

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JONATHAN RUDENBERG,)
)
Appellee,) C.A. No.: N16A-02-006 RRC
)
v.)
)
DELAWARE DEPARTMENT OF)
JUSTICE, THE CHIEF DEPUTY)
ATTORNEY GENERAL AND THE)
DELAWARE DEPARTMENT OF)
SAFETY AND HOMELAND SECURITY,)
DIVISION OF STATE POLICE,)
)
Appellants.)

**APPELLANT DELAWARE DIVISION OF STATE POLICE'S
ANSWERING BRIEF**

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NATURE AND STAGE OF THE PROCEEDINGS

The Appellant in the instant appeal is Jonathan Rudenberg, a private citizen seeking unfettered access to law enforcement records. The Appellees are the Delaware Department of Justice (“DDOJ”), the Chief Deputy Attorney General (“CDAG”), who issued an Attorney General’s opinion regarding a Freedom of Information Act (“FOIA”) request made by Appellant; and the Delaware Department of Safety and Homeland Security, Division of State Police (“DSP”), the agency to which Appellant originally made a request for public documents. This is the answering brief of Appellee Division of State Police.

On May 15, 2015, Mr. Rudenberg and Muckrock.com, a Boston, Massachusetts-based organization that describes itself as “a collaborative news site that brings together journalists, researchers, activists, and regular citizens to request, analyze, and share government documents, making politics more transparent and democracies more informed,”¹ filed a request for documents pursuant to the Delaware Freedom of Information Act with the Delaware State Police. B-000005.² Specifically, Mr. Rudenberg and Muckrock.com requested:

- 1) Records regarding the State Police’s acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar

¹ <https://www.muckrock.com/about/> (last accessed May 31, 2006).

² Appellee DDOJ has filed the certified record cited in this case. Citations beginning with “B” refer to the bates stamped record.

documents. In response to this request, please include records of all contracts, agreements and communications with Harris Corporation.

- 2) Records regarding any arrangements or agreements between the State Police and other law enforcement agencies in Delaware to share the use of cell site simulators, or any offers by the State Police to share the use of cell site simulators with other law enforcement agencies in Delaware.
- 3) All requests by the Harris Corporation or any other corporation or any state or federal agencies, to the State Police to keep confidential any aspect of the State Police's possession and use of cell site simulators, including any non-disclosure agreements between the State Police and the Harris Corporation and any other corporation, or any state or federal agencies, regarding State Police's possession and use of cell site simulators.
- 4) Policies and guidelines of the State Police governing use of cell site simulators, including restrictions on when, where, how and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.
- 5) Any communications or agreement between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of site simulators.
- 6) Any communications, licenses, or agreements between the State Police and the Federal Communications Commission or the Delaware Public Service Commission concerning use of cell site simulators.
- 7) Records reflecting the number of investigations in which cell site simulators were used by the State Police or in which cell site simulators owned by the State Police were used and the number of those investigations that have resulted in prosecutions.
- 8) Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used as part of the underlying investigation

by the State Police or in which cell site simulators owned by the State Police were used as part of the underlying investigation.

- 9) All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the State Police in criminal investigations or authorizing use of cell site simulators owned by the State Police in criminal investigations, as well as any warrants or orders, denials of warrants or orders and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date and docket number for each sealed document.

On May 19, 2015, DSP responded that the request had been received and sent for legal review. *Id.* On June 5, 2015, DSP responded that the information sought by Mr. Rudenberg could not be divulged because, pursuant to a nondisclosure agreement between DSP and the Federal Bureau of Investigation, documents pertaining to cell site simulators were the property of the FBI and could not be discussed outside of the law enforcement community. B-000003-000004. DSP informed Mr. Rudenberg that he may be able to obtain the information he sought from the FBI. *Id.* On June 17, 2015, Mr. Rudenberg filed a petition with the DDOJ, seeking review of his request to DSP and its response to determine if DSP had violated FOIA, pursuant to 29 *Del. C.* § 10005(e). B-000002. On June 23, 2015, DDOJ acknowledged receipt of Mr. Rudenberg's petition, received on June 22, 2015, and informed him they would be seeking a response from DSP. B-000007. In a letter dated June 23, 2015, the CDAG enclosed Muckrock.com's petition alleging DSP violated the public records provisions of the Delaware FOIA

statute and requested DSP submit a response, including any factual or legal authorities for its position. B-000008.

On July 6, 2015, as requested, DSP submitted a response to clarify the bases for the decision to refer Mr. Rudenberg to the Federal authorities as it is directed to do under the terms of its non-disclosure agreement with the FBI. B-000009-000017. On July 13, 2015, Deputy Attorney General Katisha Fortune forwarded DSP's response to Muckrock.com and informed it that once DDOJ's investigation was complete, the DDOJ would be able to issue an opinion as to whether DSP violated, or was about to violate, FOIA. B-000018.

