January 13, 2017

Hon. Richard R. Cooch
New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, DE 19801
(302) 255-0664

By electronic filing

Re: Rudenberg v. Delaware DOJ, C.A. No.: N16A-02-006 RRC

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

S. ELIZABETH LOCKMAN
PRESIDENT

KATHLEEN M MacRAE
EXECUTIVE DIRECTOR

RICHARD H MORSE
LEGAL DIRECTOR

Dear Judge Cooch:

Your Honor has ordered supplemental briefing on three issues: the standard of review for this appeal; the application of a Federal FOIA exemption; and the application of the privilege protecting certain law enforcement records. This letter brief addresses each question in turn.

I. The Standard of Review in This Appeal is De Novo

The standard of review for this § 10005(e) FOIA appeal, as with any other appeal, depends on the nature of the underlying proceeding. Petitioner therefore addresses first what the underlying proceeding is supposed to be and what standard of review should result, and then separately what needs to be done given that the statutorily required underlying proceeding did not occur in this case.

A. The General Assembly tasked the Chief Deputy with making a determination as to the FOIA issues in order determine which party that office will represent in any litigation, not to issue the kind of trial findings that are entitled to fact-finding deference

What standard of review applies in an appeal to the Superior Court depends on the nature of the underlying proceeding. Delaware law provides that an appellate court ought to defer to the facts found by a trial court "when they are supported by the record and are the product of an orderly and logical deductive process." *In re Del. Racing Ass'n*, 213 A.2d 203, 207 (Del. 1965). This standard has been applied to administrative proceedings when the underlying proceeding involved an administrative agency that has been delegated a judicial function to determine some matter within its purview. *See In re Spielman*, 316 A.2d 226, 227 (Del. Super. 1974). This rule's origin was the fact that the initial fact-finder is the one who "sees

and hears the witnesses and is, therefore, better able to determine the credit and weight to be given their testimony." *Wright v. Am. Brake Shoe Co.*, 90 A.2d 681, 684 (Del. 1952). Over time, this deference was expanded beyond deference to findings based on oral testimony made in trial courts to deference to all fact-finding by a trial court, *see Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972), and eventually to instances in which an administrative body is vested with the power to hold a trial and exercise some discretionary judgment. *E.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985).

However, not every administrative weighing of evidence constitutes the sort of fact-finding entitled to deference. The deference has only been applied when the underlying proceeding functions as a judicial or quasi-judicial resolution of the matter. *Cf. Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing*, 100 A.3d 1020, 014 Del. LEXIS 373, at *4 (Del. 2014) (referring to the deference that applies when an agency exercises "quasi-judicial or adjudicatory administrative power"); *Baker*, 488 A.2d at 1309 (noting that deference applies "[w]hen sitting as an intermediate court of appeals").

The General Assembly provided little guidance as to how the underlying procedure in this case, the revised procedure under § 10005(e), is to be conducted. The statute provides that court challenges occurring after the Chief Deputy's determination are to be considered an "appeal" and that it is to be "on the record." § 10005(e). This Court has now held that this means that no evidence may be entered into the record in the course of the Superior Court proceedings. *Rudenberg v. Chief Deputy AG*, No. N16A-02-006 RRC, 2016 Del. Super. LEXIS 654, at *15 (Del. Super. Dec. 30, 2016).[1] The consequence of this Court's ruling is that the Chief Deputy's administrative process must involve—at a minimum—an opportunity for each side to present evidence and address each other's arguments, since FOIA requires a responding agency to prove by evidence the application of any exception and due process requires the opportunity for a response. *See, e.g*, *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 2001 Del. Super. LEXIS 538, at *5 (Del. Super. Dec. 28, 2001).

Notwithstanding the amended statute's use of the word "appeal," the General Assembly did not empower the Chief Deputy Attorney General to act as an administrative trial body that issues a final resolution of disputed FOIA issues subject to judicial review. Instead, the Chief Deputy's task is to determine "whether

[1] Since the DSP had a full and fair opportunity to present its arguments to the Chief Deputy Attorney General, any exceptions to Delaware FOIA not raised by the DSP in the underlying proceeding should not be considered on this appeal.

a violation has occurred or is about to occur," and based on that determination either act as counsel for the Petitioner or counsel for the Respondent in a judicial determination of the ultimate issue. § 10005(e). The statute makes it clear that the Chief Deputy's "determination" is not the equivalent of a trial court's findings because it explicitly contemplates that the agency may refuse to follow the Chief Deputy's views of the dispute. § 10005(e) (stating that the Attorney General will not represent the body in the appeal "if the public body the Attorney General is otherwise obligated to represent fails to comply with the Chief Deputy's determination"). And the appeal does not arise solely to correct errors in any "trial," since the statute says that an appeal may proceed "[r]egardless of the finding of the Chief Deputy." § 10005(e).

