IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JONATHAN RUDENBERG, Petitioner Below, Appellant v. DELAWARE DEPARTMENT OF JUSTICE, THE CHIEF DEPUTY ATTORNEY GENERAL & DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DIVISION OF STATE POLICE, Respondents Below, Appellees	C.A. No. N16A-02-006 RRC

Appellant's Reply Brief

Ryan Tack-Hooper (No. 6209)
Richard H. Morse (No. 531)
American Civil Liberties Union Foundation of Delaware
100 West 10th Street, Suite 706
Wilmington, DE 19801
(302) 654-5326 x 105
Attorneys for Petitioner Below, Appellant

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The Answering Brief dispatches a series of straw men, rebutting numerous mischaracterizations of Petitioner's position, including that Petitioner: believes a formal administrative hearing is required for § 10005(e) review (An. Br. at 25, addressed *infra* at 2-5); is requesting a *Vaughn* index (An. Br. at 25-27, addressed *infra* at 8-10); is demanding affidavits (An. Br. at 25, 28, addressed *infra* at 7); is seeking the creation of new compilation records (An. Br. at 19, 33, addressed *infra* at 18-19); and is demanding further records despite all responsive records having been provided (An. Br. at 30, addressed *infra* at 17-18). None of those assertions is correct. What Petitioner is asking for is spelled out in the Notice of Appeal. Namely, that the State Police "work[] in cooperation with other employees and representatives, [to] make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records," 29 Del.C. § 10003(g)(2) and provide "[a]ll records held by the agency . . . unless they fall within the scope of enumerated exceptions." 29 Del.C. § 10003(d)(1), including the applications for court orders, supporting documentation, and court orders that the State Police admit exist and are responsive.

A. Petitioner does not seek a formal administrative hearing—he merely seeks the basic protections of due process in the administrative review of FOIA petitions under § 10005(e).

The Answering Brief contends that Petitioner seeks "a formal administrative adversarial hearing." An. Br. at 26. Petitioner does not seek such a hearing. Petitioner is asking for rudimentary due process consistent with both the statute's purpose and constitutional requirements: notice of respondent's arguments and an opportunity to respond to them before the Chief Deputy makes a decision.[1]

Allowing the respondent to enter new arguments and evidence into the record without giving the petitioner an opportunity to address them, and then allowing only an "on the record" appeal, would create a useless, one-sided process that does not achieve the legislature's manifest intent under the FOIA statute. In the absence of statutory text on the subject, this Court's obligation is to construe the statutory procedure to effect the legislature's

[1] There is no material dispute in this appeal over the fact that Petitioner did not receive notice of the State Police's position and an opportunity to respond to it before a final decision was reached by the Chief Deputy Attorney General. The verified notice of appeal, supported by Mr. Rudenberg's sworn declaration, states that he did not receive it—it was not attached to the July 13 letter from Deputy Attorney General Fortune. Notice of Appeal ¶ 19. Moreover, the opening brief attached as an exhibit Petitioner's email to the DAG noting that the response was not sent. Br. Ex. A at 5. Since the Chief Deputy refused to consider Mr. Rudenberg's February 17, 2016 petition, filed after he finally received notice of the arguments made against his petition, the only dispute is whether such notice was legally required.

intent, as reflected in the statute's language and legislative history. *See Broadmeadow Inv., LLC v. Del. Health Res. Bd. & Healthsouth Middletown Rehab. Hosp.*, 56 A.3d 1057, 1062 (Del. 2012) (finding a statute silent as to who had the right to appeal an agency decision and construing the other statutory language to determine the legislative intent).