In a letter dated December 11, 2015, Ryan Tack-Hooper of the ACLU informed DAG Fortune that the ACLU had been retained by Mr. Rudenberg in the matter of his FOIA petition filed on June 17, 2015. B-000019. The ACLU indicated it planned to file a lawsuit on Mr. Rudenberg's behalf if the CDAG failed to issue a written opinion by the end of the year. *Id.* On December 29, 2015, the CDAG issued Attorney General Opinion No. 15-IB14. B-000020-000034. In the opinion, the CDAG found that the non-disclosure agreement between DSP and the FBI is a public record subject to disclosure under FOIA. *Id.* The CDAG requested DSP provide a copy of the agreement within 10 calendar days of the determination, along with the purchase orders the FBI agreed to provide so long as any elements of the technology or components were redacted, and any policies concerning the

use of the simulators, should they exist. *Id.* Undeterred, the ACLU filed its own petition, dated February 17, 2016, alleging the DSP violated FOIA by providing the exact records the CDAG found were subject to FOIA. B-000035-B-000039.

On March 4, 2016, the CDAG issued Attorney General Opinion No. 16-IB03, finding the ACLU's February 17, 2016 letter was an impermissible attempt to have the DDOJ reconsider Opinion 15-IB14. B-000040. The CDAG noted, however, that redactions of shipping information and contacts on purchase orders were impermissible, were likely redacted in error, and directed DSP to review the redactions to determine whether an error had been made. *Id.* The ACLU appealed the CDAG's opinion to this Court on February 26, 2016 and filed its opening brief on May 9, 2016. This is Appellee DSP's Answering Brief.

STATEMENT OF FACTS

The Delaware Division of State Police entered into a non-disclosure agreement on May 23, 2012 with the Federal Bureau of Investigation regarding the DSP's acquisition of wireless collection equipment and technology to be used for law enforcement purposes ("cell site simulators"). B-000030. The FBI requires state and local law enforcement to coordinate with it, including signing a non-disclosure agreement, prior to the acquisition of equipment technology from the Harris Corporation, the Federal contractor authorized to manufacture cell site simulators. *Id.* The FBI maintains that the non-disclosure agreement itself is the property of that agency and may only be distributed within the Federal Government (and its contractors), U.S. Intelligence, law enforcement, public safety or protection officials, and individuals with a "need to know." *Id.*

Indeed, in its non-disclosure agreement, the FBI states:

Disclosing the existence of and the capabilities provided by [cell site simulators] to the public would reveal sensitive technological capabilities possessed by the law enforcement community and *may allow individuals who are the subject of investigation wherein this equipment/technology is used to employ countermeasures to avoid detection by law enforcement.* This would not only potentially endanger the lives and physical safety of law enforcement officers and other individuals, but also adversely impact criminal and national security investigations. That is, *disclosure of this information could result in the FBI's inability to protect the public from terrorism* and other criminal activity because, through public disclosures, this technology has been rendered essentially

useless for future investigations. B-000030-B-000031
(emphases added).

Under the non-disclosure agreement, DSP agreed not to distribute, disseminate, or otherwise disclose *any information* concerning the cell site simulator equipment, technology, or any software, operating manuals, or related technical documentation (*including its technical/engineering description(s)* and capabilities) to the public, including to any non-law enforcement individuals or agencies. B-000031 (emphases added).

On May 15, 2015 Muckrock.com and Mr. Rudenberg filed a FOIA request with the DSP, seeking information regarding DSP's acquisition and use of cell site simulators as law enforcement tools. B-000005. Muckrock.com divided its request into nine categories of documents. *Id.* DSP initially responded to Muckrock.com's FOIA request citing the non-disclosure agreement, and refusing to produce any documents. B-000003-B-000004. DSP noted that the agreement itself could only be disseminated amongst law enforcement and that the requestor should forward its requests to the parties with the autonomy to produce the documents sought – the FBI, the Harris Corporation or Boeing. *Id.* On June 17, 2015, Mr. Rudenberg filed a petition with the Delaware Department of Justice, alleging DSP violated FOIA when it stated a non-disclosure agreement would not allow it to provide him with detailed information regarding these law enforcement tools. B-000002. In his June 17 correspondence, Mr. Rudenberg indicated that no

FOIA exemptions were provided by DSP, and he falsely insinuated that the DSP's non-disclosure agreement with the FBI does not prevent disclosure of the information he sought, providing a link to a *Washington Post* article. *Id.*

At the request of the Chief Deputy Attorney General, DSP prepared a response to Muckrock.com/Rudenberg's petition. B-000009-B-000017. DSP noted that the response was being submitted to clarify the basis for the decision of the DSP to refer Mr. Rudenberg to the Federal authorities, as it was directed to do under the non-disclosure agreement. B-000011. DSP explained that the *Washington Post* article referenced by Mr. Rudenberg in his petition is not evidence of a change in stance or a change in the non-disclosure agreement. B-000012. Rather, it is a clarification of the purpose and meaning of the non-disclosure agreement. *Id.* Not apropos to providing cell site simulator evidence to private citizens or public websites, the *Washington Post* article addressed law enforcement agencies utilizing cell site simulator technology in situations that result in arrests, criminal charges, and subsequent prosecutions. *Id.* According to the article, law enforcement officers were testifying in criminal trials, invoking the non-disclosure agreement whenever they were cross-examined about their use of a cell site simulator. *Id.* This, the FBI clarified, was not the purpose of the non-disclosure agreement. *Id.* Contrary to Muckrock.com's assertion in its FOIA petition, the *Washington Post* article did not evidence that "the FBI recently told

the *Washington Post* that the nondisclosure agreement does not prevent police departments from disclosing information about cell site simulators” to private citizens who express an interest in combing through the records of any given law enforcement agency. *See* B-000002. Rather, the article made clear that law enforcement officers can discuss on the stand the fact that they utilized cell site simulators in making an arrest, and they can confirm that there is a non-disclosure agreement between their agency and the FBI, but the non-disclosure agreement is not to be used as a shield to cross-examination during criminal prosecutions. *Id.*