Thus, § 10005(e) does not establish a judicial procedure over which this Court is to sit as a true court of appeals. Instead, it established an opportunity for the Chief Deputy to coerce responding agencies to comply with FOIA or to refuse to represent them, a change from the previous version of FOIA under which the Office of the Attorney General was required to represent responding state agencies regardless of the merit of the agency's position on FOIA. Limiting the parties to an appeal "on the record" forces the parties to lay their cards on the table so that the Chief Deputy can properly assess the strength of each side's position before deciding whom to defend in court should litigation be necessary. This limitation ensures that the Chief Deputy's assessment will be based on all of the arguments and evidence that it will eventually have to address as counsel for either the petitioner or the responding agency.

Deferring to the Chief Deputy's fact-finding would be like deferring to an attorney's assessment of the facts of a case. Indeed, in a very real sense, it *would be* deferring to one party's fact-finding, since the Office of the Attorney General will very often be representing one of the two parties. Such deference would lead to substantially less court oversight over one class of FOIA petitions, without any justification in the legislative history or language for the differential treatment of such petitions.[2] For these reasons—the structure of the statute and role of the Chief Deputy Attorney General—the proper standard is *de novo* review, the same standard that was applied prior to the amendment and continues to apply to judicial review of all other FOIA disputes. This Court should not employ a unique and deferential standard of review for petitions seeking information from state agencies without the statute clearly requiring this.

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[2] Under the current statutory scheme, FOIA cases involving agencies that are not represented by the Attorney General are still brought as *de novo* legal challenges. § 10005(b).

B. Because the underlying proceeding did not allow Petitioner to submit evidence in respond to the DSP's arguments raised after the initial denial, this Court should resolve the matters not involving issues on which Petitioner would introduce evidence, and then if any issues remain, remand to the Chief Deputy to conduct an appropriate evidentiary hearing

In this case, as set forth in the Opening Brief, Petitioner was not given notice of the arguments relied on by the DSP in the proceeding before the Chief Deputy, nor did he have an opportunity to contest any of them before the Chief Deputy's determination was made, with evidence or otherwise. Accordingly, even if the appropriate standard of review in the general case were deferential, it would still be inappropriate in this case to resolve any factual disputes by relying on whatever evidence might be in the record because the underlying proceeding did not give Petitioner the opportunity to contest that evidence. *See Quaker Hill Place v. Saville*, 523 A.2d 947, 958 (Del. Super. 1987) (rejecting deference when lower proceeding did not follow basic procedural requirements).

Instead, and in light of the Court's Dec. 30, 2016 Opinion and Order not to admit additional evidence from the Petitioner in the current proceeding, this case should proceed as follows: The Court should resolve all of the issues that do not require the resolution of any disputed factual issue (which in Petitioner's view is all of them, based on the paucity of the record evidence and the nature of Respondent's evidentiary burden). To the extent that the Court finds that some disputed fact in the record supports Respondent's position as to any of the issues in this appeal, it should remand that issue or issues after deciding the issues of law. As Petitioner noted in his letter of brief of October 12, 2016, any remand to cure the deficits of the original underlying proceeding should come only after this Court resolves the pure questions of law and decides the appropriate procedure for the Chief Deputy to follow.

II. Based on the legislative history and other statutory language of Delaware FOIA, § 10002(l)(6) does not incorporate Federal FOIA's exceptions including 5 U.S.C. § 552(b)(7)(E)

Delaware FOIA exempts from disclosure "[a]ny records specifically exempted from public disclosure by statute or common law." § 10002(l)(6). However, the other provisions in Delaware FOIA and its legislative history show that this provision is not intended to incorporate Federal FOIA exceptions into Delaware

FOIA. Notably, the DSP did not attempt to assert this exception before the Chief Deputy or in the merits briefing in this appeal.

