

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

AMERICAN CIVIL LIBERTIES UNION )  
FOUNDATION OF DELAWARE, INC. )

Plaintiff, )

v. )

CITY OF WILMINGTON, )

Defendant. )

C.A. No.

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**COMPLAINT FOR WRIT OF MANDAMUS**

1. Plaintiff American Civil Liberties Union Foundation of Delaware, Inc. (“ACLU-DE”), a corporation of the State of Delaware, is an affiliate of the American Civil Liberties Union. It has worked since 1961 through legal advocacy, engagement in the legal process and public education to protect and advance civil liberties and civil rights in Delaware.

2. Defendant City of Wilmington is an incorporated municipality in the State of Delaware.

3. ACLU-DE brings this action pursuant to 29 *Del. C.* § 10005 to obtain information for use in the public interest.

**COUNT I**

**(Taser Use and Training)**

4. On December 17, 2010, pursuant to the Delaware Freedom of Information Act (“FOIA”), ACLU-DE’s legal director sent the Wilmington Chief of Police a written request (the “taser FOIA request”) requesting access to and copies of the following records: (a) the continuum of force policy of the Wilmington Police Department (the “Department”); (b) the Department’s policies and procedures applicable to the use of tasers; (c) the materials used by

the Department to train personnel with regard to the use of tasers; and (d) the materials received from outside sources, including taser manufacturers and taser providers, regarding the use of tasers. (A copy of the taser FOIA request is attached hereto as Exhibit A.)

5. ACLU-DE sought this information as part of its investigation of taser use by Delaware law enforcement agencies. The investigation was prompted by multiple deaths in Delaware resulting from questionable taser use. A significant body of evidence indicates that misuse of tasers by law enforcement personnel has resulted in needless death and injury throughout the United States, and ACLU-DE seeks to determine whether changes in law enforcement policies, procedures and training with regard to taser use in Delaware are necessary to protect the public.

6. This is an appropriate and vital step toward changing public policy. Accordingly, ACLU-DE's taser FOIA request serves purposes of the FOIA statute: enabling Delaware citizens to monitor the decisions that are made by public officials in formulating and executing public policy, and ensuring that the society "remain free and democratic." 29 *Del. C.* § 10001.

7. Counsel for ACLU-DE and Wilmington engaged in an extended exchange following Wilmington's receipt of the taser FOIA request. The exchange, which included resubmission of the taser FOIA request on March 7, 2011 and June 10, 2011, concluded on August 22, 2011 when the City Law Department stated the City's final position, denying the request on that ground that "the information requested is not subject to disclosure under FOIA." This total non-disclosure was in contrast to positive responses to the same request, with materials provided, by the Delaware State Police, the New Castle County Police and police agencies from a number of Delaware municipalities.

12. In the taser FOIA request, ACLU-DE requested that any document withheld on the basis of a claimed exemption be identified by date, sender, recipient and author, and that its contents be described sufficiently to enable an independent evaluation of the possible exemption. Wilmington did not provide a log or index containing that information, i.e., did not provide what is commonly referred to as a Vaughn index.

13. By refusing to produce the documents requested by the first FOIA request and by failing to provide a Vaughn index, Wilmington violated FOIA.

14. Pursuant to 29 *Del.C.* § 10005(b) and (d), a writ of mandamus is an appropriate remedy where a citizen is denied access to records pursuant to a FOIA request. A writ of mandamus is used to compel an official to perform their duties as required by law.

## COUNT II

### (Cell Phone Records)

15. On July 25, 2011 ACLU-DE's legal director sent the Wilmington Chief of Police a FOIA request for records relating to the Wilmington Police Department's acquisition of cell phone location records, warrant usage and communications practices with cell phone companies (the "cell phone FOIA request"). (A copy is attached hereto as Exhibit C.)

16. Public access to the records showing government access to cell phone location information in the hands of private parties is a matter of public interest concern, nationally and locally. The requested materials are crucial to determining whether the City of Wilmington government is adequately respecting its obligation to respect individuals' privacy as required by the Fourth Amendment of the United States Constitution and Article I, § 6 of the Delaware Constitution. Thus, the cell phone FOIA request, too, serves the purposes of the FOIA statute.

17. The cell phone FOIA request was denied in its entirety on August 19, 2011.

(Exhibit D hereto.)

18. Wilmington invoked §§10002(g)(17)(1) and (5.a)<sup>2</sup> as a basis for refusing to produce records in the following categories:

- a. Policies, procedures and practices Wilmington follows in determining how to obtain cell phone location records;
- b. Data retention policies, detailing how long cell phone location records are kept, databases in which they are placed, and agencies (federal, state and local) with which they are shared;
- c. The use of cell phone location records to identify “communities of interest (detailing those persons who have been called, or called by a target)” in investigations;
- d. The use of cell phone records to identify all of the cell phones at a particular location;
- e. Wilmington’s use of “digital fences” (systems whereby you are notified whenever a cell phone comes within a specific geographic area);
- f. Communications with cell phone companies and providers of location-based services regarding cell phone location records, including
  - i. company manuals, pricing, and data access policies,
  - ii. invoices reflecting payments for obtaining cell phone location records,
  - iii. instances in which cell phone companies have refused to comply with a request or order.