DSP contended the FOIA request by Muckrock/Rudenberg fell under two specific statutory exceptions to the definition of a “public document.” *Id.* First, the request fell within the exception 29 *Del. C.* § 10002(1)(6): “[A]ny records specifically exempted from public disclosure by statute or common law” due to the fully-executed non-disclosure agreement requiring information concerning cell site simulators be kept confidential. *Id.* DSP reiterated that any breach of confidentiality by DSP would leave the agency vulnerable to possible legal action or the FBI removing the technology. *Id.* Second, the request fell within the exception in 29 *Del. C.* § 10002(1)(2): “[T]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” B-000013. Because the FBI holds the cell site simulator technology confidential as it is non-public and only available to law enforcement who execute

a non-disclosure agreement, and because cell site simulator technology is obtained exclusively by the FBI through two suppliers—Boeing and the Harris Corporation—DSP maintained that information pertaining to cell site simulators is a trade secret that is confidential in nature. *Id.* Finally, DSP maintained that because Muckrock.com is a Boston, Massachusetts based company, and because Delaware’s FOIA statute limits document requests to state citizens, DSP was under no obligation to respond to Muckrock.com’s request. *Id. citing McBurney v. Young*, 569 U.S. ____, 133 S.Ct. 1709 (2013). The DSP’s response was sent to Muckrock.com on July 13, 2015. B-000018. No reply was ever received.

Abandoning his association with the Massachusetts company, on December 11, 2015, Mr. Rudenberg next associated himself with the American Civil Liberties Union. B-000019. The ACLU emphasized the CDAG was obligated to render a written determination as to whether a FOIA violation had occurred within 20 day of the petition, and noted that Mr. Rudenberg’s petition had been filed with the CDAG 177 days earlier. *Id.*

The CDAG issued Attorney General Opinion No. 15-IB14 on December 29, 2015. B-000020. The CDAG opined that the non-disclosure agreement between the State Police and the FBI is a public record subject to disclosure under Delaware’s FOIA. B-000028. The CDAG requested the State Police to provide a copy of that agreement to Mr. Rudenberg within 10 days of the determination. *Id.*

In the opinion, the CDAG rejected Mr. Rudenberg's contention the State Police violated FOIA because it did not cite any statutory exemption to justify its refusal to disclose records regarding cell site simulators. B-000025. The CDAG noted FOIA does not require a public body to cite a specific exemption when denying access to public record. *Id.* Rather, FOIA requires that the public body provide a reason for denying access to the records, and, the CDAG found, the State Police did so. *Id.* The CDAG stated the request for several categories of records had become moot because of subsequent events: First, the State Police had confirmed that it would [and subsequently did] produce records in category numbers 1 and 4. *Id.* In a footnote, the CDAG discussed that DSP had asserted there is currently no reference to cell site simulators within DSP's Divisional Manual, however DSP agreed to check for documents that includes policies and guidelines. *Id.* Should such documents exist, the FBI permitted DSP to provide them as long as any reference to specific elements of technology or components would be redacted. *Id.* The CDAG stated similar redactions should be made to category number 1. *Id.*

In addition, the CDAG stated the State Police confirmed to DDOJ there are no responsive records in category numbers 2 and 5 – 9. *Id.* The CDAG accepted the representations regarding the nonexistence of the records, and opined there was no need to consider whether the requested records could be withheld under FOIA if they did exist. *Id.* Within a footnote, the CDAG cited *Del. Op. Att'y Gen. 07-IB21*

(Oct. 22, 2007) which states, “It has been our historical practice to accept such representations from an attorney for the custodian of public records to determine that such documents do not exist for purposes of FOIA.” *Id.* On January 15, 2016, DSP provided the documents in its possession that the CDAG had opined were subject to FOIA. B-000035.

On February 17, 2016, the ACLU filed yet another petition, purportedly pursuant to 29 *Del. C.* §§ 10001-10007, to the CDAG alleging that the Delaware State Police’s production of the exact records the CDAG directed be provided in *Del. Op. Att’y Gen.* 15-IB14 (December 29, 2015) constituted a violation of FOIA. B-000035. According to the ACLU, the State Police’s January 15, 2016 production of records violated FOIA in three ways: (1) the search for records performed by the State Police was unreasonable; (2) the State Police failed to provide explanations pursuant to FOIA for the records withheld in whole or in part; and (3) at least some of the redactions are plainly improper under any rationale. B-000036. The ACLU asserted, with no citation to the law, that the FOIA coordinator was obligated to ask the officers tasked with using the devices whether they were aware of any guidelines or policies governing its use. B-000037. In addition, the ACLU boldly asserted “it is not plausible that DSP spent hundreds of thousands of dollars on these devices and had no written correspondence concerning the transactions” five years after the purchase occurred. *Id.* Therefore,

despite absolutely no requirement in the FOIA statute, and in direct contradiction to the CDAG's opinion, the ACLU demanded that the State Police be required to propose and disclose a reasonable search method for each category of the FOIA request and then be ordered to conduct a search anew according to that method. *Id.*

