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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 15-IB14

December 29, 2015

VIA EMAIL AND US MAIL

Jonathan Rudenberg
MuckRock News
DEPT MR 17984
PO Box 55819
Boston, MA 02205-5819

Re: June 17, 2015 FOIA Petition Concerning the Delaware Department of Safety and Homeland Security, Division of State Police

Dear Mr. Rudenberg:

We write in reference to your June 17, 2015 petition (the "**Petition**") seeking a determination of whether the Delaware Department of Safety and Homeland Security, Division of State Police (the "**State Police**") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("**FOIA**"), by failing to provide access to public records. Our determination is set forth below.

I. BACKGROUND

The FOIA request submitted to the State Police (the "**Request**") asked for copies of the following records:

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

3. All requests by the Harris Corporation or any other corporation or any state or federal agencies, to the State Police to keep confidential any aspect of the State Police's possession and use of cell site simulators, including any non-disclosure agreements between the State Police and the Harris Corporation and any other corporation, or any state or federal agencies, regarding State Police's possession and use of cell site simulators.
4. Policies and guidelines of the State Police governing use of cell site simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.
5. Any communications or agreement between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of site simulators.
6. Any communications, licenses, or agreements between the State Police and the Federal Communications Commission or the Delaware Public Service Commission concerning use of cell site simulators.
7. Records reflecting the number of investigations in which cell site simulators were used by the State Police or in which cell site simulators owned by the State Police were used and the number of those investigations that have resulted in prosecutions.
8. Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used as part of the underlying investigation by the State Police or in which cell site simulators owned by the State Police were used as part of the underlying investigation.
9. All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the State Police in criminal investigations or authorizing use of cell site simulators owned by the State Police in criminal investigations, as well as any warrants or orders, denials of warrants or orders and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date and docket number for each sealed document.¹

The State Police, through Colonel Nathaniel McQueen, Jr., responded to the Request, declining to provide any records. Col. McQueen explained that there is "a nondisclosure agreement with the Federal Bureau of Investigation (FBI)," but that the information in the

¹ Email from J. Rudenberg to K. Chandler dated May 15, 2015.

agreement is the property of the FBI and may only be distributed to certain persons and entities unless permission is first obtained from the FBI Operational Technology Division.² He then stated: “As to the remaining items requested, per the nondisclosure agreement the Delaware State Police may not discuss these matters outside of law enforcement. A better option may be to direct your requests to the FBI, Harris Corporation or Boeing.”³

The Petition to DOJ asserted that the State Police violated FOIA because it provided no records and did not cite any FOIA exemptions. The Petition also stated: “For additional context, the nondisclosure agreement does not prevent police departments from disclosing information about cell site simulators.” The Petition provided a link to a Washington Post article in support.⁴

In response to the Petition (the “**Response Letter**”), the State Police again relies upon the nondisclosure agreement between the State Police and the FBI (the “**Agreement**”) and argues that it has committed no FOIA violation.⁵ The State Police contends that the Agreement requires that all information regarding cell site simulator technology be kept confidential,⁶ and that when the State Police denied your Request, it referred you to the FBI because that is what the Agreement required.⁷

Nevertheless, the State Police states that it has now conferred with the FBI and has obtained permission to produce the records responsive to category nos. 1 and 4, as long as certain information is redacted. The State Police also represents that it has no records responsive to category nos. 2 and 5-9 of the Request. In connection with category no. 3, however, the State Police continues to argue that it may not provide the Agreement because it is, by its terms, a confidential document. The State Police contends that the Agreement is thus exempt from disclosure “by statute or common law” pursuant to 29 *Del. C.* §10002(1)(6).⁸ However, counsel

² Letter from Col. N. McQueen to J. Rudenberg dated June 5, 2015. This is an apparent acknowledgement that the document is responsive to at least one category.

³ *Id.* at 2.

⁴ See Ellen Nakashima, *FBI Clarifies Rules on Secretive Cellphone-Tracking Devices*, WASHINGTON POST (May 14, 2015), available at https://www.washingtonpost.com/world/national-security/fbi-clarifies-rules-on-secretive-cellphone-tracking-devices/2015/05/14/655b4696-f914-11e4-a13c-193b1241d51a_story.html.

