

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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

Civil Action No.

NOTICE OF APPEAL

Petitioner Below, Appellant, Jonathan Rudenberg, appeals the December 29, 2015 decision of the Chief Deputy Attorney General on his June 17, 2015 petition pursuant to 29 Del. C. §10005(e). The Chief Deputy's decision concerned Mr. Rudenberg's May 15, 2015 request pursuant to 29 Del. C. §§ 10001-10007 ("FOIA") that the Delaware Department of Safety and Homeland Security, Division of State Police ("State Police") disclose certain public records documenting their use of cell site simulators. Pursuant to 29 Del. C. § 10005, Mr. Rudenberg requests that this Court reverse the findings of the Chief Deputy and order the disclosure of all responsive public records. In support of this request, Mr. Rudenberg alleges the following facts:

1. On May 15, 2015, a Delaware citizen named Jonathan Rudenberg submitted a FOIA request by email to the State Police.

2. The Request sought information about a technology known as cell site simulators or “Stingrays.” As explained in the Request, cell site simulators impersonate a wireless service provider’s cell tower, prompting cell phones and other wireless devices to communicate with them. Cell site simulators are commonly used in two ways: to collect information on all phones in a given location, or to track and locate particular phones.

3. Mr. Rudenberg emailed the Request using a web service called MuckRock, available at <https://www.muckrock.com>. The Boston-based website helps citizens to file, track, and share FOIA requests.

4. Mr. Rudenberg resides in Delaware and is a citizen of this state.

5. The Request asked for the following public records:

- A. 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.
- B. Records regarding any arrangement or agreement 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.
- C. 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 or any other corporation, or any state or federal agencies, regarding the State Police’s possession and use of cell site simulators.
- D. 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.

- E. Any communications or agreements between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.
- F. 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.
- G. 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.
- H. 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.
- I. 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.

6. On June 5, 2015, the State Police denied the Request in its entirety, citing a nondisclosure agreement they had entered with the Federal Bureau of Investigation.

7. FOIA requires that a citizen seeking relief from the improper denial of records “by an administrative office or officer, a department head, commission, or instrumentality of state government which the Attorney General is obliged to represent” is obligated to “within 60 days of denial, present a petition and all supporting documentation to the Chief Deputy as described in subsection (e) of this section. Thereafter, the petitioner or public body the Attorney General is otherwise obligated to represent may appeal an adverse decision on

the record to the Superior Court within 60 days of the Attorney General's decision.” 29 Del. C. § 10005(b).

8. On June 17, 2015, Mr. Rudenberg filed a petition with the Chief Deputy Attorney General pursuant to 29 Del. C. § 10005(e) as described in 29 Del. C. § 10005(b). On July 6, 2015, the State Police submitted a response to the Chief Deputy Attorney General. The Response stated that three FOIA provisions justified non-disclosure of any responsive records.

9. First, the Response cited 29 Del. C. § 10002(l)(6) (“[A]ny records specifically exempted from public disclosure by statute or common law”), arguing that the common law of contracts rendered the nondisclosure agreement a common law bar to disclosure under FOIA.

10. Second, the Response cited 29 Del. C. § 10002(l)(2) (“[T]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.”), arguing that all the requested information about the State Police use of cell site simulators constituted a trade secret.

11. Third, the Response argued that “legally Mr. Rudenberg/Muckrock.com from Boston, MA is not entitled to these documents,” implicitly contending that since Mr. Rudenberg sent the request using MuckRock that he was not entitled to the records.

12. The Response goes on to say that despite these objections “in an effort to be cooperative, DSP contacted the FBI regarding the appeal filed by Mr. Rudenberg. Counsel for both parties [i.e., the DSP and FBI] participated in a conference call on July 1, 2015 and the FBI and DSP have reached an agreement as to some limited production that can be made.”

13. The proposed “limited production” was to include records responsive to Category 1 “so long as any reference to specific elements of the technology or components is redacted.”

14. The proposed “limited production” was not to include the FBI nondisclosure agreement.

15. As to Category 4 (concerning policies and guidelines governing the use of these devices), the Response stated that “There is currently no reference to cell site simulators within DSP’s Divisional Manual. However, DSP will check if there is some separate document that includes policies and guidelines.”

16. The State Police have told the news media that they do, in fact, have policies and guidelines governing the use of cell site simulators.