19. Section 10002(g)(17)(1) establishes an exemption for “[r]esponse procedures or plans prepared to prevent or respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures.” Plainly, however, neither that exemption, nor the § 10002(g)(17)(5.a)

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<sup>2</sup> Correspondence from the City Solicitor’s office cites § 10002(g)(16), but that reference to subparagraph (16) instead of (17) appears to be an error.

exemption (set out in para. 10, *supra*) provides a basis for the City of Wilmington's refusal to produce the documents in those categories.

20. The City also refused to produce records in the following categories: (a) the legal standard (e.g. probable cause, relevance) which Wilmington proffers to obtain cell phone location records and (b) judicial decisions and orders ruling on Wilmington's applications to obtain cell phone location records. Wilmington's basis for asserting that those categories of records are exempt from FOIA is that it "is not required to produce any legal research and [those records] can be considered Attorney/Work Product [sic]." It appears to be Wilmington's position that FOIA permits an implied exemption for records which state public policy whenever that policy may be based on a legal determination. There is no such exemption. Moreover, neither the Delaware Uniform Rules of Evidence nor judicial decisions support applying attorney/client privilege or attorney work product protection to public judicial decisions.

21. Wilmington failed to provide a Vaughn index of the responsive records withheld.

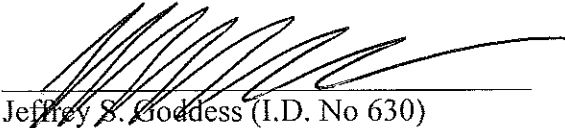
22. By refusing to produce the documents requested by the cell phone FOIA request and by failing to provide a Vaughn index, Wilmington violated FOIA.

23. Pursuant to 29 *Del.C.* § 10005(b) and (d), a writ of mandamus is an appropriate remedy where a citizen is denied access to records pursuant to a FOIA request. A writ of mandamus is used to compel an official to perform their duties as required by law.

WHEREFORE, plaintiff ACLU-DE requests judgment in its favor

- a. Declaring that the City of Wilmington's bases for denying ACLU-DE's FOIA requests are without merit;
- b. Issuing a writ of mandamus directing the City of Wilmington to produce all records requested in the taser and cell phone FOIA requests;

- c. If the City of Wilmington is permitted to withhold any records, directing it to provide ACLU-DE with a Vaughn index; and
- d. Awarding ACLU-DE attorney fees and costs pursuant to 29 *Del. C.* §10005(d).



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Foundation of Delaware, Inc.  
100 W. 10th Street, Suite 603  
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(302) 654-5326, ext. 103  
rmorse@aclu-de.org

*Attorneys for American Civil Liberties  
Union Foundation of Delaware, Inc.*



# ACLU

FOUNDATION

AMERICAN CIVIL LIBERTIES UNION of DELAWARE

American Civil Liberties Union / Foundation of Delaware  
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December 17, 2010

Chief Michael J. Szczerba  
Chief of Police  
Wilmington Police Department  
300 North Walnut St.  
Wilmington, Delaware 19801

Re: Freedom of Information Act Request

Dear Chief Szczerba:

I hereby request access to and copies of certain public records in your possession, custody, or control, pursuant to the Delaware Freedom of Information Act, 29 Del. Code § 10001 et seq. Specifically, I request access to and copies of the following:

1. The continuum of force policy of the Wilmington Police Department (the "Department") currently in use;
2. The Department's current policies and procedures applicable to the use of tasers;
3. All materials used by the Department to train personnel with regard to the use of tasers;
4. All materials received from outside sources, including taser manufacturers and taser providers regarding the use of tasers.

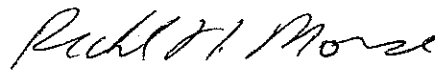
If you believe that any of the requested records are exempt and need not be disclosed, and intend to withhold documents on that basis, please explain the basis for your belief, and for each document or portion withheld state its date, sender, recipient and author, and describe its contents sufficiently to enable an independent evaluation of the possible exemption, so that I may decide whether a judicial challenge is appropriate.

I also request a waiver of all fees for this request. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in a commercial interest. The information is being requested on behalf of the American Civil Liberties Union of Delaware, a public interest organization that seeks the information for use in the public interest.

In accordance with the June 2, 2003 opinion of the Delaware Attorney General (available at <http://attorneygeneral.delaware.gov/office/opinions/2003/03-ib13.htm>) please produce the documents by January 10, 2011. If you have any questions regarding the scope of the request or any other matters, please contact me at (302) 654-5326, ext.103 or [rmorse@aclu-de.org](mailto:rmorse@aclu-de.org).

Thank you.

Sincerely yours,

A handwritten signature in cursive script, reading "Richard H. Morse".

Richard H. Morse  
LEGAL DIRECTOR





# City of Wilmington

James M. Baker, Mayor

Louis L. Redding City/County Building  
800 N. French Street  
Wilmington, Delaware 19801-3537

www.WilmingtonDE.gov  
Law Department  
(302) 576-2175

rec'd 1/3/11

December 28, 2010

Mr. Richard H. Morse  
Legal Director  
ACLU  
100 W. 10<sup>th</sup> Street, Suite 603  
Wilmington, DE 19801

Re: **Freedom of Information Act Request**

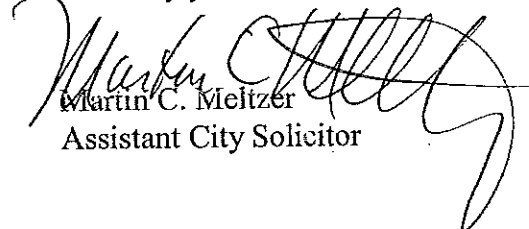
Dear Mr. Morse:

I am Assistant City Solicitor Martin C. Meltzer and your Freedom of Information Act request was referred to me. Please fill out and submit a formal Freedom of Information Act form, which is on the City's website. You may address it to me at the Office of the City Solicitor and I will act on it in the most expeditious manner.

