Duran

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Question presented: Whether the losing state agency should bear the successful requester's reasonable attorney fees and litigation costs.

> **CORE CONCLUSION** **The strongest position is not a free-standing rule that every loser pays. It is that Delaware already enacted a FOIA-specific exception to the American Rule, and the Vanella majority construed that exception too narrowly. Current law nevertheless uses "may," so automatic payment in every successful case would require a statutory amendment or a new controlling interpretation.**

1. The governing legal distinction

1. The American Rule ordinarily requires each party to pay its own attorneys, even when that party wins.
2. A statute, court rule, contract, bad-faith finding, contempt order, or recognized equitable doctrine can authorize fee shifting.
3. Delaware FOIA contains an express fee provision, but Vanella holds that it does not reach a state-agency on-the-record appeal.

Delaware courts recognize only limited exceptions to the American Rule, including statutory authorization, contractual fee clauses, litigation bad faith, violation of a court order or contempt, and common-fund or corporate-benefit cases. [River Valley Ingredients, LLC v. American Proteins, Inc. (Del. Super. July 20, 2026)]

Federal precedent states the same baseline: courts do not create a general private-attorney-general exception in the absence of statutory authorization. [Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)]

2. The statutory fee-shifting argument

> *"The court may award attorney fees and costs to a successful plaintiff of any action brought under this section."* [Delaware Freedom of Information Act, 29 Del. C. ch. 100]

This language is the required statutory exception. The dispute is not whether Delaware has authorized FOIA fees in the abstract. It is whether a requester forced into the special state-agency appeal route remains a "successful plaintiff" in an "action brought under" § 10005.

A. "Any action" includes the only judicial enforcement proceeding available

Section 10005(b) requires a state-agency requester first to petition the Chief Deputy Attorney General and then permits an on-the-record appeal to Superior Court. The requester cannot choose the ordinary direct-suit route that remains available against many non-state public bodies. [Delaware Freedom of Information Act, 29 Del. C. ch. 100]

- The appeal exists solely because § 10005 authorizes it.
- The proceeding asks a court to determine and remedy a FOIA violation.
- The remedies are supplied by the same enforcement section.
- "Any action brought under this section" is naturally broad enough to encompass that proceeding.

Under this functional reading, "appellant" describes procedural posture; it does not erase the requester's substantive role as the party prosecuting the statutory claim.

B. The 2010 amendment changed the route, not the fee remedy

The 2010 legislation created the mandatory state-agency petition and appellate route by amending subsections (b), (e), and (f). It did not amend subsection (d), which contains the fee provision. [77 Del. Laws ch. 400, Senate Bill 283 (2010)]

- Before 2010, a citizen could sue a state agency directly and qualify as a successful plaintiff.
- The amendment changed how that citizen reaches court.
- It did not expressly withdraw fees or costs.
- A procedural amendment should not silently eliminate an existing enforcement remedy, particularly where the new procedure is compulsory.

The Vanella dissent emphasized that the 2010 amendments left § 10005(d) "unscathed" and that the legislative record contained no indication that lawmakers intended to abandon the existing fee-shifting paradigm. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

C. "Plaintiff" can describe a function, not only a caption

The majority used a current dictionary definition to distinguish a civil-suit "plaintiff" from an "appellant." The dissent instead examined usage when the fee language was enacted and treated "plaintiff" as a person seeking remedial relief for an injury to rights. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

The dissent's central point is categorical: two terms need not be synonymous for one category to include the other. A requester can be an appellant procedurally while remaining the claimant who seeks judicial enforcement of a statutory right.

D. The contrary construction creates an unexplained disparity

Public body	Judicial route	Fee eligibility after Vanella
Municipality, county, or other non-state body	Ordinary FOIA suit	Potentially eligible
State agency represented by the Attorney General	Mandatory petition and on-the-record appeal	Categorically ineligible under Vanella

Source: the enforcement routes and fee provision in 29 Del. C. § 10005. [Delaware Freedom of Information Act, 29 Del. C. ch. 100]

The records, enforcement costs, and public interest do not become less important because the defendant is a state agency. Yet the requester loses fee eligibility solely because the legislature assigned a different procedural label. The dissent found no policy justification for that distinction.

