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January 23, 2017

The Honorable Richard R. Cooch
New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, DE 19801

RE: *Rudenberg v. Delaware State Police, et al.*
C.A.No.: N16A-02-006

Dear Judge Cooch:

Pursuant to Your Honor's order of December 30, 2016, please accept this letter as the Division of State Police's responsive supplemental brief, addressing the specific legal questions raised in that order. Each question is addressed in turn below.

1. THE APPROPRIATE STANDARD OF REVIEW IS *DE NOVO* AS THE QUESTION BEFORE THIS COURT IS ONE OF STATUTORY INTERPRETATION.

The instant action was initiated in this Court pursuant to 29 *Del. C.* § 10005(e). Section 10005(e) of the Delaware Freedom of Information Act provides the process for citizens wanting to question the validity of an agency's refusal to disclose requested information. Under § 10005(e), the Attorney General is tasked with the determination of whether a FOIA violation has occurred. 29 *Del. C.* § 10005(e). For those agencies which the Attorney General is statutorily required to represent, such a complaint is referred to the Chief Deputy Attorney General. *Id.* The Chief Deputy Attorney General must notify the agency of any complaint received within ten days of receipt of such complaint. *Id.* The Chief Deputy Attorney General must render a "written determination of whether a violation has occurred or is about to occur, and shall provide the citizen and any custodian of records or public body involved with a copy of the determination." *Id.* Following the decision by the Chief Deputy Attorney General, both parties

have the right to appeal to the Superior Court. *Id.* Such appeal is “on the record.” *Id.*

The process prescribed by statute to occur before the Chief Deputy Attorney General does not contemplate a full-fledged evidentiary proceeding; the emphasis is on effectuating a timely adjudication and, as pointed out by the ACLU, establishing that the Attorney General’s office will not represent an agency in any proceeding arising out of what it has determined to be a violation of FOIA. Indeed, the entire process is one of statutory interpretation: initially by the Chief Deputy Attorney General, and ultimately by this Court.

Similar to administrative agencies and their grant to hear complaints based on their area of expertise, the Attorney General under the Delaware Freedom of Information Act was tasked with the enforcement of petitions brought under the Act and administration of the Act.¹ Thus, the Attorney General and the Chief Deputy Attorney General are the agency recognized as possessing expertise in analyzing FOIA issues. Accordingly, the decision of the Chief Deputy Attorney General in this petition concerning disclosure by a public body must be regarded under the same standard of review as a decision of an administrative agency would be reviewed when the question is one of an agency’s interpretation of statute:

This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings. We review questions of law and statutory interpretation *de novo*. Absent an error of law, we review an agency’s decision for abuse of discretion. An agency abuses its discretion only where its decision has exceeded the bounds of reason under the circumstances.

Sweeney v. Del. Dept. of Trans., 55 A.3d 337 (Del. 2012). Indeed, this Court has long recognized that findings of fact will be overturned only when “clearly wrong” and where “justice requires.” *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972).

The ACLU contends this Court should “resolve all of the issues that do not require the resolution of any disputed factual issue (which in Petitioner’s view is all of them, based on the paucity of the record evidence and the nature of Respondent’s evidentiary burden).” Appellant’s Letter Jan. 13, 2017 Br. at 4. However, to date, the ACLU has not indicated what factual issues remain. As

¹ 29 *Del. C.* § 10003(c) implies that the request form for a FOIA request is to be promulgated by the Attorney General. 29 *Del. C.* § 10003(g)(1) establishes the Attorney General as the proper authority to whom public bodies must submit their information concerning the identity of their FOIA coordinator.

outlined in the Delaware State Police's Answering Brief of May 31, 2016, the only determinations that remain in dispute are:

- Whether the DSP properly redacted the model names of the technology used by DSP in the purchase orders it provided pursuant to the FOIA request.
- Whether the DSP should be required to describe its search for any non-disclosure agreements between the State Police and the Harris Corporation and any other corporation, or any state or federal agencies, regarding the Delaware State Police's possession and use of cell site simulators, which the DSP has indicated it does not have and does not exist.
- Whether the DSP should be required to search each and every criminal investigative file, open and closed, in its possession and compile a new document that does not currently exist, reflecting the number of investigations in which cell site simulators were used and the number of those investigations that have resulted in prosecutions.
- Whether the DSP should be required to search each and every criminal investigative file, open and closed, in its possession and compile a new document that does not currently exist, reflecting the docket numbers of criminal cases culminating from investigations in which cell site simulators were used.
- Whether the DSP should be required to search each and every criminal investigative file, open and closed, in its possession and provide all applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by Delaware State Police in any criminal investigation, as well as all warrants or orders, denials of warrants or orders and returns of warrants associated with those applications.