The ACLU asserted the State Police did not provide any records responsive to category 2, any records responsive to category 3 other than the FBI non-disclosure agreement, or any records responsive to categories 4-9. *Id.* Despite its repeated assertions in its Opening brief that Mr. Rudenberg was never given an opportunity to respond to DSP's response to his FOIA petition, the ACLU noted in its February 17, 2016 letter that the State Police sent a response letter to the Attorney General on July 6, 2015, ***and then proceeded to address that response to the CDAG.*** *Id.* Specifically, the ACLU contends the DSP's response is not a satisfactory explanation for multiple reasons including: alleging it is unclear whether there are no responsive records or the records exist and are exempt from FOIA; there was no update as to the time period between July 2015 and January 2016 to reflect any further search for documents; and—in direct contradiction to the DDOJ's letter of July 13, 2015 providing Muckrock.com with a copy of the DSP's response—the ACLU claimed DSP's response not provided to Mr. Rudenberg until after the January 15, 2016 production. B-000038. Finally, the ACLU asserted the redactions made to the purchase orders provided were not

permissible as an exception to FOIA. *Id.* The ACLU demanded the CDAG direct the State Police how to formulate and conduct a search for records, and further direct DSP to disclose the resulting responsive records in their entirety unless there is a clear explanation provided for each withholding. B-000039.

On March 4, 2016, the CDAG issued Attorney General Opinion 16-IB03 in response to the ACLU's February 17, 2016 letter. B-000040. The CDAG correctly surmised that while the ACLU's letter was guised as a petition, it was actually an impermissible attempt to have the DDOJ reconsider Attorney General Opinion 15-IB14. *Id.* However, the CDAG noted the redacted shipping information – though not contemplated in the December 29 Opinion – could be addressed and therefore the CDAG opined the redactions of this information may have been an error, requesting DSP check to see and if so, provide that information. B-000041. The CDAG went on to state that in accepting representations that the State Police found no responsive documents, the DDOJ implicitly accepted the scope of the search. *Id.* Prior to submission of Appellant's Opening Brief, DSP provided yet another clarification to detail the efforts by State Police to determine whether any documents responsive to Mucrock's/Rudenberg's request exist, the scope of the search and whether such documents fall within the definition of a "public record" without exception. Op. Br. Ex. B.

Because the documents requested, provided, and those still at issue remains complicated by multiple opinions, communications, and concessions made in the Opening brief, the Appellee provides the following synopsis of Mr. Rudenberg's outstanding FOIA request.

- 1) Records regarding the State Police's acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents. In response to this request, please include records of all contracts, agreements and communications with Harris Corporation.**

The only documents in the possession of DSP responsive to this request are purchase orders, indicating the cell site simulator equipment purchased by DSP. DSP provided redacted copies of these purchase orders for multiple years pursuant to Attorney General Opinion 15-IB14, redacting only the specific model names of the technology purchased. B-000025. The FBI permitted DSP to disseminate this information, so long as any reference to the specific technology or its components were redacted. B-000014. In its supplemental letter dated April 22, 2016, DSP again reiterated the FBI's position that the redacted information is proprietary. Op. Br. Ex. B at 2. Moreover, DSP and the FBI maintain that the release of the specific model names may allow individuals to develop technologies to impede or negate the operation of particular cell site simulator systems. *Id*; B-000030. As the FBI also uses this technology, disclosure of the specific model names used in Delaware

would have negative repercussions across the country and would put the public and the national security at risk as criminals and terrorists could actively work to thwart law enforcement efforts by developing defensive technologies to combat the effectiveness of this surveillance equipment or render it non-functional all together. *Id.* The public safety concern greatly outweighs any private interest in obtaining specific model names of law enforcement equipment off of purchase orders. *Id.* Appellant states he is satisfied as to the searches performed for acquisition-related documents. Op. Br. at 19. However, Mr. Rudenberg continues to maintain that he is entitled to the specific model names of the technology used by DSP and the purchase orders should not be redacted. Op. Br. at 23.

2) Records regarding any arrangements or agreements between the State Police and other law enforcement agencies in Delaware to share the use of cell site simulators, or any offers by the State Police to share the use of cell site simulators with other law enforcement agencies in Delaware.

DSP responded in its July 5, 2016 letter that there were no records responsive to this request. B-000014. Appellant has elected not to pursue his appeal with respect to demanding descriptions of the searches conducted for this category. Op. Br. at 19.

3) All requests by the Harris Corporation or any other corporation or any state or federal agencies, to the State Police to keep confidential any aspect of the State Police's possession and use of cell site simulators, including any non-disclosure agreements between the State Police and the Harris Corporation and any other corporation, or any state or

federal agencies, regarding State Police's possession and use of cell site simulators.