⁵ The State Police responded through counsel.

⁶ Response at 3-4.

⁷ *Id.* at 3.

⁸ *Id.* at 4 (“[T]he request falls within the exception 29 *Del. C.* § 10002(1)(6): ‘[A]ny records specifically exempted from public disclosure by statute or common law’ due to the fully-executed non-disclosure agreement requiring information concerning cell site simulators be kept confidential.”).

for the State Police informed us that the FBI will not object to the release of the Agreement if required by FOIA.

II. APPLICABLE LAW

FOIA defines a “public record” as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes.”⁹ Pursuant to 29 *Del. C.* §10003(a), “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”

The mandate to provide access to public records is limited in sections 10003(h)(1) and (2). A public body is permitted to deny access to records under some circumstances, but it must “indicate the reasons for the denial.”¹⁰ The statute does not require a public body to cite a specific FOIA exemption when denying access to records, but Delaware courts have determined that any denial of records must, in fact, be authorized by FOIA.¹¹ The burden of proof rests upon the custodian of records to justify the denial of access to the records.¹²

FOIA also provides that certain records are not “public records” and need not be provided in response to a FOIA request. Section 10002(l) states, in pertinent part:

For purposes of this chapter, the following records shall not be deemed public:

(6) Any records specifically exempted from public disclosure by statute or common law[.]

⁹ 29 *Del. C.* §10002(l).

¹⁰ 29 *Del. C.* §10003(h)(2).

¹¹ See *Gannett Co. v. Delaware Criminal Justice Info. Sys.*, 768 A.2d 508, 511 (Del. Super. 1999), *aff'd* 765 A.2d 951 (Del. 2000) (“In order to achieve [a clear and comprehensive policy of disclosure in order to ensure government accountability], FOIA requires the disclosure of all ‘public records’ as provided by § 10002(d).”); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 781 (Del. Super. 1995) (holding that a public body’s records are available for inspection by the public unless they fall within any of the exceptions to the term “public record”).

¹² 29 *Del. C.* §10005(c).

III. DISCUSSION

The Petition states that the State Police violated FOIA because it did not cite any statutory exemption to justify its refusal to disclose records regarding the cell site simulators. As noted above, however, FOIA does not require a public body to cite a specific exemption when denying access to public records. Rather, FOIA requires that the public body provide a reason for denying access to the records, and the State Police did so. Nevertheless, because it is also clear that the reason provided by a public body to support a denial to provide records must be one that is proper under FOIA, the validity of the State Police's arguments regarding the denial of records may need to be addressed.

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 4.¹³ 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.

In addition, 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, and we need not consider whether the requested records could be withheld under FOIA if they did exist.¹⁴

That leaves category no. 3. To repeat, the records requested are:

All requests by the Harris Corporation or any other corporation or any state or federal agencies, to the State Police to keep confidential any aspect of the State Police's possession and use of cell site simulators, including any non-disclosure agreements between the State Police and the Harris Corporation and any other corporation, or any state or federal agencies, regarding State Police's possession and use of cell site simulators.¹⁵

¹³ Counsel's response to category no. 4 states: "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. Should such documents exist, the FBI has allowed DSP to provide them so long as any reference to specific elements of technology or components would be redacted." Response Letter at 7. We read this as an intention to provide all records, subject to the identified redactions, similar to that stated in response to category no. 1.

¹⁴ *See Del. Op. Att'y Gen.* 07-IB21 (Oct. 22, 2007) (quoting *Del. Op. Att'y Gen.* 05-IB19 (Aug. 1, 2005)) ("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.").

¹⁵ Response Letter at 7.

The State Police acknowledges that the Agreement is responsive to the request, but it maintains that the Agreement may be withheld pursuant to FOIA. Specifically, the State Police contends:

The only non-disclosure agreement regarding cell site simulators that the DSP is a party to is the one with the FBI. As stated earlier, this agreement is a confidential document pursuant to its terms. This request falls within the exemption for records made exempt under common law such as a contract or confidentiality agreement.¹⁶

The State Police's argument implicitly acknowledges that Delaware's FOIA contains no express exemption for nondisclosure agreements or confidentiality agreements. Rather, according to the State Police, when a document is confidential according to its terms,¹⁷ the document is protected by the common law from disclosure and, therefore, need not be provided pursuant to 29 *Del. C.* §10002(1)(6).

