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 Opening Brief

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May 9, 2016

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Nature and Stage of the Proceedings

On May 15, 2015, pursuant to the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), Jonathan Rudenberg submitted a request to the State Police for information concerning their use of cell site simulators. Certified Record On Appeal ("R") at 3-4.[1] On June 5, 2015, the State Police denied the request in its entirety citing a non-disclosure agreement. R. at 4. As required by § 10005(b) when challenging a state agency's denial of a FOIA petition, Mr. Rudenberg filed a § 10005(e) petition with the Chief Deputy Attorney General challenging the denial on June 17, 2015. R. at 2.

As a result of the petition, the Chief Deputy Attorney General was required to declare "whether a violation [of FOIA] has occurred or is about to occur." § 10005(e). After this, regardless of the outcome, "the petitioner or the public body may appeal the matter on the record to Superior Court." *Id*. The Chief Deputy issued her decision on December 29, 2015. R. at 20. Pursuant to § 10005(b)-(d) and Rule 72 of the Superior Court Rules of Civil Procedure, Mr. Rudenberg timely initiated this appeal on February 26, 2016.

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[1] The Certified Record omits the request itself. A copy is attached to this Brief as Exhibit A, along with copies of the omitted email discussed *infra* at Note 8.

Statement of the Facts

The General Assembly has commanded that Delaware citizens must "have easy access to public records in order that the society remain free and democratic." 29 *Del. C.* § 10001. But when it came to learning about the way the State Police use controversial cell phone surveillance technology, Appellant Jonathan Rudenberg encountered something quite far from "easy access." Instead, his FOIA request was met with categorical denial on grounds with no basis in FOIA, over six months of unexplained delay, and ultimately near-complete denial—on new grounds about which he was given no notice or opportunity to respond.

A. The Delaware State Police use a controversial phone surveillance technology called cell site simulators or "Stingrays."

Cell site simulators are used to gather data from all phones in a given location, or to track and locate particular phones. R. at 11. Colloquially referred to by their best-known brand name, Harris Corporation's "Stingray," the devices work by impersonating a wireless base station (the relevant part of a cell tower) and causing the target's phone to connect to it. *Id.* Stingrays are capable of identifying nearby phones, locating them with

extraordinary precision, and intercepting outgoing calls and text messages.[2] They send signals, often indiscriminately, through the walls of homes, vehicles, purses, and pockets in order to probe and identify the phones located inside, including the signals of other phones used by innocent third parties.[3] The United States Department of Justice has required its law enforcement agents to obtain a search warrant before using a Stingray for location tracking, R. at 35,[4] a requirement that courts around the country have begun to recognize as constitutionally compelled. *E.g., State v. Andrews*, No. 1496, 2016 Md. App. LEXIS 33, at *65 (Md. App. Mar. 30, 2016).

B. Appellant sought Stingray-related records from the State Police, but was categorically denied based on a non-disclosure agreement.

On May 14, 2015, an article in *The Washington Post* revealed, among other things, that judges "typically are not informed by the law enforcement

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[2] For more information about Stingrays, see Stephanie K. Pell & Christopher Soghoian, *Your Secret Stingray's No Secret Anymore: The Vanishing Government Monopoly Over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 Harv. J.L. & Tech. 1, 8-13 (2014).

[3] *Id.*

[4] *See* Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology (2015), *available at*, http://www.justice.gov/opa/file/767321/download

agencies that they are planning to use a cell-site simulator."[5] The next day, on May 15, 2015, a Delaware small business owner and security researcher named Jonathan Rudenberg submitted a FOIA request by email to the State Police seeking information about their use of Stingrays. R. at 3-4. The Request asked for nine categories of records. R. at 3-4.