The City does not waive cost of production. You will be charged a standard fee in accordance with law.

If you need any further information, please feel free to contact me.

Sincerely yours,

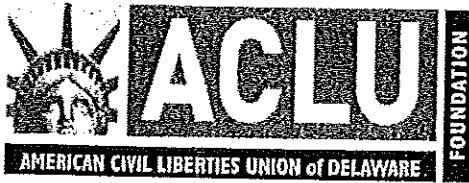
  
Martin C. Meltzer  
Assistant City Solicitor

MCM



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www.aclu-de.org

March 7, 2011

Martin C. Meltzer, Esq.  
Assistant City Solicitor  
City of Wilmington Law Department  
Louis L. Redding City/County Building  
800 N. French Street  
Wilmington, DE 19801.

Re: FOIA Request

Dear Mr. Meltzer:

In accordance with your response to my letter to Chief Szczerba, I am enclose a form duplicating the FOIA request previously submitted by letter.

Sincerely yours,

Richard H. Morse  
Legal Director



Louis L. Redding City/County Building 800 French Street Wilmington, DE 19801

**FREEDOM OF INFORMATION ACT REQUEST FORM**

NAME: Richard H. Moore Date: 3/7/11  
AGENCY: ACLU of Delaware  
ADDRESS: 100 W. 10th St., Wilmington DE, Suite 603  
PHONE: 302-654-5326 x103

This is a request for records under the Delaware Freedom of Information Act, 29 Del. C. §10001 et seq. and the Rules of Public Access to Records of the City of Wilmington.

PROPERTY ADDRESS(ES),  
COMPANY, INDIVIDUAL OR  
PROJECT NAME(S) AND/OR  
CONTRACT NUMBER:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

INFORMATION REQUESTED:

See attached

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

REQUESTOR'S SIGNATURE: Richard H. Moore

- The City's Rules of Public Access to Records require acknowledgment\* of a written request within fifteen (15) business days. Acknowledgment means:

- I. Production of the requested documents;
- II. Denial of the request with stated reasons therefore; or
- III. Notification that an extension is needed and a statement about the time period in which the response will be made.

\* **STAFF IS ENCOURAGED TO RESPOND AS SOON AS PRACTICABLE.**

- Copies are \$.50 per page; \$18.50 for police and/or fire reports.
- Payment shall be made in cash, by money order, business check or certified check made payable to the City of Wilmington (Identification may be requested).
- I am willing to pay: \$ 10.00.
- If costs exceed this figure, please contact me at telephone number: see above

bjr

12/08

1. The continuum of force policy of the Wilmington Police Department (the "Department") currently in use;
2. The Department's current policies and procedures applicable to the use of tasers;
3. All materials used by the Department to train personnel with regard to the use of tasers;
4. All materials received from outside sources, including taser manufacturers and taser providers regarding the use of tasers.



# City of Wilmington

James M. Baker, Mayor

Louis L. Redding City/County Building  
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March 28, 2011

Mr. Richard H. Morse  
Legal Director  
ACLU  
100 W. 10<sup>th</sup> Street, Suite 603  
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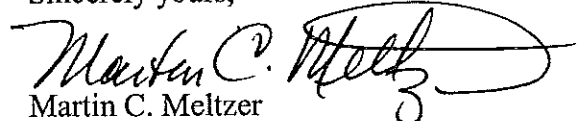
**Re: Freedom of Information Act Request**

Dear Mr. Morse:

This is the City's formal response to your Freedom of Information Act request. Respectfully, your request is denied under the exemption 29 *Del. C.* §10002(g)(16)(a.5.A) of Delaware's Freedom of Information Act. In support of this decision I would refer you to the Delaware Attorney General's opinion 2005 Del. A.G. LEXIS 16 (August 1, 2005).

Please feel free to contact me for any further assistance.

Sincerely yours,

  
Martin C. Meltzer  
Assistant City Solicitor

MCM



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LEXSEE 2005 DEL. A.G. LEXIS 16

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

[NO NUMBER IN ORIGINAL]

*2005 Del. AG LEXIS 16*

August 1, 2005

**SYLLABUS:**

[\*1]

Freedom of Information Act Complaint Against City of Wilmington

**REQUESTBY:**

Mr. David Ledford  
Vice President/News & Executive Editor  
The News Journal  
P.O. Box 15505  
New Castle, DE 19720

**OPINIONBY:**

W. Michael Tupman, Deputy Attorney General; Malcolm S. Cobin, State Solicitor

**OPINION:**

On February 15, 2005, our Office received your complaint alleging that the City of Wilmington (Athe City) violated the public records requirements of the Delaware Freedom of Information Act, 29 Del. C. Chapter 100 (AFOIA), by not providing you with: (1) AA copy of the Standard operating procedure (SOP) for the police department's >F Squad'; and (2) ACopies of all email communications generated since Nov. 1, 2004 regarding shootings, homicides, street violence or illegal drug sales sent to, written by, copied to, or forwarded to any of the following individuals: Mayor James M. Baker, Chief of Staff William Montgomery, Public Safety Director James Mosley, Police Chief Michael Szczerba, Communications Director John Rago, Capt. James Jubbs and members of the City Law Department.