Independent of whatever procedure the statute requires, the United States and Delaware Constitutions also require notice and an opportunity to be heard because the Chief Deputy's decision upon a § 10005(e) review affects a petitioner's protected interests. *See Cohen v. State*, 89 A.3d 65, 86 (Del. 2014) (describing the requirement of these twin pillars of process whenever government action affects a protected interest). A FOIA petitioner has a statutory entitlement to copies of public records, and when the records belong to a state agency, the enforcement of that entitlement is limited to the arguments raised in the administrative review. *See* § 10005(e) (limiting appeal to "on the record" review). Moreover, the statute provides an entitlement to have the Chief Deputy declare that a FOIA violation has occurred. § 10005(e) ("Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur."). This administrative review may coerce compliance with FOIA—as

it did in this case with respect to the non-disclosure agreement and partial purchase orders—allowing a petitioner to avoid the time and expense of a suit. Because both effects of the decision on a § 10005(e) petition protect substantive legal interests of the petitioner, the Chief Deputy's review must comply with due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests."); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections."); *Brown v. Eppler*, 725 F.3d 1221, 1226-27 (10th Cir. 2013) (holding that due process applies to a statutory entitlement to ride public transportation).

The fact that § 10005(e) does not require the sort of formal administrative hearing at issue in the cases cited in the Opening Brief does not mean no due process at all is required. A formal administrative hearing exists on one side of the due process spectrum. *See Cohen*, 89 A.3d at 86 (citing *Mathews*, 424 U.S. at 335). What Petitioner is asking for is the minimal process that is constitutionally required. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (holding that the "elementary and

fundamental requirement of due process" is notice and an opportunity to present objections).

In this case, the Answering Brief exploits the fact that the State Police had the opportunity to build a record while Petitioner did not, by seeking to bar Petitioner from introducing evidence relevant to the application of exceptions because it was not introduced at the review stage—when Petitioner had no notice that the State Police would be asserting them. An. Br. at 32 n.4. This Court should reject that approach and hold that Petitioner is entitled to notice of the arguments advanced by a responding public agency and to an opportunity to respond to them, and that the failure to provide this process means Petitioner may add new counter-arguments or evidence in this appeal.

B. Under the express terms of Delaware FOIA, the State Police must make "every reasonable effort" to search for records, and the existence of appellate review depends on the public body describing that effort.

Each public body's FOIA coordinator is obligated to "make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records." 29 Del. C. § 10003(g)(2). In order for compliance with this obligation to be reviewed on appeal, the public body must—at a

minimum—describe the search it performed. *See Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1221 (D.C. 2008) (explaining what is necessary to show that a reasonable search was conducted). If the responding agency is not required to describe its searches, then it is impossible to review whether the agency has complied with Delaware FOIA.

The Answering Brief contends that since the federal cases cited in the Opening Brief involved summary judgment burdens, and this case is not on summary judgment, it follows that the State Police need not describe the searches. An. Br. at 30. But the difference in procedural posture is irrelevant. Petitioner cited *Doe* and other federal cases in support of two simple propositions: that the state agency bears the burden of proof that it conducted a reasonable search; and that the evidentiary burden of production when that burden is tested requires descriptions of its searches. Neither proposition turns on the procedural posture of the cases. Moreover, under Delaware FOIA, the last stage at which a party may adduce evidence to meet its burdens is at the § 10005(e) review, because the appeal is to be "on the record." So the State Police cannot reasonably contend that it would be procedurally premature to put them to the burdens that parties are put to at the summary judgment stage in federal FOIA litigation.

The Answering Brief also contends that requiring affidavits is going too far. An. Br. at 30. But, although Petitioner cited cases requiring affidavits, Petitioner did not argue that affidavits are required. Br. at 18. For the reasons explained in the Opening Brief, this Court need not reach the question of whether the State Police's burdens of production and proof require submission of an affidavit because the State Police never provided *any* description of the searches as to the categories still at issue. Moreover, the fact that Petitioner accepted the State Police's unsworn representations as to the other categories and omitted them from this appeal shows that Petitioner is not demanding affidavits.

C. Under the express terms of Delaware FOIA, the State Police bear the burden of proving that a FOIA exception applies, and the existence of appellate review depends on the public body providing sufficient information for review.

The burden of proof that an exemption applies is on the public body. 29 Del. C. § 10005(c) ("In any action brought under this section, the burden of proof shall be on the custodian of records to justify the denial of access to records."); *see also ACLU of Delaware v. Danberg*, 2007 WL 901592, at *3 (Del. Super. March 15, 2007) ("[I]t is the public body's burden, in the first instance, to establish the factual and legal bases for its

refusal to provide information in response to a FOIA request.").[2] The public body must provide an explanation of the reason for each such withholding "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (internal quotation marks, citation omitted); *see also* 29 Del. C. § 10003(h)(2) ("If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial."). If there were no requirement that agencies explain the application of FOIA exceptions as to individual records or to similar categories of records, then there could be no review of whether the agency has correctly applied them.