[5] The article is referenced at R. at 2, 22. *See* Ellen Nakashima, FBI clarifies rules on secretive cellphone-tracking devices, *The Washington Post* (May 14, 2015) available at *washingtonpost.com/world/national-security/fbi-clarifies-rules-on-secretive-cellphone-tracking-devices/2015/05/14/655b4696-f914-11e4-a13c-193b1241d51a_story.html*

By way of summary, the detailed categories in the May 15, 2015 FOIA Request included:

- **Category 1**: Stingray purchase records (letters, contracts, etc.);
- **Category 2**: Arrangements to share Stingrays with other agencies;
- **Category 3**: Non-disclosure agreements;
- **Category 4**: Policies and guidelines governing use of Stingrays;
- **Category 5**: Communications with wireless service providers;
- **Category 6**: Communications with the FCC and DPSC;
- **Category 7**: Records of numbers of investigations using Stingrays;
- **Category 8**: Lists of cases in which Stingrays were used;
- **Category 9**: Applications for court orders to use Stingrays.

R. at 3-4.[6] This kind of information about the use of Stingrays has routinely been ordered to be disclosed under the Federal Freedom of Information Act, 5 U.S.C. § 552 ("Federal FOIA"). *See, e.g.*, *ACLU of N. Cal. v. DOJ*, 2015 U.S. Dist. LEXIS 79340, at *1 (N.D. Cal. June 17, 2015); *ACLU v. United States DOJ*, 655 F.3d 1, 19 (2011).

At first, the State Police denied the FOIA request in its entirety. They cited a non-disclosure agreement they had entered with the FBI. R. at 4. That agreement requires that the State Police to seek approval from the FBI before disclosing any information concerning the technology. R. at 31-32.

[6] The full text of the individual categories of the request is at R. at 3-4.

Mr. Rudenberg timely filed an administrative appeal of the denial because it had no basis in FOIA.

C. The State Police's *ex parte* submission to the Chief Deputy Attorney General raised new grounds for denial of the records.

After filing his appeal, Mr. Rudenberg waited 195 days for a response in the belief that the Chief Deputy was adjudicating the question of whether the FBI non-disclosure agreement was a valid basis under FOIA to deny the request. R. at 20. As it turns out, during this period the Chief Deputy was reviewing new grounds for denial raised in an *ex parte* submission by the State Police.

The State Police's submission asserted that the non-disclosure agreement did qualify as a FOIA exception, contending that because they had entered into a common law contract agreeing not to disclose the record, the records were therefore "specifically exempted from public disclosure by statute or common law." *See* 29 *Del. C.* § 10002(l)(6); R. at 12. The submission also asserted that all of the responsive information, such as internal policies or court orders, would be trade secrets exempt from disclosure under FOIA. R. at 13; *see* 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.").

The State Police submission also addressed the request category-by-category. R. at 14-17. As to the records concerning the purchase of Stingrays (Category 1), the State Police agreed to provide some records "so long as any reference to specific elements of the technology or components is redacted." R. at 14. As to non-disclosure agreements (Category 3), the State Police stated that the FBI non-disclosure agreement was the only responsive record, and refused to provide it, again citing the exception for records "specifically exempted from public disclosure by . . . common law." *See* 29 *Del. C.* § 10002(l)(6); R. at 15. As to policies governing the use of Stingrays (Category 4), the State Police stated, "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." R. at 15.

As to Categories 5-7, the State Police stated that no responsive records existed. R. at 15-16. As to the list of cases in which Stingrays had been used (Category 8), the State Police said that no responsive records existed, but cited 11 *Del. C.* § 8502(4) (concerning criminal history information) as a basis for refusing to disclose responsive records. R. at 16-17. Finally, the State Police also contended as to the request concerning court orders

authorizing the use of the devices (Category 9) that they had no "central database" and that, in any event, these records fall under the FOIA exemption for investigatory files. *See* 29 *Del. C.* § 10002(l)(3); R. at 17.[7]

The State Police's *ex parte* submission was mentioned in a letter from Deputy Attorney General Katisha Fortune to Mr. Rudenberg on July 13, 2015, but the letter omitted to attach the submission. R. at 18. Although it was unclear to Mr. Rudenberg at the time what the document was, he noted the failure to attach the document and requested it in an email to Ms. Fortune on October 9, 2015.[8] It was not provided until January 22, 2016, after the decision on the § 10005(e) petition had already been made. It was at that time that he learned that counsel for the State Police had submitted a 9-page letter asserting a number of alternative grounds for its denial. Even if the document had been provided, there was no mechanism for Mr. Rudenberg to respond to the new arguments and representations.

