

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JONATHAN RUDENBERG)
Petitioner Below,)
Appellant,)

v.)

C.A. # N16A-02-006 RRC)

DELAWARE DEPARTMENT OF)
JUSTICE, THE CHIEF DEPUTY)
ATTORNEY GENERAL & DELAWARE)
DEPARTMENT OF SAFETY AND)
HOMELAND SECURITY, DIVISION OF)
STATE POLICE,)
Respondents Below,)
Appellees.)

CERTIFICATION OF RECORD

I, Kim Siegel, FOIA Coordinator, as custodian of the records for the Delaware Department of Justice, do hereby certify that the documents contained herein are copies of the original records as maintained in the files for the Delaware Department of Justice for the determination in this matter.

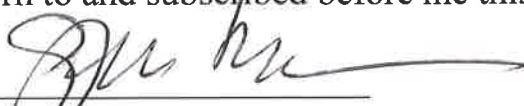
In testimony whereof, I have hereunto set my hand of office at Wilmington, New Castle County, Delaware, this 29th day of March, 2016. I further certify that the above information is true and correct.



Kim Siegel
FOIA Coordinator

STATE OF DELAWARE)
)
COUNTY OF NEW CASTLE)

Sworn to and subscribed before me this 29th day of March, 2016



Notary Public
STUART B. DZOWOS, D.A.C.
(My commission expires N/A.)
Bar ID 427
Per 24 Del.C § 4323

Letter from Jonathan Rudenberg to FOIA Coordinator re: Rudenberg Appeal dated June 17, 2015	000001 - 000006
Letter from Danielle Gibbs to Jonathan Rudenberg re: acknowledging receipt of petition dated June 23, 2015	000007
Letter from Danielle Gibbs to Rae Mims re: Rudenberg FOIA appeal dated June 23, 2015	000008
Letter from Rae Mims to Katisha Fortune re: FOIA appeal response from DSP dated July 6, 2015	000009 - 000017
DSP FBI Nondisclosure Agreement	000018 - 000023
Letter from Katisha Fortune to Jonathan Rudenberg re status dated July 13, 2015	000024
Letter from Ryan R. Tack-Hooper to Katisha Fortune re: representing Rudenberg dated December 11, 2015	000025
Final DSP FOIA Opinion (15-IB14) regarding cell site simulators dated December 29, 2015	000026 - 000034
Letter from Ryan R. Tack Hooper to Danielle Gibbs re: Second Petition for Review of FOIA Violation dated February 17, 2016	000035 - 000039
Attorney General Opinion 16-IB03 dated March 4, 2016	000040 - 000042

Delaware Department of Justice
Attn: Edward Black, Deputy Attorney General, FOIA Coordinator
820 N. French Street
Wilmington, DE 19801
Fax: 302-577-5866

June 17, 2015

To Whom It May Concern:

An incomplete version of this appeal was submitted to your office via mail yesterday. Please accept in its place this revised version.

Thank you very much for your help.

000001

FOIA APPEAL

Delaware Department of Justice
Attn: Edward Black, Deputy Attorney General, FOIA Coordinator
820 N. French Street
Wilmington, DE 19801
Fax: 302-577-5866

CC:
Delaware State Police
1441 N. DuPont Highway P.O. Box 430
Dover, Delaware 19903-0430

June 17, 2015

To Whom It May Concern:

This is a petition under the Delaware Freedom of Information Act. I request that you review my request sent to the Department of Safety and Homeland Security Division of State Police on May 15, 2015.

My request was for various records containing information about the department's cell site simulators. In a response dated June 5, 2015 Colonel Nathaniel McQueen, Jr. denied my request citing a nondisclosure agreement with the Federal Bureau of Investigation. The letter did not cite any FOIA exemptions. Since no applicable exemptions were provided in the letter and no records were released, I believe a violation of the Freedom of Information Act has occurred.

For additional context, the FBI recently told the Washington Post that the nondisclosure agreement does not prevent police departments from disclosing information about cell site simulators: http://www.washingtonpost.com/world/national-security/fbi-clarifies-rules-on-secretive-cellphone-tracking-devices/2015/05/14/655b4696-f914-11e4-a13c-193b1241d51a_story.html

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response within 20 days as required by the statute.

Sincerely,

Jonathan Rudenberg

On June 9, 2015:

The request has been rejected, with the agency stating that the information or document(s) requested are exempt from disclosure.

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STATE OF DELAWARE
DEPARTMENT OF SAFETY AND HOMELAND SECURITY
DIVISION OF STATE POLICE
P.O. Box 430
DOVER, DELAWARE 19903

June 5, 2015

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

RE: Freedom of Information Act Request

Dear Mr. Rudenberg:

By email dated May 15, 2015, you made a request under the Delaware Freedom of Information Act (FOIA) for:

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 arrangement or agreement between the State Police and other law enforcement agencies in Delaware to share the use of cell site simulators, or any offers by the State Police to share the use of cell site simulators with other law enforcement agencies in Delaware.
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 or any other corporation, or any state or federal agencies, regarding the 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 agreements between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.

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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.

Stingrays and other cell site simulators impersonate a wireless service provider's cell tower, prompting cell phones and other wireless devices to communicate with them. Cell site simulators are commonly used in two ways: to collect information on all phones in a given location, or to track and locate particular phones.