Each of these determinations that the ACLU is asking this Court to make are pure legal determinations of what FOIA requires. The ACLU is asking this Court to graft onto the Delaware statute requirements that are simply not there. If robust discovery before the Chief Deputy Attorney General is sought, the ACLU's relief is with the General Assembly and not this Court.

2. RECORDS EXEMPT UNDER THE FEDERAL FOIA STATUTE MAY NOT BE OBTAINED UNDER DELAWARE STATE FOIA.

The instant action involves a particularly unique situation in that the United States' government has expressed a clear interest in protecting the documents sought by the ACLU from public disclosure. As explained in the United States' position paper, these records, if requested from the Federal government, would not be disclosed pursuant to Federal FOIA. The records concerning cell site

simulator technology are exempt under the Federal Freedom of Information Act statute, 5 U.S.C. § 552(b)(7)(E). For this reason, the United States' government required the state of Delaware to sign a non-disclosure agreement, agreeing to protect the exact documents sought by the ACLU from public disclosure. Clearly, these records should not be available pursuant to Delaware's FOIA statute, as such would lead to an absurd result. *See Del. Op. Att'y Gen 05-IB16* (Jun. 22, 2005) at *5 (citing *City of Riviera Beach v. Barfield*, 642 SO.2d 1135, 1136 (Fla. App. 1994) (“investigative records maintain their exempt status under the Florida Public Records Act when the records are shared with another criminal justice agency.”)).

Pursuant to 29 *Del. C.* § 10002(l)(6), “any records specifically exempted from public disclosure by statute or common law” contemplates this honorable Court considering statutory exemptions that exist under Federal law. This exemption in Delaware's FOIA statute would not incorporate every exception in the Federal statute, but rather it allows this honorable Court to examine the basis for the United State Government's decision to deny the request for any information concerning cell-site simulator technology. The United State Government so vehemently opposes any disclosure it has submitted a Statement of Interest asserting its rights to the information and the exemption under its laws. The Federal FOIA statute, located within the United States Code, may be considered under Delaware's statutory exemption where, as here, the Federal government has made clear that it would not disclose the very documents sought by the ACLU had the ACLU's request been directed to the Federal government rather than the state.

3. THE COMMON LAW “LAW ENFORCEMENT PRIVILEGE” RECOGNIZED BY FEDERAL COURTS IS CONTEMPLATED BY DELAWARE'S OWN LAW ENFORCEMENT EXEMPTION.

The Federal government's common law “law enforcement privilege” falls squarely within Delaware's own FOIA exemption for “those portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety.” 29 *Del. C.* § 10002(l)(17a)(5). “The only items that are protected from disclosure by this paragraph are: records not subject to public disclosure under federal law that are shared by federal or international agencies and information prepared from national security briefings provided to state or local governments officials related to domestic preparedness for criminal acts against United States citizens or targets.” 29 *Del. C.* § 10002(l)(17a)(5)(B).

The U.S. Government shares the cell-site simulator technology with state, local and municipal police agencies, so long as these agencies sign a comprehensive non-disclosure agreement. In addition, the U.S. Government

utilizes this same cell-site simulator technology for its own Federal criminal and anti-terrorist operations. Under the agreement, law enforcement agencies, such as Delaware Division of the State Police agree to hold any information concerning the technology confidential.

The U.S. Government contends the information sought by Appellant, if made public, increases the ability of those suspects sought by Federal, State and Local law enforcement in their investigations to avert the technology – rendering the technology useless and affecting the outcome of ongoing investigations. Law enforcement agencies, such as DSP, utilize cell-site simulator technology in situations that results in arrests, criminal charges, and subsequent prosecutions. This honorable Court has upheld the existence of a law enforcement privilege in similar cases. *Griffin v. Sigma Alpha Mu Fraternity*, 2011 WL 2120064 at *2 (Del. Super. Apr. 26, 2011). “In determining whether to apply the privilege, the court must balance ‘the government’s interest in confidentiality against the litigant’s need for the documents.’” *Id.*

This honorable Court analyzes the competing interests under these factors: (1) the extent to which the disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff’s suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of information sought to the plaintiff’s case. *Id.*

In addition, other factors include if nothing in the information sought reveals any confidential investigative techniques or nothing in the information sought reveals any information about possible future investigations or other ongoing investigations. *Id.* at *3. In the instant case, the United States government asserts its common law “law enforcement privilege” as a basis for not disclosing all that the ACLU requested. This honorable Court maintains such a privilege exists and conducts a balancing test. Delaware’s FOIA statute exempts records not subject to public disclosure under federal law and shared by the federal government with state or local officials. State and local law enforcement may only obtain cell-site simulator technology from the U.S. Government and must sign an extensive agreement. Not only does the requested information fall within

the Federal common law “law enforcement privilege,” the information falls within Delaware’s own FOIA exemption.

Respectfully submitted,

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cc: Ryan Tack-Hooper, Esquire (via electronic service)
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