At the start, we should explain the delay in making a written determination in response to your complaint. Both sides provided us with a significant amount of [\*2] factual information which required our thorough review. In addition, the issue whether certain information in the possession of the police department is exempt under FOIA was one of first impression for this Office and required original legal research. Our determination could have been more expedient, however, and we apologize to all parties for the delay, which is not in keeping with our usual responsiveness.

By letter dated February 22, 2005, we asked the City to respond to your complaint within ten days. We received the City's response on March 7, 2005. We asked the City for additional information, which we received on April 7, 2005.

According to the City, the Wilmington Police Department is divided into six squads (A through F). ASquads A through E are regular patrol platoons, with rotating shifts. Each platoon covers the entire city, broken down into geographic radio districts. The F squad is the Community Sector Specialist Squad, which has two shifts. The F squad's only distinc-

tion from squads A through E is the F squad is assigned to long-term problem solving, therefore F squad is not generally subject to basic calls for service, . . . .

In reviewing the correspondence [\*3] and documents provided to us by you and the City, it is apparent that there was some misunderstanding about what information you were seeking regarding the F Squad. By e-mail dated January 7, 2005, you clarified: ARegarding the >F-Squad' document we discussed, we've heard it described several ways. What we are looking for is the document used during the police department's mandatory training for members of the F-Squad. The document has been described as an SOP, a policy and a training guide. The document contains standards, goals, requirements and the mission of the squad.

According to the City, there are no standard operating procedures, policies, or training guides specific to the F Squad. AThe White Book is the exclusive source of standard operating procedures for the Wilmington Police Department . . . There is no special manual for Community Service Specialists (F Squad) that is unique or specific to F Squad, or otherwise distinct from the White Book, or even distinct from squads A through E.

According to the City, the police department has recently developed written guidelines (not published in the White Book) Aprescribing how to conduct a checkpoint encounter. . . . The [\*4] guidelines are not standard operating procedures of the F Squad, but are general guidelines for the Police Department as a whole. The City provided a copy of the checkpoint guidelines for our in camera review.

The City contends that the checkpoint guidelines and the police department's White Book are exempt from disclosure under Section 10002(g)(16)a.5.A of FOIA. \*

As for the e-mails you requested, the City claims none exist within the parameters of your request. The Assistant City Solicitor has represented that he: (1) Aindependently verified with Director Mosley, Chief Szczerba and Captain Jubb that none of them sent or received any e-mail regarding shootings, homicides, street violence, or illegal drug sales; (2) Aindependently verified with Law Department personnel that no one has sent or received any communications relating to shootings, homicides, street violence, or illegal drug sales during the time period identified by The News Journal; and (3) Aindependently verified with [Mayor Baker, Chief of Staff Montgomery, and Communications Director Rago] that none of them sent or received any communications relating to shootings, homicides, street violence, or illegal drug sales [\*5] during the time period identified by The News Journal.

#### Relevant Statutes

FOIA provides that A[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body. 29 Del. C. '10003(a).

FOIA exempts from disclosure A[t]hose 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. Id. '10002(g)(16)a.5.

#### Legal Authority

##### 1. Law Enforcement Manuals

The City provided for our in camera review a copy of the index to the Wilmington Police Department's APolice Officer's Manual (a/k/a the White Book). The index shows that the White Book is a comprehensive compendium (AA (Abandoned Car) through AZ (Zoo)) of operating procedures for all police matters, criminal as well as personnel. The City also provided us for in camera review a copy of the police department's check point guidelines.

The City claims that the White Book and the check point guidelines are exempt from disclosure under FOIA under Section 10002(g)(16). The General [\*6] Assembly enacted that exemption in 2002 in response to the terrorist attacks of 9/11.

Section 10002(g)(16) exempts from public disclosure any records that A could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual. The exemption goes on to identify specific types of records, including Avulnerability assessments, specific tactics, specific emergency procedures, or specific security procedures; and A[b]uilding plans, blueprints, schematic drawings, diagrams, operational manuals, or other records of mass transit facilities, bridges, tunnels, . . .

Subparagraph 5. of the statute more broadly exempts Arecords 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 including Avulnerability assessments or specific and unique response or deployment plans.

The federal FOIA has a similar exemption for records that would disclose Ainvestigative techniques and procedures or Aendanger the life and physical [\*7] safety or law enforcement personnel. 5 U.S.C. '552(b)(7)(E)(F).

In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2nd Cir. 1978), an attorney made a FOIA request for the BATF pamphlet ARaids and Seizures. The federal district court held that portions of the pamphlet regarding law enforcement techniques and procedures were exempt from disclosure Aincluding descriptions of the equipment used by agents in making raids, the methods of gaining entry to buildings used by law breakers, factors relating to the timing of raids, and the techniques used by suspects to conceal contraband. 587 F.2d at 545. A[R]elease of such parts of the pamphlet would hinder investigations, enable violators to avoid detection and jeopardize the safety of Government agents. Id.