Upon advice of the Delaware Department of Justice Deputy Attorney General assigned to the Delaware State Police, there is a nondisclosure agreement with the Federal Bureau of Investigation (FBI), "Law Enforcement Sensitive: the information in the nondisclosure agreement is the property of the Federal Bureau of Investigation (FBI) and may be distributed within the Federal Government (and its contractors), U.S. intelligence, law enforcement, public safety of protection officials and individuals with a need to know. Distribution beyond these entities without FBI Operational Technology Division authorization is prohibited." As to 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.

Sincerely,



Colonel Nathaniel McQueen, Jr.
Superintendent

On June 8, 2015:
To Whom It May Concern:

I wanted to follow up on the following Freedom of Information request, copied below, and originally submitted on May 15, 2015. Please let me know when I can expect to receive a response, or if further clarification is needed.

Thank you for your help.

On May 19, 2015:
Mr. Rudenberg,
Your request has been received and sent for legal review. I will provide a response within 15 business days. Thanks,
Kimberly

Kimberly H. Chandler
Delaware Dept. of Safety and Homeland Security
302.744.2667 (office)
302-632.7060 (cell)

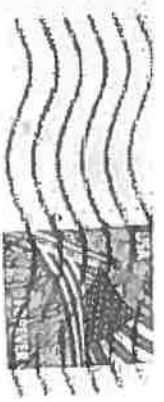
On May 15, 2015:
To Whom It May Concern:

Pursuant to Delaware's Freedom of Information Act, I hereby request the following records:

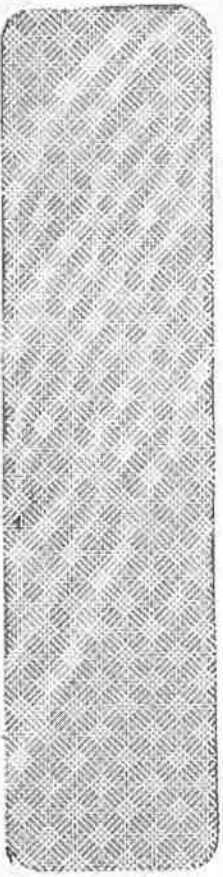
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2. Records regarding any arrangement or agreement between the State Police and other law enforcement agencies in Delaware to share the use of cell site simulators, or any offers by the State Police to share the use of cell site simulators with other law enforcement agencies in Delaware.
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 or any other corporation, or any state or federal agencies, regarding the 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 agreements between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of cell site simulators.
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

MUCKROCK
P.O. Box 55819 | Boston, MA 02205

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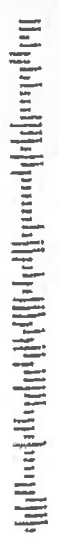


RECEIVED
JUN 22 2015
CIVIL DIV.



19801350305

FOIA APPEAL



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MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499

June 23, 2015

VIA U.S. MAIL

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

Re: FOIA Request to Division of State Police Dated May 15, 2015

Dear Mr. Rudenberg:

This will acknowledge receipt of your petition, received on June 22, 2015, alleging that the Delaware Department of Safety and Homeland Security, Division of State Police (the "State Police") violated the public records provisions of Delaware's Freedom of Information Act, 29 Del. C. §§ 10001-10006 ("FOIA").

Pursuant to FOIA Section 10005(e), I am forwarding your letter to the State Police's legal counsel, asking that they respond to your allegations within ten (10) calendar days. When we have the State Police's response, we will decide what further action is appropriate.

Very truly yours,

A handwritten signature in cursive script that reads "Danielle Gibbs".

Danielle Gibbs
Chief Deputy Attorney General

DG/jg

cc: Katisha D. Fortune, FOIA Deputy (via e-mail)
Rae Mims, Deputy Attorney General (via e-mail)

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MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-8630
CRIMINAL DIVISION (502) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-8499

June 23, 2015

VIA E-MAIL

Rae M. Mims
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750

RE: FOIA Request to Division of State Police Dated May 15, 2015

Dear Ms. Mims:

Enclosed is a letter, dated June 17, 2015 and received on June 22, 2015, from Mr. Jonathan Rudenberg, MuckRock News, alleging that the Delaware Department of Safety and Homeland Security, Division of State Police (the "State Police") violated the public records provisions of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 ("FOIA"). In accordance with 29 *Del. C.* § 10005(e), we are treating this complaint as a petition for a determination by this Office as to whether the State Police violated FOIA.

Please provide us with the State Police's response to the appeal, including the factual basis and any legal authorities for its position, by no later than Thursday, July 2, 2015. Please provide a copy of your response to Katisha Fortune.

Very truly yours,

A handwritten signature in cursive script that reads "Danielle Gibbs".

Danielle Gibbs
Chief Deputy Attorney General

DG/jg
Enclosures

cc: Katisha D. Fortune, FOIA Deputy (via e-mail)
Mr. Jonathan Rudenberg, (via U.S. mail)

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MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
KENT COUNTY
102 WEST WATER STREET
DOVER, DELAWARE 19904

CIVIL DIVISION (302) 739-7641
FAX (302) 739-7652
CRIMINAL DIVISION (302) 739-4211
FAX (302) 739-6727

July 6, 2015

Katisha Fortune, Deputy Attorney General
Department of Justice
820 North French Street
Wilmington, DE 19801

Dear Ms. Fortune:

I submit this letter on behalf of the Department of Safety and Homeland Security ("DSHS"), Division of State Police ("DSP) in response to the June 23, 2015 letter from Chief Deputy Attorney General Danielle Gibbs in reference to a FOIA request made to the State Police on May 15, 2015.