The State Police erroneously contend that in seeking to enforce these basic provisions of Delaware FOIA that Petitioner is asking for a *Vaughn* index and that no such index is not required under Delaware FOIA. An. Br. at 27 (citing § 10003(h)(2)). But Petitioner is not seeking any "index." It is possible to fully comply with § 10003(h)(2)'s first sentence (to "indicate the reason" when any "part" of a FOIA request is denied), without providing an index. For example, the State Police assert that all of the information sought

[2] A copy of this unpublished case is attached to the Answering Brief.

in the request is subject to the FOIA exception for common law confidentiality because of the FBI non-disclosure agreement. With respect to that claimed exception, because it is clear which parts of the request it supposedly applies to, the Police are not obliged to create an index that identifies every responsive record and asserts this exception as to each.

But for exceptions that do not apply categorically, more information is required to determine whether an exception applies. Instead of finding a middle ground between the two sentences of § 10003(h)(2), the State Police's position is, effectively, that the second sentence contradicts the first. They claim they are excused from providing "specific statutory citations justifying" withholding records, An. Br. at 26,[3] because the statute says they do not have to provide an "index." That argument reads "index" too broadly because the statute clearly requires that the public body "indicate the reasons for the denial" if any "part" of a request is denied.

The public body must provide enough information about the application of claimed exceptions to allow the Chief Deputy, and eventually a reviewing court, to assess whether those claims are correct. That entails

[3] Although the State Police address this argument only to Category 1, in fact they rely on this proposition in several other ways. For example, the State Police position is that they need not explain which particular records constitute "criminal history information."

providing an explanation of the reason for each withholding whenever a document or part of a document responsive to a FOIA request is withheld. If a public body fails to do so, the Court should find that the exception has not been proven and order production of the document.

D. The State Police have not met their burden of proving the application of any exception.

Exceptions to FOIA "pose a barrier to the public's right to access," and so they are interpreted narrowly. *Danberg*, 2007 WL 901592, at *3. For the reasons described in more detail in the following sections, because the State Police have failed to substantiate these exceptions, and under the narrow scope given to the exceptions under FOIA, this Court should find that no FOIA exception applies.

1. 29 Del. C. § 10002(l)(2) (trade secrets) does not apply.

The State Police represent that the redacted information on the purchase orders consists of model names of devices owned by the State Police, and that they are trade secrets because they are "confidential commercial information." An. Br. 31. The model name of a product may be commercial, but it is not a secret. *See* Delaware Uniform Trade Secrets Act, 6 Del. C. § 2001(4) (defining "trade secret" as information that derives value from the fact that "other persons . . . can obtain economic value from its

disclosure"). Far from being a secret, it is intentionally disclosed by the manufacturer in order to market and sell the product. Harris Corporation model names of Stingray devices are publicly known and divulged in their marketing material. *See* Br. at 22-23.

Conversely, which models were purchased by the State Police may be a secret, but it is not the kind of "commercial" or "financial" information that this exception protects. The State Police have no commercial competitors. There simply is no justification for declaring the models of a product owned by a state agency to be a trade secret. The State Police's conclusory averments to the contrary do not meet their burden of showing that the exception applies. *See Wash. Post Co. v. N.Y. State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984) (holding that conclusory averments, without more, are insufficient to meet an agency's burden to shield records from disclosure under N.Y. FOIA).

2. 29 Del. C. § 10002(l)(3) (investigatory files) does not apply.

FOIA provides an exception for "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue." 29 Del. C. §

10002(l)(3). The State Police claim that any remaining responsive documents are physically located within investigative files. Though left unstated, their apparent position is that any document found in a physical folder related to a criminal investigation—whether or not that investigation is "pending" as described in the statute, and whether or not the document is something obtained through investigation—is exempt from disclosure under FOIA. That position is incorrect. First, by its terms, the exception applies to "pending" investigative files. The legislature would not have enumerated that category if it intended the exception to apply to closed investigations.