3. FOIA's purpose supports fee eligibility

> *"It is vital that citizens have easy access to public records."* [Delaware Freedom of Information Act, 29 Del. C. ch. 100]

A right that costs more to enforce than the requested information is worth may exist on paper but fail in practice. That problem is acute in public-records litigation because the ordinary remedy is disclosure rather than monetary damages.

In Newman, the U.S. Supreme Court reasoned that few citizens could advance the public interest if successful plaintiffs routinely had to absorb their own fees. It therefore held that discretionary statutory language supported an ordinary presumption favoring fees for a successful public-interest plaintiff. [Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)]

Newman interprets a federal civil-rights statute and is not controlling Delaware FOIA authority. Its enforcement reasoning is nevertheless persuasive: the citizen functions as a private attorney general, and a fee award encourages compliance rather than merely punishing subjective bad faith.

4. Delaware precedents supporting the enforcement rationale

A. Gannett: success, partial fees, and litigation incentives

In Gannett, the Delaware Supreme Court affirmed a partial FOIA fee award. It held that the News Journal was a successful plaintiff because it prevailed on at least some issues and approved consideration of "the incentive structure facing the parties." [Gannett Co. v. Board of Managers of DELJIS, 840 A.2d 1232 (Del. 2003)]

Gannett establishes two important propositions. First, fee eligibility can follow meaningful partial success. Second, a court can tailor the amount to the circumstances rather than mechanically awarding every dollar billed.

B. Judicial Watch: earlier treatment of fees in an appellate posture

Judicial Watch reached the Delaware Supreme Court after an appeal from an Attorney General FOIA determination. The Court held that the requesters had not yet established a FOIA violation and therefore were not yet successful, but permitted the Superior Court to reconsider fees on remand. [Judicial Watch, Inc. v. University of Delaware, 267 A.3d 996 (Del. 2021)]

This was not a binding holding that every state-agency appellant was eligible; the categorical eligibility question was not resolved. It is still significant because the Court analyzed success instead of holding that appellate posture itself foreclosed fees.

5. The majority's arguments and the legal responses

A. Different procedural terms were intentional

Majority position: the statute uses "plaintiff," "defendant," "petitioner," "public body," and "appellant." Courts ordinarily presume that different terms carry different meanings. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

Response: the terms operate at different levels. "Appellant" identifies posture; "plaintiff" can identify the party seeking affirmative enforcement. The broad modifier "any action brought under this section" also must receive effect.

B. Treating appellant as plaintiff could expose citizens to state fees

Majority position: because either side may appeal, equating appellant with plaintiff could allow a successful state agency to seek fees against a citizen without the statute's frivolous-or-harassing limitation. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

Response: the dissent accepted that the defendant-side clause continues to govern. A state agency could recover only if the citizen's petition and appeal were frivolous or brought solely to harass. The limitation need not disappear merely because the case arrives by appeal. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

C. Sovereign immunity requires an unmistakable waiver

Majority position: money, including costs, cannot be awarded against Delaware without a clearly expressed waiver. Because § 10005(d) says "plaintiff" rather than "appellant," the majority found no waiver for the state-agency appellate proceeding. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

Response: the waiver is already expressed in the words authorizing "attorney fees and costs" in "any action" under § 10005. The 2010 procedural amendment neither deleted nor narrowed that authorization. The dissent therefore treated the problem as interpretation of an existing waiver, not creation of a new waiver.

6. Why a universal "loser pays" formulation is legally inaccurate

Even under the dissent's interpretation, success would establish eligibility—not an automatic right to every billed dollar. Section 10005(d) uses "may," and Delaware precedent treats the amount as a matter of trial-court discretion.

- A court may reduce fees for limited or partial success.
- Time spent on unrelated unsuccessful issues may be excluded.
- Hours, rates, staffing, duplication, and expenses must be reasonable.
- A substantial private commercial incentive may affect the amount under Gannett.
- A successful defendant may recover only when the case was frivolous or brought solely for harassment.