Procedural History

On or about May 15, 2015, Jonathan Rudenberg of Muckrock.com in Boston, MA, sent to the DSHS an electronic request pursuant to the Delaware Freedom of Information Act, 29 *Del.*

C. §§ 10001-10006 ("FOIA") seeking the following:

- 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

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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.

DSP responded in a June 5, 2015 letter explaining the existence of a non-disclosure agreement with the Federal Bureau of Investigation (“FBI”) covering all documents responsive to Mr. Rudenberg’s request and, pursuant to the non-disclosure agreement’s terms, informed Mr. Rudenberg that he should contact the FBI for this information. On or about June 17, 2015, Mr. Rudenberg/Muckrock.com filed a petition of appeal with the Department of Justice regarding his May 15, 2015 request to DSP. As there were no specific FOIA exemptions enumerated, Mr. Rudenberg assumed the DSP violated FOIA. This letter, provided in response to Mr. Rudenberg’s complaint, is submitted to clarify the basis for the decision of the DSP to refer Mr. Rudenberg to the Federal authorities as it is directed to do under terms of the non-disclosure agreement between DSP and the FBI.

ANALYSIS

Cell site simulators allow law enforcement to gather information about all cell phones in a given area and to track individuals through their cell phone. Cell site simulators accomplish this by appearing to be a cell tower to cell phones in range. Cell phones bounce off cell site simulators as they would a normal cell tower, allowing law enforcement to collect information. This technology belongs to the Federal Bureau of Investigation. The FBI shares the technology with state, local, and municipal police agencies, so long as these agencies sign a comprehensive non-disclosure agreement. *See* Exhibit A. Under this agreement, law enforcement agencies, such as the Division of State Police, agree to hold *any information* concerning the technology confidential. In addition, the non-disclosure agreement itself is to be kept confidential per the language of agreement.

Despite the news article shared by Mr. Rudenberg, during conversations with the FBI last week, undersigned counsel was informed that the FBI’s non-disclosure agreements that have

been signed by state, local and municipal police agencies are still active, and the expectation is that all information concerning the cell site simulator technology will be kept confidential. The FBI states the *Washington Post* article referenced by Mr. Rudenberg in his appeal is not a change in stance or a change in the non-disclosure agreement. Rather, it is a clarification of the purpose and meaning of the non-disclosure agreement. Law enforcement agencies utilize cell site simulator technology in situations that result in arrests, criminal charges, and subsequent prosecutions. According to the FBI, these law enforcement officers were testifying in criminal trials, invoking the non-disclosure agreement whenever they were cross-examined about their use of a cell site simulator. This, the FBI clarified, was not the purpose of the non-disclosure agreement. Law enforcement officers can discuss on the stand the fact that they utilized cell site simulators in making an arrest, and they can confirm that there is a nondisclosure agreement between their agency and the FBI. Here, Mr. Rudenberg has requested documents that clearly fall within the non-disclosure agreement. In addition, the FBI has provided over 5,000 pages of documents to Muckrock.com, much of it heavily redacted of any mention of the technology, that Muckrock.com has been posted on its website. Nonetheless, in the interest of clarity, DSP contends the FOIA request by Mr. Rudenberg falls under three specific exceptions to the definition of a “public document,” and, therefore need not be produced.

First, the 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. Any breach of confidentiality by DSP would leave the agency vulnerable to possible legal action or the FBI removing the technology. “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 (Del. 2012). Pursuant to the non-disclosure agreement, DSP notified the requestor of the existence of the non-disclosure agreement, directed him to the FBI, and notified the FBI about the request.

Second, the request falls within the exception in 29 *Del. C.* § 10002(1)(2): “[T]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature.” The FBI holds the cell site simulator technology confidential as it is non-public and only available to law enforcement who execute a non-disclosure agreement.

Under the Delaware Trade Secret Act, a trade secret:

Shall mean information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

6 *Del. C.* § 2001(4). Cell site simulator technology is held exclusively by the FBI through two suppliers – Boeing and the Harris Corporation and provided only to law enforcement agencies upon an agreement to hold all information relating to the technology confidential. Law enforcement agencies also pay the equivalent of a user fee or lease for the technology.

Finally, while to the DSP has historically provided documents in response to out-of-state FOIA requests, legally Mr. Rudenberg/Muckrock.com from Boston, MA is not entitled to these documents. The U.S. Supreme Court ruled that such out-of-state requestors are not entitled to documents under FOIA and state statutes that limit to in-state only, such as Delaware, do not violate the law. *McBurney v. Young*, 569 U.S. ____ (Apr. 29, 2013)(Docket 12-17). As can be seen by the request of Mr. Rudenberg/Muckrock.com, these types of requests can be very time-

consuming for Delaware agencies, boards and commissions. Many of the documents have to be obtained, reviewed, and redacted.

