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Case No. N16A-02-006 RRC



February 2, 2017

Hon. Richard R. Cooch
New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, DE 19801
(302) 255-0664

By electronic filing

Re: Rudenberg v. Delaware DOJ, C.A. No.: N16A-02-006 RRC

Dear Judge Cooch:

This is Petitioner-Appellant's reply to the supplemental letter brief filed by Respondent-Appellee State Police on January 23, 2017.

I. The issues that remain in this case may be resolved as a matter of law

Petitioner seeks access to records concerning the purchase and use of cell site simulators by the State Police, including purchase orders that describe the model names of the purchased equipment and records related to the application for court authority to use this surveillance equipment. While Petitioner disputes the State Police's framing of the issues that remain in this case (as explained in Petitioner's Reply Brief of June 14, 2016, D.I. 11 ("Reply Br.")), he agrees with the State Police that the remaining issues may be resolved as matters of law. *See* Opp. Supp. Br. 1-2. Petitioner is asking this Court to rule as a matter of law that:

- When adjudicating a § 10005(e) appeal, the Chief Deputy Attorney General must provide a FOIA petitioner notice of the responding agency's arguments and an opportunity to respond, and as well as sufficient procedures to permit the parties to create a complete record in accordance with this Court's ruling on the nature of the record in these matters;
- When a FOIA response is challenged as to the adequacy of the search for records, a responding agency is obligated to describe the searches it performed (Reply Br. 5), since there is no way for a reviewing court to ensure that FOIA has been followed without such a description;
- When a FOIA request is denied on the basis of FOIA exceptions and challenged, a responding agency is obligated to describe the application of FOIA exceptions as to individual records or to similar categories of records, (Reply Br. 8-10), since there is no way for a reviewing court to ensure that FOIA has been followed without such a description;
- The State Police have not made "every reasonable effort" to search for records and are not permitted to refuse to search for records by asserting,

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after being sued, that the search was too difficult, when they did not work with Petitioner to narrow the search or follow the statutory procedure for when an agency determines that a search is too burdensome (Reply Br. 17-19);

- The State Police have not met their evidentiary burdens to support the application of any FOIA exception, including (1) with respect to the redaction of the purchase orders; and (2) with respect to records responsive to Categories 7-9 of the FOIA request that the State Police have refused to search for and produce while admitting they exist (including court orders, affidavits supporting those applications, and the resulting court orders) (Reply Br. 10-17).

Petitioner believes that each of these rulings should be decided in Petitioner's favor as a matter of law. However, in the event the Court believes that there is evidence in the record that is sufficient to meet the State Police's burden as to the application of a FOIA exception, then Petitioner is entitled to the opportunity to rebut Respondent's evidence, an opportunity that was denied by the flawed procedures at the administrative appeal stage of this case.

II. This Court should not defer to the factual findings of the Chief Deputy

Petitioner's Opening Supplemental Brief explains that fact-finding deference to an agency is only appropriate when an agency has been tasked with holding a judicial or quasi-judicial hearing. Supp. Br. 2-3. The newly created FOIA procedure is not a quasi-judicial procedure because the Office of Attorney General is not asked to make any decision on the merits that bind the parties in the absence of an appeal, and because the decision-maker becomes the attorney in any challenge to the determination. Supp. Br. 2-3.

In response, the State Police contend that deference is warranted because the Office of the Attorney General is an expert in these matters. Opp. Supp. Br. 2. This response simply misses the point. The Office of the Attorney General may well be the agency best suited to interpret Delaware FOIA, but it has not been granted the discretion to issue a judicial or quasi-judicial judgment resolving particular FOIA disputes. Accordingly, factual determinations made by the Chief Deputy Attorney General do not warrant deference.

III. This Court should not apply a Federal FOIA exception

Petitioner's Opening Supplemental Brief explained that incorporating 5 U.S.C. § 552(b)(7)(E) into Delaware FOIA would be inconsistent with the General Assembly's intent given the legislative history of Delaware FOIA, and that such incorporation would disrupt the finely calibrated choices made by the General Assembly in adopting § 10002(1)(17). Supp. Br. 4-6. Additionally, such an interpretation of Delaware FOIA would be contrary to the way the courts have interpreted the statute. Supp. Br. 6.