The only authority the State Police cites in support of its argument is the following: "A confidentiality agreement ... is intended and structured to prevent a contracting party from using and disclosing the other party's confidential, nonpublic information except as permitted by the agreement." *Martin Marietta Materials Inc. v. Vulcan Materials, Co.*, 68 A.3d 1208, 1219 (Del. 2012). In *Martin Marietta*, the statement was intended to distinguish a confidentiality agreement from a standstill agreement. *Id.* At issue in the underlying litigation was whether one party had breached the terms of its confidentiality agreement with the other party. The case does not address the issue raised by this Petition.

Thus, the argument we infer from the quoted language is that because confidentiality agreements are generally enforceable by their parties against each other at common law, the Agreement is "specifically exempted from public disclosure by ... common law." We disagree that this general principle constitutes a "specific exempt[ion]" that will satisfy section 10002(1)(6). We examined a similar issue in *Del. Op. Att'y Gen.* 02-IB24, and our opinion makes clear that neither the fact that an agreement is generally enforceable nor that the parties

¹⁶ *Id.* We note that this response is narrower than the scope of records sought. It is not clear whether the response is intended to constitute a representation that the Agreement is the only record responsive to category no. 3. If there are other records constituting a request by any corporation, state agency or federal agency to keep confidential any aspect of the State Police's possession and use of cell cite simulators, the analysis applies to those records as well.

¹⁷ We have reviewed the Agreement. In an abundance of caution, we describe here only the language to which the State Police referred. The first page of the Agreement states that the document is "Law Enforcement Sensitive (LES)," and may not be distributed beyond "the Federal Government (and its contractors), U.S. intelligence, law enforcement, public safety or protection officials, and individuals with a need to know."

agree to maintain its confidentiality is sufficient to invoke the exemption or to “override the public records requirements of FOIA.”¹⁸

The State Police has cited no other statute or common law that specifically exempts confidentiality or nondisclosure agreements from disclosure under FOIA. Neither did we find any case holding that a nondisclosure agreement that is not itself covered by an exemption in a state’s Sunshine Law is protected from disclosure.¹⁹ We therefore conclude that the Agreement is a public record under Delaware’s FOIA.

¹⁸ *Cf. Del. Op. Att’y Gen.* 02-IB24, 2002 WL 31867898, at *3, 4-5 (Oct. 1, 2002) (examining potential bases to withhold settlement agreement between New Castle County and one of its employees, including exemption under predecessor to section 10002(l)(6)).

¹⁹ Generally, other jurisdictions agree that confidentiality or nondisclosure agreements entered into by public bodies cannot be used to prevent the disclosure of public documents. *See, e.g., State ex rel. Sun Newspapers v. Westlake Bd. of Edn.*, 601 N.E.2d 173, 175 (Ohio Ct. App. 1991) (“A public entity cannot enter into enforceable promises of confidentiality with respect to public records.”); *Tex. Att’y Gen. Op.* OR2003-0948, 2003 WL 1691268, at *5 (Feb. 12, 2003) (“[A] governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act.”); *Haw. Op. Att’y Gen.* No. 90-39, 1990 WL 482387, at *13 (Dec. 31, 1990) (“[A]n agency may not, after the effective date of [Hawaii’s Sunshine Law], enter into a ‘confidentiality agreement’ which prohibits or restricts the agency’s disclosure of government records which are not protected from disclosure by one of the [Sunshine Law’s] exceptions to access.”).

Conclusion

We determine that the Agreement between the State Police and the FBI is a public record subject to disclosure under Delaware's FOIA. We ask the State Police to provide a copy of that agreement to you within 10 calendar days of the date of this determination. Either party may appeal this determination to the Superior Court of the State of Delaware.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs".

Danielle Gibbs
Chief Deputy Attorney General

cc: Rae Mims, Deputy Attorney General (by email)