It would be anomalous indeed to attribute to Congress the intention to require agency revelation of internal law enforcement manuals. Such a step would increase the risk of physical harm to those engaged in law enforcement and significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection.

[\*8]

587 F.2d at 547. Accord *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980) (the exemption for investigatory techniques and procedures Awould be pointless unless the manuals instructing agents to use those techniques and procedures were also exempt from disclosure).

Although a response to 9/11, Section 10002(g)(16) of Delaware's FOIA is not limited to information that might aid terrorists to destroy buildings or infrastructure, but also exempts information Aprepared 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(g)(16)A.5. We believe that exemption covers law enforcement manuals to the extent they contain information that would disclose investigative techniques and procedures, or endanger the life and safety of citizens or law enforcement officers.

We appreciate the difficulty a requestor may have in trying to frame a FOIA request when it is not certain what records are in the possession of the government entity. Your FOIA request specifically mentions AA copy of [\*9] the standard operating procedures (SOP) for the police department's AF Squad. Based on the representations of the Assistant City Solicitor, there apparently are no written operating procedures, policies, or training guides specific to the F Squad. A[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record. Att'y Gen. Op. 96-IB28 (Aug. 8, 1996).

Our investigation, however, reveals that there may be two other records which may contain information you are seeking, and to which you might have sought access: (1) the police department's checkpoint guidelines; and (2) the White Book.

We have reviewed the City's checkpoint guidelines in camera, and believe that they fall within the exemption under FOIA. Public disclosure of those guidelines might hinder criminal investigations, enable violators to avoid detection, jeopardize the safety of police officers, and undermine enforcement of the law. *Caplin*, 587 F.2d at 545.

We now address the White Book. In *Caplin*, the federal appeals court held that only those portions of the BATF pamphlet ARaids and Seizures) which might disclose confidential law enforcement techniques [\*10] and procedures were



exempt from disclosure. Other portions pertaining to purely administrative matters must be disclosed to the public. All administrative materials, even if included in staff manuals that otherwise concern law enforcement, must be disclosed unless they come under one of the other exemptions of the act. *Hardy*, 631 F.2d at 657.

The Index to the White Book indicates that there are portions of the manual which appear to be protected by Section 10002(g)(16) of FOIA (e.g., Building Security, D.U.I. Investigation, Court Security, Felony car stops, Stakeout, V.I.P. Protection). Other portions of the manual appear to be administrative in nature and may not be exempt under FOIA (e.g., Budgeting, Career Ladder Program, Classification of Uniforms, Meal Periods, Overtime, Promotion System).

We do not believe that the index to the White Book is exempt from disclosure under FOIA because the listings do not reveal any confidential law enforcement techniques or otherwise jeopardize officer safety and effective law enforcement. To the extent that the Index is within the purview of your FOIA requests, the City must make a copy available to you. That [\*11] will enable you to determine whether any portions of the White Book are what you are seeking in your FOIA requests.

If so, you may request a specific portion or portions of the White Book, at which time the City can (consistent with this opinion) decide whether the section is protected from disclosure under FOIA as a confidential law enforcement manual.

#### B. E-Mails

FOIA does not require a public body to produce public records that do not exist. Att'y Gen. Op. 96-IB28 (Aug. 8, 1996). The Assistant City Solicitor has represented, after verifying with the individuals named in your FOIA request, that they do not have any e-mails responsive to your request. 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. @ Att'y Gen. Op. 97-IB01 (Jan. 14, 1997). Based on the representations of the Assistant City Attorney, we cannot compel disclosure under FOIA what apparently does not exist. A[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record. Att'y Gen. Op. 96-IB28.

#### Conclusion

For the foregoing reasons, we [\*12] determine that the City did not violate the public records requirements of FOIA by not providing you with access to the police department's checkpoint guidelines because those guidelines are exempt from disclosure under FOIA as confidential law enforcement techniques and procedures.

We also determine that the City did not violate the public records requirements of FOIA by not providing you with access to any standard operating procedures or training manuals specific to the AF squad, and e-mails you requested, because those documents apparently do not exist, based on the representations of the Assistant City Solicitor. To the extent you are seeking access to the police department's White Book, we determine that the index to the White Book is a public record under FOIA. We do not have to determine at this time whether any particular section of the White Book is exempt under FOIA because that issue is not yet ripe for decision.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information Freedom of Information Defenses & Exemptions Law Enforcement Records Endangerment Criminal Law & Procedure Discovery & Inspection General Overview Governments Local Governments Police Power



BY EMAIL: [mmeltzer@wilmington.de.us](mailto:mmeltzer@wilmington.de.us)

June 10, 2011

Martin C. Meltzer, Esquire  
Assistant City Solicitor  
City of Wilmington  
800 North French Street  
Wilmington, DE 19801

*Re: FOIA Request for Taser Information*

Dear Mr. Meltzer:

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE  
100 W 10TH ST, SUITE 603  
WILMINGTON, DE 19801  
T/302-654-5326  
F/302-654-3689  
WWW.ACLU-DE.ORG

NORMAN M MONHAIT  
PRESIDENT

KATHLEEN M MacRAE  
EXECUTIVE DIRECTOR

RICHARD H MORSE  
LEGAL DIRECTOR

With this letter I am resubmitting the FOIA request you previously denied by letter dated March 28, 2011. Many police departments across the state responded to our FOIA request with documents. No police department or attorney raised the same legal objection you did. Most likely, that is because the legal analysis on which you relied, by referring to a 20005 Delaware Attorney General's opinion, is wrong.