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[7] The Response also argued that "legally Mr. Rudenberg/Muckrock.com from Boston, MA is not entitled to these documents," implying Mr. Rudenberg was not entitled to use Delaware's FOIA. This issue was never addressed by the Chief Deputy. Mr. Rudenberg is a Delaware citizen.

[8] This email was omitted from the Certified Record, but is included at Exhibit A.

D. The Chief Deputy's determination, requiring only the production of the FBI non-disclosure agreement, relied on the arguments and representations in the *ex parte* submission.

Mr. Rudenberg prevailed as to the sole argument he had the opportunity to challenge—the application of the FBI non-disclosure agreement as a FOIA exception. The Chief Deputy agreed that the FBI non-disclosure agreement was not a valid basis on which to withhold documents under FOIA. R. at 26-27. Accordingly, the Chief Deputy ordered the State Police to produce the agreement.[9] The Chief Deputy also acknowledged the State Police's offer to produce purchase orders responsive to Category 1, accepting their decision to redact them without citing any justification in FOIA. R. at 25, 27. The only justification provided in the State Police submission was the FBI request to redact the documents—a justification the Chief Deputy seemingly rejected as sufficient under FOIA when it analyzed the disclosure of the FBI agreement.

However, the Chief Deputy declined to order any further relief beyond the redacted purchase orders and FBI non-disclosure agreement. The Chief Deputy accepted the State Police representation in the *ex parte* submission that there were "no responsive records in category nos. 2 and 5-

[9] The State Police have not appealed that determination.

9." R. at 25. In two footnotes (notes 13 and 16 in the determination), R. 25-26, the Chief Deputy's determination acknowledged the response to Category 4 indicating that only a partial search had been conducted and that the State Police did not rule out the existence of other Category 3 documents, respectively. But even though six months had elapsed without further disclosures since the State Police letter had been submitted, the Chief Deputy did not order any particular relief as to those categories, such as ordering a reasonable search or ordering the production of any documents.

The Chief Deputy accepted the representation about the lack of responsive records without having been provided any information about the nature of the search as to most of the categories. R. at 25. The Chief Deputy did not ask the State Police to describe any of the searches. R. at 25. And as to Category 9, the Chief Deputy found that there were no responsive records even though the State Police did not represent that they had no responsive documents. What the State Police actually did was deny having a "central database" of court orders and applications. R. at 17. Then they cited a FOIA exception for investigative files, presumably as a basis for not producing the documents outside a "central database." R. at 17.

As the result of the Chief Deputy's determination, Mr. Rudenberg received only the FBI non-disclosure agreement and redacted versions of purchase orders.[10]

On April 22, 2016, nearly two months after this appeal was filed, the State Police produced a supplemental response to the FOIA request, offering further details concerning their original search and subsequent searches.[11] The response describes the search for Stingray acquisition records (Category 1). The response also represents that any records reflecting how many or which cases in which Stingrays are used, as well as any records showing that proper court approval had been sought and received, would be contained in individual investigative files (Categories 7-9). However, the response does not indicate that any investigative files were searched.

The response also continues to assert the State Police authority to redact acquisition-related documents (Category 1) without citing a basis in

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[10] As described above, the determination left open some issues concerning the State Police's disclosure of any additional documents responsive to Categories 3 and 4. For this reason, and because of some ambiguity in the statute, in order to preserve his right to judicial review as to all aspects of his petition, Mr. Rudenberg filed a second § 10005(e) petition addressing the State Police's continuing FOIA violations. R. at 35-39. The petition was denied on the grounds that it was an impermissible effort to seek reconsideration of the issues decided on December 29, 2015, making this appeal ripe as to the issues raised within it. R. 40-42.

[11] The supplemental response is attached as Exhibit B.