Second, and more importantly, not every document placed by the State Police into a physical investigative file constitutes the sort of investigative record protected by the exception. *See Lawson v. Meconi*, 897 A.2d 740, 745 (Del. 2006) (noting that the exception applies to "information gathered during the course of an investigation"). For example, that part of a court order revealing what court authority was sought in order to deploy a Stingray—which is the principal information sought by Petitioner and of tremendous public interest and import—cannot be construed as something the State Police obtained or learned through investigation. It is a court order, not a witness statement or notes concerning a crime scene. Protecting

everything in a particular kind of physical folder from disclosure creates a FOIA "black hole" from which no public records will ever escape if they are the least bit politically sensitive or embarrassing.

3. 29 Del. C. § 10002(l)(5) (intelligence files) does not apply.

The State Police assert that disclosure of the model names of the devices they purchased is exempt from FOIA under § 10002(l)(5) ("Intelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an endangerment to the local, state or national welfare and security."). An. Br. at 31. But they provide no support for the proposition that the model name of a device mentioned on a purchase order constitutes or is contained within an "intelligence file."

Additionally, the State Police have not met the burden of showing that disclosure of this information is a security risk. The State Police rely exclusively on the FBI non-disclosure agreement to substantiate their assertion that disclosing model names of the devices purchased presents a security risk. But that agreement makes no mention of disclosure of model names. Instead, the Answering Brief contends that since the agreement applies to "any information concerning" Stingrays, it must follow that the disclosure of any information constitutes a security threat. An. Br. at 6-7, 32

n.4. But, as noted in the Verified Notice of Appeal ¶ 16-18, the State Police voluntarily disclosed many different kinds of information concerning Stingrays to the news media and general public, so they cannot credibly claim that *any* such information harms our safety. As pointed out in the Opening Brief, the model names of the devices available for purchase from Harris (as well as their competitors) are already publicly known, both from prior FOIA requests and from the marketing literature. Br. at 22-23. Therefore, the Court must ask whether there is any evidence that this particular information—disclosure of the model names of devices purchased by the State Police—constitutes a threat to public welfare or security. The State Police provided no such evidence.

The Answering Brief and the Record are devoid of argument or evidence that public knowledge of which models were purchased by the State Police would impact public welfare or security. Nor is there any evidence or argument that a purchase order constitutes an "intelligence file." This exception should be found to be inapplicable.

4. 29 Del. C. § 10002(l)(6) (common law confidentiality) does not apply.

The State Police did not cross-appeal the Chief Deputy's determination that the FBI non-disclosure agreement does not constitute a

valid basis for withholding documents under FOIA. Nevertheless, the Answering Brief continues to refer to the non-disclosure agreement as a potential basis for applying the exception, so Petitioner will briefly address the issue.

The Delaware Attorney General has consistently rejected the argument that a public agency can avoid FOIA by entering an agreement not to disclose records. R. 26-27 n.18-19. Such an exception would empower any state agency to hide wrongdoing or embarrassing information simply by agreeing with another party not to disclose it. Moreover, it would effectively constitute a contract to violate Delaware law by withholding otherwise public records from disclosure. For these reasons, other jurisdictions have also consistently rejected such an exception to their FOIA laws. *See In State ex rel. Findlay Publ'g Co. v. Hancock Cnty. Bd. of Comm'rs*, 684 N.E.2d 1222, 1225 (Ohio 1997) (noting line of Ohio cases explaining why such an exception cannot exist); *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) ("[A] confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.").

5. 29 Del. C. § 10002(l)(9) (litigation exception) does not apply.

The Answering Brief also briefly asserts that the State Police may withhold these records because Petitioner seeks to use them in litigation. The sole support for this contention is the fact that over five years ago a separate affiliate of the ACLU expressed an intention to contact criminal defendants in a different state to ask whether they were aware that they had been subjected to warrantless phone tracking. An. Br. at 34 n.5. That fact, loosely related to Petitioner's counsel, simply has no bearing on whether Petitioner is entitled to these documents. There is no evidence whatsoever that either Petitioner or his counsel intends to bring litigation concerning the records Petitioner seeks. Neither Petitioner nor his counsel has attempted to solicit plaintiffs who might have standing to bring any lawsuit concerning Stingrays, and they do not have any such intention.