Your letter states that you are denying our request under the FOIA exemption provided by 29 *Del. C.* §10002(g)(16)(a.5.A), and the Attorney General's opinion refers to a statute by that citation. At present, there is no statutory provision with that citation, but there is a 29 *Del. C.* §10002(g)(17)(a.5.A). I assume that is what you meant, and speculate that your understanding of the statute is based on the quotation of the statute by that opinion. However, the opinion fails to quote the entire provision. Reading all of §10002(g)(17)(a.5.A) shows that it doesn't support your decision – or the result reached by the Attorney General's opinion.

The Attorney General's opinion is based on two oversights.

First, it quotes only the first sentence of the statutory provision and omits the rest, stating "FOIA exempts from disclosure A [sic] [t]hose 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." 2005 Del. AG LEXIS 16, \*5. It omits the following language, which makes clear that you cannot rely on it to deny our request:

The only items that are protected from disclosure by this paragraph are:

A. Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments or to the response or deployment plans; and

B. 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 government officials related to domestic preparedness for criminal acts against United States citizens or targets.

Obviously, those protections do not apply to the taser material we requested.

Second, the opinion relies on two federal decisions, *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978) and *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9<sup>th</sup> Cir. 1980), which provide no support for the reasoning or conclusion of the Attorney General's opinion, since they apply statutory provisions that bear no resemblance to §10002(g)(16)(a.5.A).

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE

June 10, 2011  
Page | 2

Please confirm promptly that you will make the materials requested by our FOIA request available immediately. To some extent we will not need photocopies, because we may already have them. However, the documents we have are or may be subject to a protective order entered in *Hale v. Wilmington*. I am waiting to get a document from Mike Cochran that will let me determine whether we need to return the documents to him. If it is determined that we do, and he wants them returned before you recognize that they must be disclosed under FOIA, my plan is to request that he hold them in safekeeping while the FOIA issue is resolved. It would make no sense for them to be shredded, only to be reprinted when you respond to the FOIA request. I have not read the documents, excepted for their titles, and will not do so until this issue is resolved. One is a notebook that I assume we received from Richards Layton with the title, in part, "WPD White Book and Directives" and the other is entitled "Use of Force/Departmental Weapons Directive: 6.7."

Sincerely yours,

*s/ Richard H. Morse*

Richard H. Morse

cc: [Cochran@rlf.com](mailto:Cochran@rlf.com) (by email)

Enclosure

rec'd 7/6/11



# City of Wilmington

James M. Baker, Mayor

Louis L. Redding City/County Building  
800 N. French Street  
Wilmington, Delaware 19801-3537

[www.WilmingtonDE.gov](http://www.WilmingtonDE.gov)  
Law Department  
(302) 576-2175

June 29, 2011

Richard H. Morse  
Legal Director  
ACLU  
100 W. 10<sup>th</sup> Street, Suite 603  
Wilmington, DE 19801

**RE: Freedom of Information Act Request**

Dear Mr. Morse:

The response to your June 10, 2011 letter is the City continues to rely upon the opinion of the Attorney General on this issue. Therefore, your FOIA request is denied.

Please feel free to contact me if any further assistance is necessary.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Martin C. Meltzer", with a long horizontal flourish extending to the right.

Martin C. Meltzer  
Assistant City Solicitor

MCM



**Wilmington**  
In the middle of it all

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## Richard Morse

---

**From:** Brenda James-Roberts <BJAMES@ci.wilmington.de.us>  
**Sent:** Monday, August 22, 2011 2:24 PM  
**To:** Richard Morse  
**Cc:** John Sheridan; Rosamaria Tassone; Marty Meltzer; Betsy Power; Faye Oakes  
**Subject:** RE: ACLU FOIA Request Denial - - Use of Force Policies  
**Attachments:** FOIAOpinion0719\_001.pdf

Mr. Morse I appreciate your giving me the opportunity to review the security exemption provision to FOIA and the 2005 Delaware Attorney General's ("AGs") Opinion interpreting it.

Be advised that the City's position as stated to you by ACS Meltzer remains unchanged.

In addition, the attached AGs opinion lends further support for the City's position that the information requested is not subject to disclosure under FOIA.

Because the City has a good faith basis to rely upon the AGs Opinions, please consider this missive the City's final position on the matter.

Thank you.

Brenda James-Roberts, Esquire  
Senior First Assistant City Solicitor  
City of Wilmington Law Department  
Louis L. Redding City/County Building  
800 N.French Street, 9th Floor  
Wilmington, DE 19801  
Phone: (302) 576-2186  
Fax: (302) 571-4565  
Email: [bjames@wilmingtonde.gov](mailto:bjames@wilmingtonde.gov)  
Web: <http://www.wilmingtonde.gov>

"Never compare your beginning to someone else's middle. Any worthwhile pursuit is a process..."