17. As to Category 9 (concerning warrants or other court orders authorizing the use of the devices), the Response stated that “DSP does not keep a central database of all applications submitted to state and federal courts for search warrants or orders. Moreover, these records fall under the FOIA exemption 29 Del. C. § 10002(l)(3), investigatory files compiled for civil or criminal law enforcement purposes. These would certainly contain information that is held confidential under the nondisclosure agreement, as well as other confidential information such as confidential informant information, and the procedures by law enforcement as part of the search warrant process.”

18. The State Police have told the news media that they do have applications and court orders connected to each time they have used cell site simulators.

19. The July 6, 2015 Response was not provided to Mr. Rudenberg until January 22, 2016, after the decision on the § 10005(e) had already been made, depriving Mr.

Rudenberg of notice of the arguments made by the State Police and an opportunity to respond to them.

20. FOIA requires that a 29 Del. C. § 10005(e) petition be decided within 20 days of receiving the petition.

21. After repeated prompting and ultimately under the threat of a writ of mandamus action, the petition was finally decided on December 29, 2015, 190 days after the petition was filed.

22. As described in more detail in the following paragraphs, the Decision ordered the State Police to produce the FBI nondisclosure agreement and acknowledged the State Police's agreement to produce some records responsive to Category 1. But it did not compel the production of any other responsive documents and it permitted the State Police to redact the Category 1 documents.

23. The Decision states that "The requests for several categories of records have become moot because of subsequent events. First, the State Police has confirmed to DOJ that it will produce the records in category nos. 1 and 4," because the Attorney General read the Response Letter's discussion of Category 4 as "an intention to provide all records, subject to the identified redactions, similar to that stated in response to category no. 1."

24. The Decision states that "The State Police will redact from these records information concerning specific elements of the technology or components. We trust that this is satisfactory for your purposes, as it is consistent with the nature of the information requested."

25. The Decision states that "the State Police has confirmed to DOJ that there are no responsive records in category nos. 2 and 5-9. We accept the representations regarding the existence of the records."

26. In response to category no. 3, the Decision states that 29 Del. C. § 10002(l)(6) (“[A]ny records specifically exempted from public disclosure by statute or common law”) did not apply.

27. The Attorney General erred by allowing the State Police to redact FOIA records responsive to Category 1 although the State Police did not satisfy, or even try to satisfy, the requirement that a basis in FOIA be cited to justify the partial withholding of the documents; or, in the alternative, by accepting the State Police argument that the FBI request to redact the documents provided a sufficient basis in FOIA to do so.

28. The Attorney General erred by failing to order a reasonable search for records responsive to Category 1 in light of the implausibility of the State Police not having any contracts or written correspondence connected to the purchase of hundreds of thousands of dollars worth of technology.

29. The Attorney General erred by failing to order a reasonable search for the records responsive to Category 4 when the only search described by the State Police was not a reasonable search since it only searched the Divisional Manual for reference to cell site simulators.

30. The Attorney General erred by accepting the State Police’s representation that the State Police had no documents responsive to Categories 5-8 in light of the fact that the July 6, 2015 Response Letter did not describe any search method used to look for those documents or otherwise indicate that a search had been done, and the only search described in that letter (as to Category 4) was not a reasonable search.

31. The Attorney General erred by accepting the State Police representation that it had no documents responsive to Category 9 even though the July 6, 2015 did not state that

there were no responsive documents as to Category 9 and instead asserted the application of a FOIA exception.

32. The Attorney General erred by failing to give Mr. Rudenberg notice of and an opportunity to respond to the arguments and allegations contained in the July 6, 2015 Response Letter.

33. The Attorney General erred by failing to order an explanation as to what provision of FOIA justified the non-disclosure of each responsive record or part of a responsive record that was not disclosed.

WHEREFORE, Mr. Rudenberg respectfully prays that this Court:

Find that the Chief Deputy Attorney's ruling on the petition was error, reverse the decision of the Chief Deputy Attorney General finding that the State Police had no responsive records other than those produced and permitting the redaction of the produced records, and grant such relief as is just and proper, including but not limited to:

- a) Declare that none of the records sought in the FOIA Request are subject to any of the exceptions to records deemed public under 29 Del. C. § 10002(1);
- b) Direct the State Police to conduct a reasonable search for responsive records, to document the nature of the search as to each category of the Request, and to produce all responsive records discovered during the search;
- c) Declare that when adjudicating a § 10005(e) petition the Chief Deputy Attorney General must provide the petitioner with notice of the respondent's arguments and an opportunity to reply to them;

- d) Declare that whenever a document or part of a document responsive to a FOIA request is withheld from disclosure that the responding agency provide an explanation of the reason for each such withholding; and
- e) Award attorney fees and costs pursuant to 29 Del. C. §10005.



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