Nonetheless, in an effort to be cooperative, DSP contacted the FBI regarding the appeal filed by Mr. Rudenberg. Counsel for both parties participated in a conference call on July 1, 2015 and the FBI and DSP have reached an agreement as to some limited production that can be made.

(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.

The FBI has allowed DSP to provide these documents so long as any reference to specific elements of the technology or components is redacted. In particular, part numbers, serial numbers, unit costs, specific software updates, or any description of the product may not be produced.

(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.

There are no records responsive to this request as this practice is not permitted under the non-disclosure agreement. Any agency that receives cell site simulator technology must sign a non-disclosure agreement with the FBI.

(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.

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.

(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.

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 the technology or components would be redacted.

(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.

No records exist that are responsive to this request.

(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.

No records exist that are responsive to this request.

(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.

No records exist that are responsive to this request. Moreover, DSP is not required to compile or create a statistic analysis in order to create a new document responsive to a FOIA request.

(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.

No records exist that are responsive to this request. Moreover, DSP is not required to compile or create a statistic analysis in order to create a new document responsive to a FOIA request. Further, this information falls within an exemption to FOIA cited in the State Bureau of Investigation portion of the Delaware Code. Pursuant to 11 *Del. C.* § 8502(4), "Criminal history record information" shall mean information collected by state or federal criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision and release. "Criminal history record information" shall include the names and identification numbers of police, probation, and parole officers, and such

information shall not be within the definition of a "public record" for purposes of the Freedom of Information Act, Chapter 100 of Title 29.

(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.

DSP does not keep a central database of all applications submitted to state and federal courts for search warrants or orders. Moreover, these records fall under the FOIA exemption 29 *Del. C. § 10002(l)(3)*, investigatory files compiled for civil or criminal law enforcement purposes. These would certainly contain information that is held confidential under the non-disclosure agreement, as well as other confidential information such as confidential informant information, and the procedures by law enforcement as part of the search warrant process.

Please do not hesitate to contact me if I can provide any further assistance.

Respectfully,

/s/ Rae M. Mims

Rae Meredith Mims, Deputy Attorney General
102 W. Water Street
Dover, DE 19904
Counsel for Delaware State Police



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

July 13, 2015

VIA U.S. MAIL

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

Re: FOIA Petition Dated May 15, 2015

Dear Mr. Rudenberg:

The Delaware State Police (“DSP”) responded to our request for information regarding your FOIA Petition on July 6, 2015. A copy of that response is attached hereto.

The response prompted additional questions, and we are following up with the DSP and its counsel to request additional information. Once we complete our investigation, our office will be in a position to issue a determination declaring whether a violation of FOIA has occurred or is about to occur.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Katisha D. Fortune".

Katisha D. Fortune
Deputy Attorney General

KDF/jg
w/enclosure

cc: Rae Mims, Deputy Attorney General (via e-mail)

000018



December 11, 2015

Katisha D. Fortune, Esq.
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8375
Katisha.Fortune@state.de.us

By E-mail

Dear Ms. Fortune:

I am writing to let you know that we have been retained by Jonathan Rudenberg, a FOIA petitioner who is being denied his statutory rights in connection with the matter we discussed in our prior emails. On May 15, 2015, Mr. Rudenberg submitted a FOIA request to the Delaware State Police seeking public records concerning cell site simulators. On June 5, 2015, this request was incorrectly denied in its entirety based on the State Police's interpretation of a nondisclosure agreement they indicated they had entered with the FBI. As required by law, on June 17, 2015, Mr. Rudenberg presented a petition to the Chief Deputy Attorney General to seek redress for the wrongful denial of his FOIA request.

The Chief Deputy was obligated to render a written determination as to whether a violation of FOIA had occurred within 20 days of that petition. *See* 29 Del. Code 10005(e). It has now been 177 days.

As a courtesy, and in an effort to resolve this issue without litigation, Mr. Rudenberg has agreed to wait an additional three weeks for you to render a decision. If he does not receive a decision by the end of the year, we will ask a court for appropriate relief. I am copying Chief Deputy Danielle Gibbs on this letter because I believe she would be the appropriate defendant in such a court action.

This is not a lawsuit we want, or should have to, file. But Mr. Rudenberg has waited much too long for a substantive response.

Sincerely yours,

Ryan R. Tack-Hooper

cc: Jennifer Noel
Aaron R. Goldstein
Danielle Gibbs

000019

AMERICAN CIVIL LIBERTIES
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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(l)(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(l)(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 site 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(1)(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 black ink, appearing to read "Danielle Gibbs". The signature is written in a cursive, flowing style.

Danielle Gibbs
Chief Deputy Attorney General

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

EXHIBIT A

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U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535-0001

May 23, 2012

Robert Coupe
Colonel
Delaware State Police
1441 N. DuPont Highway
Dover, DE 19903

Re: Acquisition of Wireless Collection Equipment/Technology and Non-Disclosure Obligations

LAW ENFORCEMENT SENSITIVE (LES): The information in this document is the property of the Federal Bureau of Investigation (FBI) and may be distributed within the Federal Government (and its contractors), U.S. intelligence, law enforcement, public safety or protection officials and individuals with a need to know. Distribution beyond these entities without FBI Operational Technology Division authorization is prohibited. Precautions should be taken to ensure this information is stored and/or destroyed in a manner that precludes unauthorized access. Information bearing the LES caveat may not be used in legal proceedings without first receiving authorization from the originating agency. Recipients are prohibited from subsequently posting the information marked LES on a website on an unclassified network.