DSP responded in its July 5, 2016 letter the only non-disclosure agreement regarding cell site simulators that DSP was a party to is the non-disclosure agreement with the FBI that has been provided to Mr. Rudenberg. B-000015. According to Mr. Rudenberg, because the ACLU has obtained a copy of a non-disclosure agreement between the Harris Corporation and Hennepin County Sheriff's Office from 2010, there must be such an agreement between DSP and the Harris Corporation. Op. Br. at 19-20. Therefore, the description of the search for this mythical document is still at issue.

4) Policies and guidelines of the State Police governing use of cell site simulators, including restrictions on when, where, how and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.

DSP responded in its July 5, 2015 letter there are currently no references to cell site simulators within its Divisional Manual, however, if there was a separate document that included such policies the FBI has granted permission to disseminate such a document with redactions. B-000015. In its supplement dated April 22, 2016, DSP informed Mr. Rudenberg that the Officer in Charge of DSP's Electronic Surveillance Unit, the group that utilizes the simulators, conducted a

thorough review of all documents and files within its office and no such written policies concerning the use, limitations, retention, and guidance exist. Op. Br. Ex. B at 2. Appellant is not challenging the non-existence of these documents or the search conducted by DSP. Op. Br. at 19.

5) Any communications or agreement between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of site simulators.

DSP responded in its July 5, 2015 response there are no records responsive to this request. B-000015. Appellant has elected not to pursue his appeal with respect to demanding descriptions of the searches conducted for category 5. Op. Br. at 19.

6) Any communications, licenses, or agreements between the State Police and the Federal Communications Commission or the Delaware Public Service Commission concerning use of cell site simulators.

DSP responded in its July 5, 2015 letter there were no records responsive to this request. B-000016. Appellant has elected not to pursue his appeal with respect to demanding descriptions of the searches conducted for category 6. Op. Br. at 19.

7) Records reflecting the number of investigations in which cell site simulators were used by the State Police or in which cell site simulators owned by the State Police were used and the number of those investigations that have resulted in prosecutions.

DSP responded in its July 5, 2015 letter there were no records responsive to this request indicating a total number of investigations in which cell site simulators were used and, furthermore, DSP is not required to compile or create a statistic analysis in order to create a new document responsive to a FOIA request. B-000016. In its supplemental response on April 22, 2016, DSP explained that its use of cell site simulators primarily falls under fugitive apprehension, and not investigations that result in prosecution. Op. Br. Ex. B at 2. By way of further explanation, DSP spelled out that the detective assigned to a particular criminal investigation will make a request to the Electronic Surveillance Unit to utilize a cell site simulator. *Id.* That detective crafts the application and affidavit for the court order. *Id.* This documentation stays with the criminal investigative file. Criminal investigative files are located in each of the eight separate Troop locations. The Electronic Surveillance Unit maintains no documentation tallying the number of times a request for use of a cell site simulator is received. *Id.* This information is not memorialized anywhere higher than an individual criminal investigative file level. Despite DSP's statement that no document exists responsive to this request—that is, there is *no list* of the investigative files in which cell site simulators were used—Mr. Rudenberg maintains the CDAG should have ordered DSP to describe its search of every investigative file for responsive

documents. Therefore, the issue of the description of the search of every criminal file within the DSP's custody and control remains unresolved.

8) Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used as part of the underlying investigation by the State Police or in which cell site simulators owned by the State Police were used as part of the underlying investigation.

DSP responded in its July 5, 2015 letter there were no records responsive to this request and DSP was not required to compile or create a statistic analysis in order to create a new document responsive to a FOIA request. B-000016. Further, any such information, if it existed, would fall within an exemption to FOIA pursuant to 11 *Del. C.* § 8502(4) (exempting criminal history record information from the definition of a “public document” subject to FOIA). *Id.* In addition, in its supplemental response, DSP indicated all such records would be located within the investigative file to which it was attached—anywhere within any file within eight Troop locations or at the Attorney General's office—and no document referencing a compilation of these cases exists. Op. Br. Ex. B at 3. Mr. Rudenberg maintains there was no description of the search for such records and therefore the issue of the description of the search for every criminal file within the DSP's custody and control remains unresolved. Op. Br. at 20.

9) All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the State Police in criminal investigations or authorizing use of cell site simulators owned by the State Police in criminal investigations, as well as any warrants or

orders, denials of warrants or orders and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date and docket number for each sealed document.

DSP responded in its July 5, 2015 letter that it does not keep a central database of all applications submitted to state and federal courts for search warrants or orders. B-000017. Moreover, these records would fall under FOIA exemption within 29 *Del. C.* § 10002(1)(3), investigatory files compiled for criminal law enforcement purposes. *Id.* In addition, these would certainly contain information that is held confidential under the non-disclosure agreement. *Id.* Mr. Rudenberg maintains there was no description of the search DSP conducted and based upon the wording of DSP's two responses, indicating no such compilation of all such applications exists, the requested documents do exist and therefore Mr. Rudenberg is entitled to their production and DSP should have been ordered by the CDAG to search each and every one of its criminal investigative files. Op. Br. at 20. Therefore, this matter remains unresolved.

QUESTIONS PRESENTED

1. Should not this honorable Court refuse to create new standards of procedure for the Chief Deputy Attorney General where, as here, no basis for the creation of such procedure exists in Delaware's Freedom of Information Act?
2. Should not this honorable Court find that the Delaware State Police have complied with the Freedom of Information Act where, as here, all public documents in the agency's possession have been provided?