6. 11 Del. C. § 8502(4) (criminal history record) does not apply.

The Answering Brief asserts that the information contained in investigative files is barred from disclosure by the statute concerning criminal history information, An. Br. at 20, such as "the names and identification numbers of police, probation, and parole officers." 11 Del. C. § 8502(4). This Court cannot know whether such information is contained

in the documents responsive to Petitioner's FOIA request—because the State Police has refused to conduct the search. But even in the unlikely event that every responsive record contained such information, the State Police can simply provide appropriately redacted copies of the records averring that the redacted information is exempt from FOIA under § 8502(4). *See, e.g.*, *State ex rel. Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982) (holding that, although the Kansas FOIA statute did not expressly require disclosure and redaction instead of complete withholding, such a procedure was nevertheless required given the goals of FOIA); *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 797 (Wyo. 1983) (same).

E. This Court should order the production of un-redacted purchase orders as well as the production of records responsive to Categories 3 & 7-9.

The Answering Brief declares that "all responsive public documents have been provided." An. Br. at 30. But this statement is misleading. What the Answering Brief is contending is that all the remaining records are not *public*, not that all the remaining records are not *responsive*. On the contrary, the Brief admits that there are additional responsive records, including applications for court orders, affidavits supporting those applications, and the resulting court orders. An. Br. at 19, 21. It also admits

that there has been no search for these records in the place they believe them to be, investigatory files. An. Br. 19-21.

This Court should enjoin the State Police to follow the plain terms of 29 Del.C. § 10003(g)(2) and "work[] in cooperation with other employees and representatives, [to] make *every reasonable effort* to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records." (emphasis added). To the extent this involves a search of investigative files, Petitioner is ready and willing to work with the State Police to find ways to conduct that search so that it complies with § 10003(g)(2), including limiting the initial search to a particular timeframe if the files to be searched are too voluminous, or limiting the search to cases that can be recalled by members of the unit in charge of Stingrays, or using other reasonable measures.

The Answering Brief also contends that Petitioner is improperly seeking to force them to create lists of compilations that do not already exist, or to "comb through court records not in its possession," or to "divulge[] information not subject to Delaware's FOIA." An. Br. at 33. These claims are false. Petitioner is asking that, at long last, the State Police conduct a reasonable search for responsive records as to Categories 3 and 7-9 in its

custody or control and turn them over. If any reasonable search was too burdensome to conduct, then the State Police should have followed the established procedure for that. *See* 29 *Del. C.* § 10003(m)(2). The State Police did not do so.

What the State Police cannot do under Delaware law is to simply refuse to search for responsive documents out of the belief that the petitioner does not deserve the records, as the Answering Brief argues. An. Br. at 34. While Petitioner has offered ample justification for the public interest in this information—including knowledge about the spending of hundreds of thousands of taxpayer dollars without any records of negotiation or bidding, as well as information about whether appropriate court oversight is occurring—the law requires no such justification. *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 781 (Del. Super. 1995) (noting "the basic public policy that disclosure, not secrecy, is the purpose behind the Act"). Delaware FOIA has never required a justification for a request. Indeed, the legislature has decreed that everything not subject to exceptions must be disclosed because it inherently serves the public interest to have the public's business disclosed to the public. *See* 29 Del.C. § 10003(d)(1)("[A]ll records held by the agency are 'public records' to

which the public should have access unless they fall within the scope of enumerated exceptions in § 10002 of this title.").

Finally, because the State Police has not met its burden of proving that any FOIA exception applies to the model names of devices purchased by the State Police, there is no justification for having provided redacted versions of the purchase orders. The State Police should be ordered to provide un-redacted versions.

Conclusion

For the foregoing reasons, Petitioner asks that this Court provide the relief requested in the Notice of Appeal.

/s/ Ryan Tack-Hooper
Ryan Tack-Hooper (No. 6209)
Richard H. Morse (No. 531)
American Civil Liberties Union Foundation of Delaware
100 West 10th Street, Suite 706
Wilmington, DE 19801
(302) 654-5326 x 105
Attorneys for Petitioner Below, Appellant