The State Police do not address these arguments. Instead, they restate that it is the position of the State Police and the FBI that these records would be exempt under Federal FOIA. Opp. Supp. Br. 3-4.¹ For the reasons summarized above and expressed more fully in the Opening Supplemental Brief, the Court need not even reach the question of whether the police agencies' interpretation of § 552(b)(7)(E) is correct.

Even if § 552(b)(7)(E) were incorporated, it would not categorically bar the redacted portions of the purchase orders at issue in the Statement of Interest—much less the other records sought in this case—for the reasons explained in Petitioner's Opening Supplemental Brief, including principally the lack of any evidence or even inadmissible explanation for how revealing model names hampers law enforcement. Supp. Br. 10-11.

IV. The State Police's new assertion that 29 Del. C. § 10002(l)(17a)(5)(B) applies is both procedurally improper and wrong on the merits

In responding to Petitioner's arguments on the application of law enforcement privilege, the State Police assert for the first time that 29 Del. C. § 10002(l)(17a)(5)(B) protects the records sought by Petitioner from disclosure (without specifying to which records the exception purportedly applies). Opp. Supp. Br. 4-5. As with the other late-raised exceptions, this Court should disregard this exception because it was offered for the first time in supplemental briefing, and not raised in the merits briefing in these proceedings, much less before the Chief Deputy.

In any event, (17a)(5)(B) does not apply by its own terms. It applies exclusively to "records" that have been "shared by federal or international agencies and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for criminal acts against United States citizens or targets." § 10002(l)(17a)(5)(B). The records sought by Petitioner—purchase orders recording a transaction between the State Police and a private corporation, as well as applications for court orders and supporting documentation and court orders—are not records that have been shared by "federal or international agencies." They are records created by the State Police or by a private corporation that have never been in the custody or control of the federal government. The State Police attempt to stretch the exception to fit all records related to a technology that is also used by the federal government. That is not what

¹ The State Police assert that the FBI non-disclosure agreement agreed "to protect the exact documents sought by the ACLU from public disclosure." Opp. Supp. Br. 4. Even reading it at its most broad, the agreement does not, in fact, apply to all of the records sought by Petitioner, nor does it assert that the disclosure of each such record would damage law enforcement.

the statute says and would be a radical expansion of its scope. Exceptions to FOIA “pose a barrier to the public's right to access,” and so they are interpreted narrowly. *ACLU of Delaware v. Danberg*, 2007 Del. Super. LEXIS 61, at *11 (Del. Super. March 15, 2007).

Based on the State Police’s assertion that “[t]he Federal government’s common law ‘law enforcement privilege’ falls squarely within [29 Del. C. § 10002(1)(17a)(5)],” it is unclear whether the State Police are also continuing to assert the application of the common law privilege apart from their argument about § 10002(1)(17a)(5)(B). Opp. Supp. Br. 4. To the extent they are, they have not responded to any of the arguments raised by Petitioner (Supp. Br. 7-10), including that: the only arguments supporting the assertion of the privilege have concerned the purchase orders and not the other records at issue in this case; the Delaware courts have limited the law enforcement privilege to the confidentiality of communications that law enforcement *receives* during criminal investigations, which would not protect the records sought in this case; and the lack of any evidentiary substantiation or even satisfactory explanation to support the broad claim that disclosing the model names of cell site simulators somehow harms investigations.

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Conclusion

Petitioner seeks government transparency about how the State Police have spent hundreds of thousands of dollars and what kind of court authority they have sought in order to surveil Delawareans. The State Police have sought to keep this information from the public based on an ever-shifting set of legal rationales that can be reduced to a single policy claim: the bald assertion that disclosing this information will somehow hamper criminal investigations. The State Police have offered no satisfactory explanation (much less evidence) for how disclosure of the records sought by Petitioner would have that effect, nor have they identified an exception to Delaware FOIA that would apply as a result. This Court should not permit the blanket assertion of unspecified security interests to override Petitioner’s clear statutory entitlement to this information.

Sincerely,



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