FOIA. Finally, the supplemental response represents that pursuant to Category 4 the State Police searched "all documents and files" and discovered no written policies "concerning the use, limitations, retention or guidance when the cell site simulators may be used."[12]

Mr. Rudenberg has still not received complete answers to the simple questions he raised nearly a year ago, including what court approval, if any, the State Police seek when Stingrays are used.

[12] On May 6, 2016, the State Police further clarified that this search of "all documents" was for any policy "governing" Stingrays or data collected by them—regardless of whether it mentions Stingrays—and confirmed that no such policies exist.

Questions Presented

I. When adjudicating a § 10005(e) appeal, must the Chief Deputy Attorney General provide a petitioner notice of the responding agency's arguments and an opportunity to respond?

II. When the denial of a FOIA request is challenged by the petitioner, must a responding agency describe its search for records, and the reviewing official or court order a reasonable search if the one described is not reasonable?

III. Did the Attorney General err in finding that the State Police represented that they had no documents responsive to Category 9, thereby failing to order production of those responsive records?

IV. Must an agency indicate what legal authority it believes justifies its denial of a responsive record or part of a responsive record?

Argument

A. The standard of review in an appeal from the Chief Deputy's FOIA determination is *de novo* review of law and facts.

Since 2010, aggrieved petitioners seeking information from state entities cannot immediately file a lawsuit as they used to do, and must instead file a petition to the Chief Deputy Attorney General followed by an "appeal [of] the matter on the record to Superior Court." *Korn v. Wagner*, 2011 Del. Ch. LEXIS 130, at *7 (Ch. Sep. 7, 2011). The amended statute does not specify the standard of review for this appeal. Because of the lack of any formal fact-finding hearing as part of the process outlined in the amended FOIA sections, *see* § 10005(b) & (e), the standard of review should be *de novo* review of the Chief Deputy's findings of fact and conclusions of law. This standard of review is consistent with the statute's intent because any narrower standard of review would effectively shield state agencies from judicial scrutiny under FOIA while subjecting municipal and other entities to *de novo* review, contrary to the intent of the 2010 amendments which was to allow for screening of state agency denials by the Chief Deputy. *See* Del. S. B. 283 syn., 145th Gen. Assem. (2010), *available at* legis.delaware.gov.

B. The Chief Deputy erred by failing to give Mr. Rudenberg notice and an opportunity to respond to the arguments and allegations contained in the State Police submission.

When 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.

The screening also provides a tangible benefit to the petitioner, because the Chief Deputy's ability to coerce a state agency to conform to the Chief Deputy's view of FOIA can help the petitioner avoid the cost of bringing suit to enforce FOIA rights. Accordingly, because Mr. Rudenberg had a protected legal interest in having the Chief Deputy appropriately review his FOIA petition, such an opportunity to respond is required as a matter of procedural due process. *See Vincent v. E. Shore Mkts.*, 970 A.2d 160 (Del. 2009) ("[D]ue process entails providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question

of right in the matter involved.") (citation omitted). In this case, there was a lack of notice, and a process providing no opportunity to be heard even if the notice had been properly provided. This violates procedural due process. *See Bell v. Burson*, 402 U.S. 535, 542 (1971) ("[D]ue process requires . . . notice and opportunity for hearing appropriate to the nature of the case.") (internal citations omitted).

C. The Chief Deputy made a number of errors in assessing the *ex parte* submission.

1. The Chief Deputy erred by failing to order the State Police to describe the search for responsive records.

Delaware courts follow federal precedent when interpreting Delaware's analogue to the Federal FOIA. *See, e.g.*, *State v. Camden-Wyo. Sewer & Water Auth.*, 2012 Del. Super. LEXIS 479, at *21 (Super. Ct. Nov. 7, 2012) (citing Federal FOIA precedent as persuasive authority). Under both FOIA statutes, a public body must conduct a reasonable search to determine whether it has any responsive documents in its possession. *See Rugiero v. United States DOJ*, 257 F.3d 534, 547 (6th Cir. 2001) (requiring reasonable search); Delaware DOJ, Policy Manual for FOIA Coordinators (July 1, 2015) *available at* attorneygeneral.delaware.gov. For example, "the public body may need to work with its IT professionals to locate older email

records in order to satisfy FOIA's 'reasonableness' requirement." *Id.* at 17. This requirement is based on the statutory text stating that "[t]he FOIA coordinator . . . shall 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," *see* 29 *Del. C.* § 10003(g)(2)), as well as the abundant precedent interpreting Federal FOIA. *See Rugiero*, 257 F.3d at 547.