Dear Colonel Coupe:

We have been advised by Harris Corporation of the Delaware State Police's request for acquisition of certain wireless collection equipment/technology manufactured by Harris Corporation. Consistent with the conditions on the equipment authorization granted to Harris Corporation by the Federal Communications Commission (FCC), state and local law enforcement agencies must coordinate with the Federal Bureau of Investigation (FBI) to complete this non-disclosure agreement prior to the acquisition and use of the equipment/technology authorized by the FCC authorization.

As you are aware, law enforcement agencies increasingly rely on wireless collection equipment/technology to conduct lawfully-authorized electronic surveillance. Disclosing the existence of and the capabilities provided by such equipment/technology to the public would reveal sensitive technological capabilities possessed by the law enforcement community and may allow individuals who are the subject of investigation wherein this equipment/technology is used to employ countermeasures to avoid detection by law enforcement. This would not only potentially endanger the lives and physical safety of law enforcement officers and other individuals, but also adversely impact criminal and national security investigations. That is,

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disclosure of this information could result in the FBI's inability to protect the public from terrorism and other criminal activity because, through public disclosures, this technology has been rendered essentially useless for future investigations. In order to ensure that such wireless collection equipment/technology continues to be available for use by the law enforcement community, the equipment/technology and any information related to its functions, operation, and use shall be protected from potential compromise by precluding disclosure of this information to the public in any manner including but not limited to: in press releases, in court documents, during judicial hearings, or during other public forums or proceedings. Accordingly, the Delaware State Police agrees to the following conditions in connection with its acquisition and use of the Harris Corporation equipment/technology:

1. By entering into this agreement, the Delaware State Police affirms that it has statutory authority to lawfully employ this technology and will do so only in support of public safety operations or criminal investigations.
2. The Delaware State Police assumes responsibility for operating the equipment/technology in accordance with Federal law and regulation and accepts sole liability for any violations thereof, irrespective of the Federal Bureau of Investigation approval, if any, for the sale of the equipment/technology.
3. The Delaware State Police will ensure that operators of the equipment have met the operator training standards identified by the FBI and are certified to conduct operations.
4. The Delaware State Police will coordinate with the FBI in advance of its use of the wireless collection equipment/technology to ensure de-confliction of respective missions.
5. The Delaware State Police will not distribute, disseminate, or otherwise disclose any information concerning the wireless collection equipment/technology or any software, operating manuals, or related technical documentation (including its technical/engineering description(s) and capabilities) to the public, including to any non-law enforcement individuals or agencies.
6. The Delaware State Police will not distribute, disseminate, or otherwise disclose any information concerning the wireless collection equipment/technology or any software, operating manuals, or related technical documentation (including its technical/engineering description(s) and capabilities) provided to it to any other law enforcement or government agency without the prior written approval of the FBI. Prior to any approved distribution, dissemination, or comparable disclosure of any information concerning the wireless collection equipment/technology or any software, manuals, or related technical documentation related to such equipment/technology, all materials shall be marked "Law Enforcement Sensitive, For Official Use Only - Not to be Disclosed Outside of the Delaware State Police."
7. The Delaware State Police shall not, in any civil or criminal proceeding, use or provide any information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related

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documentation (including its technical/engineering description(s) and capabilities) beyond the evidentiary results obtained through the use of the equipment/technology including, but not limited to, during pre-trial matters, in search warrants and related affidavits, in discovery, in response to court ordered disclosure, in other affidavits, in grand jury hearings, in the State's case-in-chief, rebuttal, or on appeal, or in testimony in any phase of civil or criminal trial, without the prior written approval of the FBI. If the Delaware State Police learns that a District Attorney, prosecutor, or a court is considering or intends to use or provide any information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related documentation (including its technical/engineering description(s) and capabilities) beyond the evidentiary results obtained through the use of the equipment/technology in a manner that will cause law enforcement sensitive information relating to the technology to be made known to the public, the Delaware State Police will immediately notify the FBI in order to allow sufficient time for the FBI to intervene to protect the equipment/technology and information from disclosure and potential compromise.

Notification shall be directed to the attention of:

Assistant Director
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod A
Quantico, Virginia 22135
(703) 985-6100

and

Unit Chief
Tracking Technology Unit
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod B
Quantico, Virginia 22135
(703) 985-6840

8. In addition, the Delaware State Police will, at the request of the FBI, seek dismissal of the case in lieu of using or providing, or allowing others to use or provide, any information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related documentation (beyond the evidentiary results obtained through the use of the equipment/technology), if using or providing such information would potentially or actually compromise the equipment/technology. This point supposes that the agency has some control or influence over the prosecutorial process. Where such is not the case, or is limited so as to be inconsequential, it is the FBI's expectation that the law enforcement agency identify the applicable prosecuting agency, or agencies, for inclusion in this agreement.
9. A copy of any court order in any proceeding in which the Delaware State Police is a party directing disclosure of information concerning the Harris Corporation equipment/technology and any associated software, operating manuals, or related

documentation (including its technical/engineering description(s) and capabilities) will immediately be provided to the FBI in order to allow sufficient time for the FBI to intervene to protect the equipment/technology and information from disclosure and potential compromise. Any such court orders shall be directed to the attention of:

Assistant Director
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod A
Quantico, Virginia 22135
(703) 985-6100

and

Unit Chief
Tracking Technology Unit
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod B
Quantico, Virginia 22135
(703) 985-6840

10. The Delaware State Police will not publicize its acquisition or use of the Harris Corporation equipment/technology or any of the capabilities afforded by such equipment/technology to the public, other law enforcement agencies, or other government agencies, including, but not limited to, in any news or press releases, interviews, or direct or indirect statements to the media.
11. In the event that the Delaware State Police receives a request pursuant to the Freedom of Information Act (5 U.S.C. § 552) or an equivalent state or local law, the civil or criminal discovery process, or other judicial, legislative, or administrative process, to disclose information concerning the Harris Corporation wireless collection equipment/technology, its associated software, operating manuals, and any related documentation (including its technical/engineering description(s) and capabilities), the Delaware State Police will immediately notify the FBI of any such request telephonically and in writing in order to allow sufficient time for the FBI to seek to prevent disclosure through appropriate channels. Notification shall be directed to the attention of:

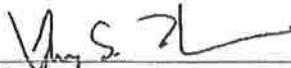
Assistant Director
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod A
Quantico, Virginia 22135
(703) 985-6100

and

Unit Chief
Tracking Technology Unit
Operational Technology Division
Federal Bureau of Investigation
Engineering Research Facility
Building 27958A, Pod B
Quantico, Virginia 22135
(703) 985-6840


The Delaware State Police's acceptance of the above conditions shall be evidenced by the signatures below of an authorized representative and wireless collection equipment operators of the Delaware State Police.

Sincerely,



Amy S. Hess
Assistant Director
Operational Technology Division
Federal Bureau of Investigation


Acknowledged and agreed to this 31ST day of MAY, 2012.




Robert Coupe
Colonel
Delaware State Police
Dover, DE



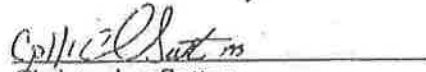
Dennis Schmitt
Detective



Michael Calloway
Detective



Fred Chambers
Detective



Christopher Sutton
Detective



February 17, 2016

Danielle Gibbs, Esq.
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8375
Danielle.Gibbs@state.de.us

By E-mail and First Class Mail

Re: § 10005(e) Petition concerning January 15, 2016 FOIA Production by Delaware Department of Safety and Homeland Security, Division of State Police

Dear Chief Deputy Gibbs:

This letter constitutes our petition pursuant to the Delaware Freedom of Information Act 29 Del. C. §§ 10001-10007 (“FOIA”) to determine whether the Delaware State Police’s partial production of redacted documents to Jonathan Rudenberg on January 15, 2016 constituted a violation of FOIA. *See* § 10005(e).

Background

On May 25, 2015, our client, a Delaware citizen named Jonathan Rudenberg, submitted a FOIA request to the Delaware Division of State Police concerning their use of cell site simulators, a technology colloquially known as stingrays. Stingrays are devices that deceive cell phones in a given area into revealing their unique identifiers, location information, and (if configured to do so) communications content. Stingrays do so by simulating cellular base stations, inducing nearby phones into connecting to the device and sharing this private information.

Because this technology is so invasive, the U.S. Department of Justice has required that its law enforcement agents obtain a search warrant before using a Stingray or similar device—even though they claim to have configured their devices not to capture communications content.¹ Courts across the country have agreed that a warrant is required for at least some uses of the device, and have crafted additional requirements.² Along with our client, we are trying to learn whether the State

¹ Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology (2015), *available at*, <http://www.justice.gov/opa/file/767321/download>

² *See, e.g., In re United States*, No. 15 M 0021, 2015 U.S. Dist. LEXIS 151811 (N.D. Ill. Nov. 9, 2015) (“[A] process must be created to reasonably ensure that innocent third parties’ information collected by the use of a cell-site simulator is not retained by

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S. ELIZABETH LOCKMAN
PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

RICHARD H MORSE
LEGAL DIRECTOR

Police are using this technology legally and responsibly. This includes learning what kind of court orders they are applying for (if any), whether and how the use of the device is disclosed to criminal defendants, and what is done with the data captured by the device.

The FOIA Request sought, among other things, policies and guidelines governing the use of stingrays; records to show which criminal prosecutions the devices had been used in; and whether and how often the Delaware State Police were seeking court approval for the use of the devices. *See* Attachment A (appeal determination enclosing language of emailed FOIA Request). The State Police initially refused to disclose any responsive records, citing a nondisclosure agreement with the FBI. *See* Attachment B. Mr. Rudenberg filed a petition with the Attorney General on June 17, 2015 challenging this denial.

On December 29, 2015, your office issued its determination on the June 17 petition. *See* Attachment A. You accepted the State Police's representation that they lacked records responsive to categories 2 and 5-9 of the FOIA Request. Your determination also permitted the State Police to provide redacted records responsive to requests 1 and 4, and ordered production of the FBI nondisclosure agreement. On January 15, 2016, the State Police produced highly redacted copies of purchase orders in partial response to category 1, no documents pursuant to category 4, and a copy of the FBI nondisclosure agreement. *See* Attachment C.