The general reasonableness principle is consistent with Hensley, which makes the degree of success crucial and excludes time devoted to unrelated unsuccessful claims. Hensley is persuasive methodology, not controlling Delaware FOIA law. [Hensley v. Eckerhart, 461 U.S. 424 (1983)]

7. The most defensible judicial rule

If Vanella were reconsidered, the best rule would be a prevailing-requester presumption rather than universal loser-pays liability:

> **Proposed rule:** *When a requester obtains judicial relief establishing a FOIA violation, the court should ordinarily award reasonable fees and costs unless special circumstances would make an award unjust.* [Rationale: Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)]

This approach gives effect to "may" while making the remedy meaningful. It protects public enforcement, permits reductions for limited success, and avoids requiring proof that an official acted with subjective bad faith.

8. Legislative language that would make payment mandatory

After Vanella, an express amendment is the most secure method of establishing mandatory fee shifting. The following model addresses the majority's textual and sovereign-immunity concerns:

> *In any action, petition, administrative proceeding, on-the-record appeal, or subsequent appeal brought under this section, the court shall award reasonable attorney fees and litigation costs to a requester who substantially prevails against a public body, including an agency of the State. This provision constitutes an express waiver of sovereign immunity. A prevailing public body may recover fees only upon a finding that the requester's claim was frivolous or brought solely for harassment.*

A more agency-protective version could permit denial or reduction when the agency proves substantial justification or special circumstances. Either version should specify:

- "shall," rather than "may";
- "requester," avoiding the plaintiff/appellant distinction;
- trial-level and appellate work, including any remand;
- whether administrative-stage work is compensable;
- an express waiver of sovereign immunity;
- partial-success and reasonableness reductions; and
- payment by the responsible agency, with defendant fees limited to frivolous or harassing cases.

The Vanella majority itself cited statutes using explicit language such as Arkansas's "or in any appeal therefrom" and Iowa's "including appellate attorney fees." Those examples show how Delaware can eliminate the interpretive dispute. [Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)]

Federal FOIA likewise authorizes courts to assess reasonable fees and litigation costs against the United States when a complainant has substantially prevailed. [5 U.S.C. § 552(a)(4)(E), federal FOIA fee provision]

9. Conclusion

The legally sound argument is not that every civil loser must always pay. It is that Delaware FOIA already created a specific fee-shifting exception, the state-agency appeal is an enforcement action under the same section, and a procedural label should not silently extinguish the remedy. The unchanged 1988 fee provision, the 2010 amendment's silence, FOIA's "easy access" policy, Gannett's incentive analysis, Judicial Watch's earlier treatment, and the Vanella dissent together form a substantial case for eligibility.

Current law nevertheless remains controlling: Vanella categorically bars § 10005(d) fees and costs in the state-agency on-the-record appeal, and even the dissent would have preserved trial-court discretion. Mandatory payment requires explicit “shall award” legislation or a future controlling decision adopting an ordinary presumption in favor of successful requesters.

Authorities and source links

1. Vanella on behalf of The Delaware Call v. Duran, No. 419, 2025 (Del. Aug. 24, 2026)
2. Delaware Freedom of Information Act, 29 Del. C. ch. 100
3. 77 Del. Laws ch. 400, Senate Bill 283 (2010)
4. Gannett Co. v. Board of Managers of DELJIS, 840 A.2d 1232 (Del. 2003)
5. Judicial Watch, Inc. v. University of Delaware, 267 A.3d 996 (Del. 2021)
6. River Valley Ingredients, LLC v. American Proteins, Inc. (Del. Super. July 20, 2026)
7. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)
8. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)
9. Hensley v. Eckerhart, 461 U.S. 424 (1983)
10. 5 U.S.C. § 552(a)(4)(E), federal FOIA fee provision

Research note: Authorities were checked through September 3, 2026. Quotations are intentionally brief. This memorandum is general legal research, not individualized legal advice.