The corollary to this rule of reasonable search is that when a denial of records is challenged a responding agency must describe its search so its reasonableness may be assessed. In order to "afford a FOIA requester an opportunity to challenge the adequacy of the search," a responding agency must submit "[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." *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1221 (D.C. 2008); *see also Nation Magazine v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (explaining affidavit requirement). The 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." *Rugiero*, 257 F.3d at 547 (citations omitted).

Except for Category 4, the State Police provided no description of their search to the Chief Deputy before the Chief Deputy issued a decision. In the absence of any description of the search, much less a sworn affidavit detailing the search terms and averring that all files likely to contain responsive materials were searched, it was error for the Chief Deputy to determine that the State Police lacked further responsive documents.

And as for Category 4, the State Police description of their original search for policies governing Stingray use showed that the original search was not reasonable. They stated in their *ex parte* submission that "[t]here 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." R. at 15. The statement admits that the police did not search all the places the records might reasonably be found. Under FOIA, it is "not enough for an agency affidavit to state that 'a search was initiated of the Department record system most likely to contain the information.'" *Doe*, 948 A.2d at 1220-21 (quoting *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Chief

Deputy therefore erred by failing to order the State Police to describe and conduct a reasonable search for Category 4 records.

After the filing of this appeal, in their supplemental response, the State Police for the first time described searches conducted for Category 1; described searches performed with respect to Category 4 at some time after their original search; and explained in more detail why they did not conduct a search for Categories 7-9. Based on those additional representations about original and subsequent searches, Petitioner is satisfied with the searches eventually performed for acquisition-related documents (Category 1) and use policies (Category 4) documents.[13]

However, the supplemental response does not describe the search for non-disclosure agreements (Category 3).[14] Nor does it describe any efforts

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[13] The description of the search for acquisition-related documents (Category 1) is not legally adequate. It offers no description of what "files" were searched—leaving unclear, for example, whether emails were searched. Nevertheless, Petitioner has elected not to pursue those records further at this time, since the described search is sufficient to conclude that the State Police did not engage in any written bid process or any other written negotiation in the purchase of this technology. Similarly, Mr. Rudenberg is satisfied with the search for records responsive to Category 4 because it is sufficient to show that the State Police have not created any written policies that constrain their use of Stingrays. Further, in order to focus on the most important remaining issues, Mr. Rudenberg has elected not to pursue his appeal with respect to demanding descriptions of the searches conducted for Categories 2 and Categories 5-6.

[14] On May 9, 2016, counsel for Mr. Rudenberg received a copy of a standardized non-disclosure agreement entered into between Harris Corporation and the Hennepin County

to search investigative files for responsive documents concerning the number of investigations using Stingrays (Category 7); cases in which Stingrays were used (Category 8); and applications for court orders to use Stingrays (Category 9). The State Police are obligated to search for records where they may exist and, if they seek to withhold such records, cite a basis in FOIA for doing so. *See* 29 *Del. C.* § 10003(h)(2). If the State Police determined that such files were too numerous to search without charging Petitioner a fee, then he is entitled to that description of the expected search so he can decide whether to undertake it. *See* 29 *Del. C.* § 10003(m)(2).

2. The Chief Deputy erroneously found that the State Police had represented that there were no court orders or related applications concerning the use of Stingrays (Category 9).