The nature of the violation

The State Police's January 15, 2016 production of violated FOIA in at least three ways: (1) the search for records performed by the State Police was unreasonable; (2) the State Police failed to provide explanations pursuant to FOIA for the records withheld in whole or in part; and (3) at least some of the redactions are plainly improper under any rationale.

A. Unreasonable search

Category 4 of the FOIA Request sought "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." *See* Attachment A.

the United States or any government body."); *In re United States*, 890 F. Supp. 2d 747, 752 (S.D. Tex. 2012) (holding that federal pen register statute was inapplicable and suggesting a warrant is required).

According to the State Police's July 6, 2015 Response Letter (*see* Attachment D),³ the only search conducted pursuant to this section of the request was a search of the State Police Divisional Manual for references to cell site simulators. It is not clear whether the State Police literally searched for the term "cell site simulators" or conducted a search of the entire manual for responsive policies. Either way, this search—which turned up nothing—was unreasonable. At a minimum, the FOIA coordinator was obligated to ask the officers tasked with using the devices whether they were aware of any guidelines or policies governing its use—a short conversation that is the epitome of minimal due diligence. Such a minimal effort is required by FOIA. *See* § 10003(g)(2) ("The FOIA coordinator and/or his or her designee, working in cooperation with other employees and representatives, 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.").

The Response Letter states that "DSP will check if there is some separate document that includes policies and guidelines." *See* Attachment D. But over six months have passed since that notation without any disclosure. And, in any event, the short conversation discussed above could and should have happened before the Response Letter was written.

Although the other methods the State Police used to search for responsive records are not apparent from the Response Letter, it seems likely based on the results that these searches were similarly unreasonable. For example, the State Police failed to produce any records other than purchase orders responsive to the request for "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." *See* Attachment A. It is not plausible that the State Police spent hundreds of thousands of dollars on these devices but entered into no contracts and had no written correspondence concerning the transactions.

Because of the flagrant inadequacy of the first search, and to avoid *seriatim* § 10005(e) petitions on the adequacy of the searches, we respectfully request that the State Police be required to propose and disclose a reasonable search method for each category of the FOIA Request and then conduct the search anew according to that method.

B. No justification for omitted records or redactions

The State Police did not provide any records responsive to category 2, any records responsive to category 3 other than the FBI nondisclosure agreement, or any records responsive to categories 4-9. The State Police did send a Response Letter to the Attorney General on July 6, 2015 discussing some of these omissions. But the

³ This document was not provided to Mr. Rudenberg until after the January 15, 2016 production.

Response Letter is not a satisfactory explanation for multiple reasons. First, it is unclear as to several requests whether there were no responsive records or the records were exempt from FOIA disclosure. Second, it was not updated between July and January to reflect any further search for responsive documents or to reflect the determination of the first § 10005(e) petition that the FBI nondisclosure agreement was not a valid basis to withhold documents. And third, it was not attached to records disclosure or even provided to Mr. Rudenberg until after the January 15, 2015 production. It has never been offered as the official explanation for the content of the January 15, 2016 production—and if it is the official explanation, it is wholly inadequate. The State Police are obligated to explain to Mr. Rudenberg as to each request whether responsive records were found and, if found and not provided, what provision of FOIA justifies the failure to provide them. *See* § 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.”).

Additionally, every page of the purchase orders produced by the State Police contains extensive redactions. But the State Police did not provide any explanation to Mr. Rudenberg of the basis for the redactions. A redaction constitutes a partial denial of a request. The State Police are obligated to explain the reason for the denials. *See id.*⁴

We respectfully request that you find that the State Police, after conducting a new and proper search for responsive records, must cite the FOIA provision that justifies each redaction or refusal to produce a responsive document.

C. Improper redactions

Finally, according to the Response Letter, the “FBI has allowed DSP to provide these documents so long as any reference to specific elements of the technology or components is redacted. In particular, part numbers, serial numbers, unit costs, specific software updates, or any description of the product may not be produced.” *See* Attachment D. Perhaps following the FBI’s request, the purchase orders redacted all of this information. But the nondisclosure agreement does not provide an independent basis for exempting FOIA documents from disclosure, and it was therefore improper to redact them on that basis. As suggested in the December 29, 2015 determination, an agreement between two law enforcement agencies to keep a secret is not an exception to FOIA. Indeed, such an exception to FOIA would eviscerate the statute.

The purchase orders also have the shipping addresses and names of contacts redacted (which is clear because they were not consistently redacted across all of the documents). There is no basis under FOIA for redacting this information. The inconsistent redactions suggest that that the redacted information is not, in fact, confidential or sensitive.

⁴ To the extent the redactions were made pursuant to FBI request as suggested in the July Response Letter, then they are improper as explained below.

We respectfully request that you find that the State Police may not rely on the FBI nondisclosure agreement as a basis for redacting FOIA records, and require that any other basis for redaction be grounded in the exceptions and definitions of FOIA.

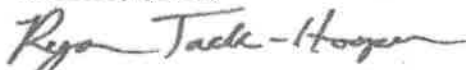
Conclusion

The State Police violated FOIA by performing an inadequate search, failing to provide any explanation to Mr. Rudenberg for which documents were not produced on January 15, 2016, and redacting the produced documents without sufficient explanation. We ask that that you tell the State Police how to formulate and conduct a proper search, and advise them that they must do so and must disclose the resulting responsive records in their entirety unless there is a clear explanation provided for each withholding.