---

**From:** Brenda James-Roberts  
**Sent:** Tuesday, August 02, 2011 11:14 AM  
**To:** 'Richard Morse'  
**Cc:** John Sheridan; Rosamaria Tassone; Marty Meltzer; Betsy Power; Faye Oakes  
**Subject:** RE: ACLU FOIA Request Denial - - Use of Force Policies

Thank you Mr. Morse.

I believe another 2 weeks would be sufficient.

Should that change, I will let you know.

Brenda James-Roberts, Esquire  
Senior First Assistant City Solicitor  
City of Wilmington Law Department  
Louis L. Redding City/County Building  
800 N.French Street, 9th Floor  
Wilmington, DE 19801

Phone: (302) 576-2186  
Fax: (302) 571-4565  
Email: [bjames@wilmingtonde.gov](mailto:bjames@wilmingtonde.gov)  
Web: <http://www.wilmingtonde.gov>

"Never compare your beginning to someone else's middle. Any worthwhile pursuit is a process..."

**From:** Richard Morse [<mailto:rmorse@aclu-de.org>]  
**Sent:** Tuesday, August 02, 2011 8:00 AM  
**To:** Brenda James-Roberts  
**Cc:** John Sheridan; Rosamaria Tassone; Marty Meltzer; Betsy Power; Faye Oakes  
**Subject:** RE: ACLU FOIA Request Denial - - Use of Force Policies

Ms. James-Roberts,

As I told you three weeks ago, I'm willing to give the City a reasonable amount of time to figure out what it thinks it should do. I understood from our conversation you needed two weeks. That apparently wasn't enough. How much more time do you need?

Rich

**From:** Brenda James-Roberts [<mailto:BJAMES@ci.wilmington.de.us>]  
**Sent:** Monday, August 01, 2011 3:00 PM  
**To:** Richard Morse  
**Cc:** John Sheridan; Rosamaria Tassone; Marty Meltzer; Betsy Power; Faye Oakes  
**Subject:** RE: ACLU FOIA Request Denial - - Use of Force Policies

Mr. Morse, we spoke on July 13 about the referenced issue.

I informed you that we would review the matter and get back to you.

In fact, the matter has not yet been assigned for review as our Research Assistant is returning from vacation on tomorrow and she had several other matters to conclude before leaving.

I will assign it to her on tomorrow. As soon as the matter is reviewed, I will let you know the City's final response.

In the interim, if you believe you must file suit, I suggest you do so.

Thank you.

Brenda James-Roberts, Esquire  
Senior First Assistant City Solicitor  
City of Wilmington Law Department  
Louis L. Redding City/County Building  
800 N. French Street, 9th Floor  
Wilmington, DE 19801  
Phone: (302) 576-2186  
Fax: (302) 571-4565  
Email: [bjames@wilmingtonde.gov](mailto:bjames@wilmingtonde.gov)  
Web: <http://www.wilmingtonde.gov>

"Never compare your beginning to someone else's middle. Any worthwhile pursuit is a process..."

**From:** Richard Morse [<mailto:rmorse@aclu-de.org>]  
**Sent:** Friday, July 29, 2011 8:10 PM

To: Margaret Scatasti  
Cc: Marty Meltzer; Brenda James-Roberts  
Subject: ACLU FOIA Request Denial

John,

A FOIA request that we directed to the Wilmington Police Department was denied by Martin Meltzer. Because I do not know if you were involved in the decision, I write to give you an opportunity to change your office's decision before we file suit.

I've attached the correspondence between me and Mr. Meltzer on the matter. Because I was told you were out for most of July, I spoke three weeks ago with Brenda James-Roberts about the matter. She was going to review the matter with another attorney and get back to me within two weeks, but I haven't heard anything.

Rich

RICHARD H. MORSE  
Legal Director  
ACLU of Delaware  
100 W. 10<sup>th</sup> Street, Suite 603  
(302) 654-5326, ext. 103 (voice)  
(302) 654-3689 (fax)  
[rmorse@aclu-de.org](mailto:rmorse@aclu-de.org)

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July 25, 2011

Chief Michael J. Szczerba  
Chief of Police  
c/o City Law Department  
300 North Walnut Street  
Wilmington, DE 19801

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE  
100 W 10TH ST, SUITE 603  
WILMINGTON, DE 19801  
T/302-654-5326  
F/302-654-3689  
WWW.ACLU-DE.ORG

NORMAN M MONHAIT  
PRESIDENT

KATHLEEN M MacRAE  
EXECUTIVE DIRECTOR

RICHARD H MORSE  
LEGAL DIRECTOR

Re: FOIA Request – Cell Phone Location Records

Dear Chief Szczerba:

Pursuant to the Delaware Freedom of Information Act, 29 *Del. C.* § 10001 et seq., I request access to and copies of the public records referred to in the Exhibit to this letter in the possession, custody or control of the Wilmington Police Department.

If you believe that any of the requested records are exempt and need not be disclosed, and intend to withhold documents on that basis, please explain the basis for your belief, and for each document or portion withheld state its date, sender, recipient and author, and describe its contents sufficiently to enable an independent evaluation of the possible exemption, so that I may decide whether a judicial challenge is appropriate.

I also request a waiver of all fees for this request. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in a commercial interest. The information is being requested on behalf of the American Civil Liberties Union of Delaware, a public interest organization that seeks the information for use in the public interest.