The Chief Deputy determined that the request as to Category 9 was moot because the State Police represented that they lack responsive documents. However, unlike their other responses saying "No records exist," the State Police response to Category 9 only denied having a "central database" and cited a FOIA exception for investigatory files, presumably as

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Sheriff's Office in 2010. The existence of this document suggests other police agencies likely entered into similar agreements with Harris at the time of purchasing the technology. Mr. Rudenberg is entitled to a description of the search that enabled the State Police to conclude that they had not entered into any such non-disclosure agreement.

a basis for not producing the court orders and applications. R. at 17. Because of the Chief Deputy's error, which she has since acknowledged, R. at 41 n.3, Mr. Rudenberg has not received any copies of court orders or applications. R. at 41.

As discussed above, the April 22, 2016 supplemental response only underscores Mr. Rudenberg's entitlement to relief as to Category 9 (as well as Categories 7-8), because it admits that these records are contained, if anywhere, inside the files that have never been searched.

3. The Chief Deputy erred by failing to order that the State Police explain what legal authority justified the non-disclosure of each responsive record or part of a responsive record.

Whenever a document or part of a document responsive to a FOIA request is withheld from disclosure, the responding agency must provide an explanation of the reason for each such withholding. *See* 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."). This is so that when a denial is challenged, there is sufficient information "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). The State Police's flouting this requirement prevents both the petitioner and this Court from being able to assess the legality of any particular withholding. *Id.* The Chief Deputy therefore erred by allowing the Category 1 purchase orders to be redacted without requiring the State Police to state a legal basis for each redaction.

The April 22, 2016 supplemental response does not cure this error. In that submission, the State Police reiterate their belief that they may redact information when they unilaterally determine that disclosing the information is not in the public interest. Such a unilateral power to make ad hoc exceptions is entirely inconsistent with the obligations imposed by FOIA.

In addition to being legally erroneous, the justification cited in the supplemental response—citing terrorism as the reason the model names must be redacted—is factually wrong. The State Police assert 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." But there is no logical connection between the public knowing the model names of devices purchased by the Delaware State Police and the ability of terrorists or others to develop technologies to negate them. 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. "Stingray" itself is one such model name. Others, including antennas and other auxiliary items, are Harpoon, Kingfish, and Stingray II. What has not been officially confirmed by the State Police is 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.

D. This Court should remedy the Chief Deputy's errors by ordering a reasonable search for and disclosure of the records sought in the FOIA request subject to any applicable exceptions.

Some of the Chief Deputy's errors have been remedied by the State Police's subsequent searches and disclosures after this appeal was filed. But there are three issues that have not been resolved for which Petitioner still seeks relief: the Chief Deputy failed to require that any withholding or redaction be justified under FOIA (Category 1); failed to order that the State Police describe their searches for responsive records for the categories in which they claimed not to have any further records (including Categories 3, 7-8); and failed to order a reasonable search for documents that the State Police claim are contained in investigative files (Category 9). Accordingly,

this Court should direct the State Police to describe and conduct a reasonable search for responsive records as to Categories 3 and 7-9 and produce all records subject to FOIA that are discovered during the search including unredacted copies of the purchase orders.[15]

[15] There are FOIA exceptions cited by the State Police that were never reviewed by the Chief Deputy. It would be impossible for this Court to appropriately assess the exceptions before the State Police identify the responsive records to which the claimed exceptions apply since each exception must be applied to a particular record or part of a record. *See Wiener*, 943 F.2d at 979, 988 (internal citations omitted). For example, responsive documents like court orders do not constitute trade secrets. Similarly, FOIA's exception for "investigatory files" might apply to parts of court orders or applications for court orders—i.e., that part containing "information gathered during the course of an investigation." *See Lawson v. Meconi*, 897 A.2d 740, 745 (Del. 2006). But it would not apply to entire documents, much less every responsive record under the different categories. The same is true for confidentiality under 11 *Del. C.* § 8502(4) (criminal history record information).

Conclusion

Under the Freedom of Information Act, every Delaware citizen has a right to know basic information about how the State Police operate. This includes, for example, what kind of court authority they seek, if any, in order to track one's cell phone. To protect this right to know, and for the reasons provided in this brief, the Court should order that Mr. Rudenberg's FOIA request be handled as the law requires—with a reasonable search for information and disclosure except for those parts of records that are exempt.

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