Insofar as the December 29, 2015 decision constituted an adverse determination as to the State Police's obligation to reasonably search for and produce documents pursuant to the FOIA Request, we will file suit on or before February 29 in order to preserve our right to judicial review under 29 Del. C. § 10005(b), unless this matter is fully resolved by that date. However, we nevertheless submit this second petition in a good faith effort to use the administrative review function of 29 Del. C. § 10005(e) to create the opportunity for your office and the State Police to take corrective action, and so that your office may review the decisions made by the State Police after December 29, 2015. If a favorable determination on this petition results in a reasonable search and properly documented disclosure of the records prior to February 29, then we will not need to file suit. And if it happens after we file, then we will be able to withdraw our suit before significant expenses are incurred by the parties.

I am happy to speak with you about any aspect of this petition. My number is (302) 654-5326 x 105.

Sincerely yours,



Ryan R. Tack-Hooper

cc: Katisha Fortune, Esq.
Rae Mims, Esq.
Kim Siegel, Esq.
Kimberly H. Chandler



MATTHEW P. DENN
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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 16-IB03

March 4, 2016

VIA EMAIL

Ryan Tack-Hooper, Esq.
American Civil Liberties Union of Delaware
100 West 10th Street
Suite 706
Wilmington, DE 19801
rtackhooper@aclu-de.org

Re: February 17, 2016 FOIA Petition Concerning the Delaware Department of Safety and Homeland Security, Division of State Police

Dear Mr. Tack-Hooper,

We write in response to your letter dated February 17, 2016 (the "February 17 Letter"). That letter is styled a "Petition concerning January 15, 2016 FOIA Production" by the State Police. As discussed more fully below, with one exception, we believe that the February 17 Letter is an impermissible attempt to have this office reconsider Attorney General Opinion 15-IB14, decided by this office on December 29, 2015 (the "December 29 Opinion").

The February 17 Letter raised one matter that was not contemplated in the December 29 Opinion – the alleged redactions of "shipping information and contacts." While FOIA does not require this office to exercise "continuing jurisdiction" to police an agency's actions in response to a FOIA determination, because this issue was not previously addressed, we believe it was acceptable to raise this matter by submitting a new petition. However, it is only as to the issue of these redactions that we deem the February 17 Letter to be a new petition.

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The inconsistent redaction of shipping information and contacts highlighted in the February 17 Letter raises the possibility that the material was redacted in error. If it was intentional, the State Police violated FOIA in not stating a basis for the redactions. By this Opinion, we are directing the State Police to review the redactions to determine whether an error was made. The State Police should thereafter promptly provide to you either (i) a new copy of the documents without the redactions, if it is determined that they were erroneous, or (ii) the basis for the redactions, if it is determined that the redactions were intentional.¹ Because this portion of the February 17 Letter is being treated as a new petition, this Opinion is a determination that may be appealed by the State Police.²

As noted above, it is the determination of this office that the remaining issues raised in the February 17 Letter constitute an impermissible request to have this office reconsider the December 29 Opinion. It was apparent from the December 29 Opinion that the State Police had already conducted a search. In accepting representations that the State Police found no responsive documents, this office implicitly accepted the scope of the search. In describing the matters the State Police intended to redact, this office effectively allowed the redactions. Based upon the foregoing, we view the December 29 Opinion as a completed determination supporting the right of either party to appeal the matter to the Superior Court.³ Indeed, Mr. Rudenberg filed a Notice of Appeal in the Superior Court challenging the December 29 Opinion on February 26, 2016. To the extent you believe that the February 17 Letter should have been characterized as a new appeal in its entirety, you are free to argue that this letter is an adverse determination of a “new” petition that is appealable to the Superior Court.⁴

* * *

¹ We ordinarily invite the public body to respond to a FOIA petition before rendering a decision, but because the February 17 letter raises one narrow issue not previously addressed, we have chosen, instead, to decide the matter without requesting a response from the State Police.

² *See 29 Del. C. § 10005(b)* (“[T]he petitioner or public body ... may appeal an adverse decision on the record to the Superior Court within 60 days....”).

³ We acknowledge and apologize for the factual error regarding your client’s request number nine. We incorrectly stated that the State Police had represented that there were no records responsive to that request, and we should have addressed the State Police’s argument that the documents requested are exempt from disclosure as civil or criminal investigative files under *29 Del. C. § 10002(1)(3)*. That matter has now been raised with the Superior Court.

⁴ *Id.* § 10005(b).

This office regularly encourages parties to work together to determine what information may be provided pursuant to FOIA and to clarify the bases of their disputes before they seek relief from this office. Accordingly, with the guidance provided here, we encourage the parties to make contact and attempt to resolve or narrow their disputes.

This determination is directed solely to the parties identified herein. It is based on the facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.⁵

Very truly yours,

A handwritten signature in black ink, appearing to read "Danielle Gibbs". The signature is fluid and cursive, with the first name being more prominent.

Danielle Gibbs
Chief Deputy Attorney General

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

⁵ See Op. Att’y Gen. No. 96-IB25 (July 22, 1996) (“[E]very FOIA complaint is inherently fact-driven, and any recommendation of remedial action can only be decided on a case-by-case basis.”).