ARGUMENT

I. JURISDICTION AND STANDARD OF REVIEW.

This Court has jurisdiction to entertain an appeal of an Executive branch agency's denial of a FOIA request pursuant to 29 *Del. C.* § 10005(e) ("Regardless of the finding of the Chief Deputy, the petitioner or the public body may appeal the matter on the record to the Superior Court."). Under 29 *Del. C.* § 10005, a citizen alleging a FOIA violation must seek an administrative review before filing suit in court when the Attorney General is obligated to represent the public body with the sought-after public records pursuant to 29 *Del. C.* § 2504. 29 *Del. C.* §§ 10005(b) & (e). In such a case, the person denied access to public records must present a petition and all supporting documentation to the Chief Deputy Attorney General, who must then render a written determination declaring whether a violation has occurred. *Korn v. Wagner*, 2011 WL 4357244, at *1 (Del. Ch. Sept. 7, 2011). Only after the CDAG's determination is made, may the petitioner or public body appeal the matter to the Superior Court. *Id.*

Mr. Rudenberg's Opening Brief advances two arguments in an attempt to persuade this honorable Court to find that the Delaware State Police violated the Delaware Freedom of Information Act. First, Mr. Rudenberg relies on case decisions from other jurisdictions in an attempt to rewrite the Delaware FOIA statute, creating new processes not contemplated by Delaware state law. Second,

Mr. Rudenberg argues that the Delaware State Police should not have redacted information regarding the specific model names of cell site simulators from the purchase orders it provided in response to his FOIA request. Each of Mr. Rudenberg's arguments, legal and otherwise, lack merit, must fail, and are discussed in turn below.

II. THE OPENING BRIEF DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF 29 Del. C. § 10005(e).

29 Del. C. § 10005(e) provides for a review of any agency's FOIA denial by the DDOJ before a citizen may petition the Superior Court for review of the agency's denial. "Regardless of the finding" of the CDAG, either the citizen or the agency may appeal the matter on the record to the Superior Court. 29 Del. C. § 10005(e). Section 10005(e) does not provide for a full administrative hearing before the CDAG when determining the proper application of FOIA to a particular request. Rather, the statute outlines simply that if the CDAG finds a violation of FIOA has occurred, "the Attorney General shall not represent the public body in any appeal filed pursuant to this chapter for such violation if the public body the Attorney General is otherwise obligated to represent fails to comply with the Chief Deputy's determination." *Id.* Assuming, without any legal basis, that the CDAG's review of his FOIA petition was an administrative hearing, Mr. Rudenberg makes much ado of the "procedural due process" he believes he should have been afforded during the CDAG's review of his petition including: (1) an opportunity to

reply to the DSP's response to his FOIA petition; (2) a requirement that the agency provide him with a *Vaughn* index, identifying all documents in DSP's possession and correlating specific statutory citations for every redacted document or portion of a document; and (3) a requirement that the DSP attest by affidavit the manner in which it searched for documents responsive to his request. No basis in the law exists for any of these requirements, and Mr. Rudenberg's pleas that this Court create such requirements out of whole cloth, and in complete contradiction to the plain language of 29 *Del. C.* Ch. 100 should be rejected.

A. The CDAG's Review of Mr. Rudenberg's FOIA Petition is not an Adversarial Hearing Before an Administrative Agency.

Mr. Rudenberg begins his argument by asserting, without any legal citation whatsoever, “[w]hen the Chief Deputy permits a state agency to advance alternative grounds for its FOIA denial in response to a § 10005(e) petition, the petitioner *must* be given an opportunity to respond to those alternative grounds. This opportunity to respond is *required* to fulfill the purpose of the screening procedure set forth in § 10005(e), since the Chief Deputy *cannot be expected to reliably evaluate* whether a FOIA violation has occurred without evaluating the claims of both sides of the dispute.” Op. Br. at 15. What Mr. Rudenberg fails to do is provide this Court with any basis—in the Delaware Freedom of Information Act or elsewhere—to support his supposition that the CDAG's evaluation is the culmination of an adversarial hearing on the issue. *See* Op. Br. at 15. Mr.

Rudenberg's failure to provide a legal basis for this position regarding FOIA requests is of no surprise, however, for no such basis in the law exists.³ Compounding his misunderstanding of the purpose of the CDAG's review of an agency's FOIA denial, Mr. Rudenberg goes on to point to case decisions holding due process must be afforded all parties to an adjudicatory, adversarial hearing before an administrative agency charged with rendering case decisions. *See* Op. Br. at 15-16 (citing *Vincent v. E. Shore Mkts.*, 970 A.2d 160 (Del. 2009) (an opinion relating to hearings before the Industrial Accident Board) and *Bell v. Burson*, 402 U.S. 535 (1971) (an opinion relating to administrative hearings before the Director of the Georgia Department of Public Safety.)). However, 29 *Del. C.* § 10005(e) does not contemplate, and the DDOJ is not required to conduct, a formal administrative adversarial hearing before the CDAG renders her opinion on a FOIA petition. Thus, Mr. Rudenberg's reliance on the decisions of *Bell* and *Vincent* is reliance misplaced and what he is asking this Court to do is create an adversarial hearing process before the CDAG when the FOIA statute clearly does not contemplate such a proceeding.