Please produce the documents within 21 days of the date of this letter. If you have any questions regarding the scope of the request or any other matters, please contact me at (302) 654-5326, ext.103 or [rmorse@aclu-de.org](mailto:rmorse@aclu-de.org).

Thank you.

Sincerely yours,

Richard H. Morse



## EXHIBIT

We request access to and copies of all records in your possession relating to your acquisition of cell phone location records. This request encompasses records regarding real-time tracking and records regarding where cell phones have been in the past, and it encompasses all available methods of locating cell phones, including "cell site," triangulation, and GPS. This request includes but is not limited to the following records:

- 1 • Policies, procedures and practices you follow to obtain cell phone location records
- 2 • Data retention policies, detailing how long cell phone location records are kept, databases in which they are placed, and agencies (federal, state and local) with which they are shared
- 3 • The use of cell phone location records to identify "communities of interest (detailing those persons who have been called, or called by a target)" in investigations
- 4 • The use of cell phone location records to identify all of the cell phones at a particular location
- 5 • Your use of "digital fences" (systems whereby you are notified whenever a cell phone comes within a specific geographic area)
- 6 • The legal standard (e.g. probable cause, relevance) you proffer to obtain cell phone location records
- 7 • Judicial decisions and orders ruling on your applications to obtain cell phone location records
- 8 • Statistics regarding your use of cell phone location records, including the number of emergency requests for which no court order was obtained
- 9 • The form in which cell phone location records are provided (hard copy, through specific online databases)

- aka 11
- 10 • Communications with cell phone companies and providers of location-based services regarding cell phone location records, including
    - company manuals, pricing, and data access policies
    - invoices reflecting payments for obtaining cell phone location records
    - instances in which cell phone companies have refused to comply with a request or order



Louis L. Redding City/County Building 800 French Street Wilmington, DE 19801

**FREEDOM OF INFORMATION ACT REQUEST FORM**

NAME: Richard H. Morse Date: 7/25/11  
AGENCY: ACLU of Delaware  
ADDRESS: 100 W. 10th St., Suite 603, Wilmington, DE 19801  
PHONE: 302-654-5326 x103

This is a request for records under the Delaware Freedom of Information Act, 29 Del. C. §10001 et seq. and the Rules of Public Access to Records of the City of Wilmington.

PROPERTY ADDRESS(ES),  
COMPANY, INDIVIDUAL OR  
PROJECT NAME(S) AND/OR  
CONTRACT NUMBER:

See attached

INFORMATION REQUESTED:

See attached

REQUESTOR'S SIGNATURE:

Richard H. Morse

- The City's Rules of Public Access to Records require acknowledgment\* of a written request within fifteen (15) business days. Acknowledgment means:

- I. Production of the requested documents;
- II. Denial of the request with stated reasons therefore; or
- III. Notification that an extension is needed and a statement about the time period in which the response will be made.

\* **STAFF IS ENCOURAGED TO RESPOND AS SOON AS PRACTICABLE.**

- Copies are \$.50 per page; \$18.50 for police and/or fire reports.
- Payment shall be made in cash, by money order, business check or certified check made payable to the City of Wilmington (Identification may be requested).
- I am willing to pay: \$            - Call me at above number with the cost.
- If costs exceed this figure, please contact me at telephone number:           .

bjr

12/08



# City of Wilmington

James M. Baker, Mayor

Louis L. Redding City/County Building  
800 N. French Street  
Wilmington, Delaware 19801-3537

www.WilmingtonDE.gov  
Law Department  
(302) 576-2175

August 19, 2011

Richard H. Morse  
Legal Director  
ACLU  
100 W. 10<sup>th</sup> Street, Suite 603  
Wilmington, DE 19801

**RE: Freedom of Information Act Request**

Dear Mr. Morse:

This is the City's formal response to your Freedom of Information Act (FOIA) request wherein you asked for cell phone location records.

In reference to bullets 1, 2, 3, 4, 5, on your exhibit attached to your letter, your request is denied pursuant to 29 Del. C. §10002(g)(16)(a1) and (5a). Documents requested under those exemptions pertain to police procedures, tactics, and/or deployment plans, which if disclosed may threaten public safety.

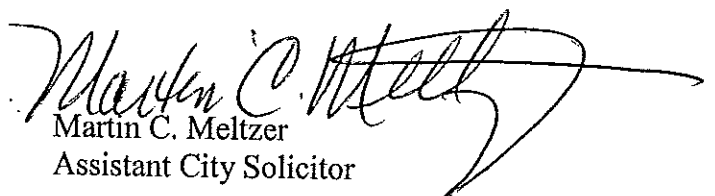
As for bullets 6, 7, this request is outside of the parameters of FOIA. The City is not required to produce any legal research and it can be considered Attorney/Work Product.

Bullets 8 and 9 are outside the parameters of FOIA. The City is only required to produce public documents and not create any statistical analysis or information as to what type of form records are kept.

Concerning bullet 11, again you are requesting information that pertains to police procedures, tactics, and deployment in relation to criminal activity. Please refer to my answer from bullets 1 through 5.

Please feel free to contact me if any further assistance is necessary.

Sincerely yours,

  
Martin C. Meltzer  
Assistant City Solicitor

- bullets 1-5: ↓  
- should be (17), not (16)  
- bullet (11) - should be (10) <sup>bullet</sup>

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