Mr. Rudenberg further argues he was procedurally short-changed when the DSP failed to provide specific statutory citations justifying its redactions of

³ Moreover, despite the fact that there is no statutory basis to expect such, the record reflects Mr. Rudenberg's prior affiliated requestor—Muckrock.com—was provided with a copy of DSP's response and it was not, as repeatedly claimed, an *ex parte* submission. B-000025.

specific model names from the purchase orders provided (Category 1). Op. Br. at 21 (citing a portion of 29 *Del. C.* § 10003(h)(2), specifically “If the public body denies a request in whole or in part, the public body’s response shall indicate the reason for the denial.”). In support of this contention, Mr. Rudenberg relies on the 9th Circuit’s holding in *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991). Such reliance is, as before, misplaced. Federal courts, when deciding cases involving federal FOIA disputes, require government agencies seeking to withhold documents requested under the FOIA supply the opposing party and the court with a *Vaughn* index, “identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected.” *Wiener v. FBI*, 943 F.2d at 977. No such requirement exists of Delaware state agencies under Delaware’s FOIA. In fact, Mr. Rudenberg fails to disclose to this Court that subparagraph § 10003(h)(2) states in its entirety: “If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial. The public body ***shall not be required to provide an index***, or any other compilation, as to each record or part of a record denied.” 29 *Del. C.* § 10003(h)(2) (emphasis added). As Mr. Rudenberg recognizes, Delaware courts follow federal precedent ***in analogous cases***. Op. Br. at 16 (citing *State ex rel. Biden v. Camden-Wyoming Sewer & Water Auth.*, 2012 WL 5431035 (Del. Super. Nov. 7, 2012)). Where, as here,

Delaware state law expressly states that a *Vaughn* index is not required, Mr. Rudenberg's plea to create such a requirement by this Court must be rejected and certainly, the failure to produce a log expressly not required by FOIA is not a violation of the Delaware statute. Simply stated, Section 10005(e) does not afford a petitioner a full adjudicatory administrative hearing before the CDAG and no such requirement may be read into that statute. Moreover, FOIA is expressly clear that an index or compilation as to any part of a record denied need not be provided and neither the CDAG, nor this Court, may order such production under Delaware's Freedom of Information Act.

B. Delaware State Law Does Not Require an Affidavit of Search Methods When Responding to FOIA Requests

With regard to DSP's response that no additional non-disclosure agreements exist (Category 3) and that no that list of all criminal investigations or prosecutions where cell site simulators were used exist (Categories 7-9), Mr. Rudenberg maintains the CDAG should have refused to accept DSP's representation and ordered DSP to describe its search for responsive documents in significant detail. Op. Br. at 20. Moreover, Mr. Rudenberg asserts that the State Police are obligated to search each and every file in its custody and control for records responsive to his request, pursuant to 29 *Del. C.* § 10003(h)(2). Op. Br. at 20. It is not enough, according to Mr. Rudenberg, that no compilation document exists responsive to his actual FOIA request.

Attempting to graft an affirmative duty onto the DSP that does not exist anywhere at law, Mr. Rudenberg boldly asserts, relying solely on holdings regarding the *pleading standard for summary judgment motions*, that “[t]he prevailing standard is that ‘the burden is on the agency to establish the adequacy of its search’ and ‘[i]n discharging this burden, the agency may rely on *affidavits or declarations* that provide reasonable detail of the scope of the search’”. Op. Br. at 17-18. In making this assertion, Mr. Rudenberg relies on *Doe v. D.C. Metro. Police Dep’t*, 948 A.2d 1210 (D.C. 2008). However, Mr. Rudenberg provides this Court with only an excerpt of a sentence in that holding to support his argument. In *Doe*, the Court actually held that “A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the . . . court to determine if the search was adequate *in order to grant summary judgment*.” *Doe*, 948 A.2d at 1221 (emphasis added to indicate portions omitted). Interestingly, although of no precedential value, the *Doe* Court also held that:

[t]here is no requirement that an agency search every record system, and a search is not presumed unreasonable simply because it fails to produce all relevant material. Nor need an agency demonstrate that all responsive documents were found and that no other relevant documents could possibly exist, and an agency's failure to turn up specific documents does not

undermine the determination that it conducted an adequate search for the requested documents.

Id. at 1221-1222 (internal quotations and citations omitted). Thus, even when addressing the adequacy of an affidavit regarding a search for the purposes of granting summary judgment, courts will not require the level of search attestation Mr. Rudenberg seeks here. Not surprisingly, absolutely no legal authority exists for the proposition that the federal courts' prevailing standard for *granting summary judgment* equates to an affirmative duty to attest as to the reasonableness of its search by a Delaware state agency when responding to a FOIA request. Mr. Rudenberg's attempt to create a duty on state agencies that does not exist in FOIA must be rejected.

III. ALL RESPONSIVE PUBLIC DOCUMENTS HAVE BEEN PROVIDED.

The utility of Mr. Rudenberg's appeal remains elusive. As explained to him repeatedly by the Delaware State Police, all public documents responsive to his requests have been provided. Whether or not the CDAG committed procedural error in reviewing Mr. Rudenberg's appeal to the DDOJ—and there is absolutely no indication this occurred, either in the record or posited in any meaningful way in the Opening Brief—that remains of absolutely no consequence to the public status of documents actually in the possession of the Delaware State Police.

29 *Del. C.* § 10001 sets forth the declaration of policy behind Delaware’s

Freedom of Information Act:

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. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed. (emphasis added).

FOIA specifically exempts from the definition of a public record “[i]ntelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an endangerment to the local, state or national welfare and security.” 29 *Del. C.* § 10002(1)(5). Specifically exempted from the definition of a “public record” are also “trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” Finally, “Investigative files compiled for civil or criminal law enforcement purposes” are expressly defined as non-public documents. 29 *Del. C.* § 10002(1)(3). Where, as here, the Division of State Police provided a private citizen with detailed purchase orders documenting the quantity and price of law enforcement equipment purchased, redacting only that information that could thwart law enforcement’s use of such equipment both in Delaware and nationwide—information identifying confidential commercial information regarding the exact type of equipment

purchased by the DSP, it strains credulity to assert that Mr. Rudenberg is entitled to “official confirm[ation] by the State Police [of] the particular models (top-of-the-line or last decade’s model, for example) on which they spent hundreds of thousands of taxpayer dollars to purchase without any formal bidding or negotiation among vendors.” *See* Op. Br. at 23. Providing the Court with absolutely no rationale for how disclosure of specific model names furthers the purpose of ensuring a free and democratic society, Mr. Rudenberg instead states, without any citation whatsoever, that the DSP’s rationale for redacting this information to protect public safety—the FBI’s explicitly stated rationale in its non-disclosure agreement—is “factually wrong.” Op. Br. at 22.⁴ Certainly, a balancing test, weighing Mr. Rudenberg’s personal curiosity regarding the specific model names purchased against the public safety threat that is posed by disclosing this information weighs in favor of redaction.

Moreover, Mr. Rudenberg has been repeatedly advised that no public records exist responsive to his requests for “records reflecting the number of investigations in which cell site simulators were used” (Category 7); “records reflecting a list of all cases . . . in which cell site simulators were used” (Category

⁴ Despite 29 *Del. C.* § 10005(e) clear statement that appeals to this Court are “on the record,” Mr. Rudenberg attempts to undermine the rationale of the Delaware State Police by making reference to “more information about Stingrays” to be found in law review articles (Op. Br. at n. 2) and information obtained by the ACLU in other states from other police agencies (Op. Br. at n. 14). The record here, however, contains the non-disclosure agreement executed by the Delaware State Police, which indicates that the FBI’s position is that disclosure of the specific information regarding cell site simulators poses a significant threat to public safety. B-000030.

8); and “all applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators” (Category 9). DSP does not track all investigations or cases in which cell site simulators are used. B-000016-B-000017; Op. Br. Ex. B. Records evidencing such lists do not exist. FOIA does not require a state agency to create a new public record “pulling together information from various sources and arranging it in the format . . . requested to create a new public record that did not already exist.” *Del. Op. Att’y Gen. Op.* 03-IB13, 2003 WL 22669562 (Jun. 2, 2003). Although Mr. Rudenberg indicates that information of this kind “has routinely been ordered to be disclosed under the Federal Freedom of Information Act,” (Op. Br. at 5), Mr. Rudenberg fails to inform this Court that in the case he cites for this proposition—*ACLU v. U.S. Dept. of Justice*, 655 F.3d 1, 3 (D.C. Cir. 2011), the USDOJ—not a police agency—possessed a list of cases responsive to this request, it was not ordered by the Court to create a list that did not already exist. Here, Mr. Rudenberg is asking this Court to require that the DSP create lists of cases and investigations that do not already exist (Categories 7-8), and comb through court records not in its possession, attorney general files not in its possession, and each and every criminal investigative file in holds in eight separate troops, divulging information not subject to Delaware’s FOIA.

FOIA does not provide for unfettered access to every portion of every document in possession of the state government. FOIA does not require the

government assist plaintiffs in preparing civil actions brought against it,⁵ nor does it require the state provide criminal defendants with information outside of the process of Criminal Rules of Procedure. *See ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (“Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”) Expressly, it precludes the divulgence of information that, as here, could constitute an endangerment to the local, state or national welfare and security. *See ACLU v. City of Wilmington*, 2012 WL 5358584, at *1 (Del. Super. Sept. 27, 2012) (holding that a FOIA request that interferes with or compromises police operations is not a proper use of FOIA). Mr. Rudenberg has provided this Court with no basis with which it may find that his request for specific model names of law enforcement equipment furthers FOIA’s explicit purpose. In stark contrast, DSP has provided the specific reason this information is not, and should not be, made public.

⁵ *See ACLU v. U.S. Dep’t of Justice*, 655 F.3d 1, 11 (D.C. Cir. 2011) (noting the ACLU admitted it may contact convicted “defendants and/or their counsel to determine whether [the] defendants ever learned that they were the targets of warrantless cell phone tracking” in its brief challenging the USDOJ’s denial of the ACLU’s FOIA request for cell site simulator documents.)

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Court hold that the DSP has not violated Delaware's Freedom of Information Act.

Respectfully submitted,

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