The General Assembly took from Federal FOIA those parts it agreed with, and rejected the other parts. When Delaware's FOIA statute was drafted, it borrowed much of its language from Federal FOIA. In parts, it copied word-for-word the exceptions found in that statute. *E.g.*, 29 Del. C. 10002(l)(2) ("Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature."); 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential"). In other parts, it amended or omitted exceptions contained in Federal FOIA. The General Assembly's decision not to follow or to amend certain of those exceptions would be contravened by a court ruling that held that those exceptions were incorporated anyway. Indeed, the General Assembly itself has acknowledged the inapplicability of Federal FOIA exemptions. When it passed § 10002(l)(17)(a)(5), it included language that exempts certain records if they meet a number of criteria, including that they are "[r]ecords not subject to public disclosure under federal law." § 10002(l)(17)(a)(5)(B). As one of several conditions that must apply in order for the records not to be disclosed, such a statutory clause would be rendered surplusage if such records were already protected from public disclosure under Delaware law by virtue of § 10002(l)(6). Indeed, if the Federal FOIA exceptions applied, it would mean that the limitations set forth in § 10002(l)(17)(a)(5) would be meaningless since a broader exception would apply.

Reading § 10002(l)(6) to incorporate 5 U.S.C. § 552(b)(7)(E) would be particularly inconsistent with the General Assembly's intent given the legislative history of § 10002(l)(17). In the wake of the terrorist attacks of September 11, the General Assembly realized that Delaware FOIA lacked exceptions for records that might jeopardize public safety if disclosed. It crafted a new exception to Delaware FOIA, covering "records, which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual." § 10002(l)(17). This new exception was the most detailed of any of the exceptions, and included records relating to law enforcement methods for "respond[ing] to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety." § 10002(l)(17)(a)(5). Such a new exception would not have been needed if Delaware FOIA incorporated an exception for "techniques and procedures for law enforcement investigations or prosecutions, or would [reveal] guidelines for law enforcement investigations or

prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[3]

The Delaware Attorney General has previously taken the position that § 10002(l)(17) is Delaware FOIA's analogous version of Federal FOIA's 7(E). *See* Del. Op. Atty. Gen. 05-IB19, 105 DEGR 7 (Aug. 1, 2005) ("The Federal FOIA has a similar exemption for records that would disclose 'investigative techniques and procedures' or 'endanger the life and physical safety or law enforcement personnel.' 5 U.S.C. § 552(b)(7)(E)(F))."). One prior decision of this court acknowledged the existence of a relevant federal exception but then proceeded to find a way to incorporate the exception by means of the Delaware Constitution—strongly suggesting that the path of simply incorporating the federal exception by means of § 10002(l)(6) was unavailable. *See Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 782 (Del. Super. 1995) (noting that the common law privilege for executive deliberations is expressly protected under Federal FOIA before proceeding to decide that the statute incorporates privileges required by the Delaware Constitution).[4]

Finally, statutes that are incorporated by § 10002(l)(6) identify records protected from public disclosure generally, not just from compelled disclosure under FOIA, and generally exist as part of a larger statutory scheme separate from FOIA. For example, § 10002(l)(6) has been applied to incorporate protections that exist

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[3] In Delaware, the General Assembly placed an important limitation on the exclusion relevant to law enforcement techniques contained in § 10002(l)(17)(a)(5), limiting it to "[s]pecific and unique vulnerability assessments or specific and unique response or deployment plans" and "[r]ecords not subject to public disclosure under federal law that are shared by federal or international agencies and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for criminal acts against United States citizens or targets." § 10002(l)(17)(a)(5). The exception under § 10002(l)(17) has not been raised in this case, and it would not apply. None of the records sought constitute "specific and unique response or deployment plans" or are records that originated with the federal government.

[4] If every statute that protects a record from public disclosure were incorporated by § 10002(l)(6), then it would incorporate FOIA exceptions from every state with a FOIA statute as well. It cannot have been the legislature's intent to incorporate the many—often contradictory—value judgments made by other legislative bodies concerning the scope of what should be excluded from public transparency. Instead, § 10002(l)(6) should be read to incorporate only non-FOIA statutes (if it applies to non-Delaware statutes at all).

outside the FOIA statute for specific records—such as jury questionnaires. *See Jacobs v. City of Wilmington*, 2002 Del. Ch. LEXIS 6, at *18-19 (Del. Ch. Jan. 3, 2002) (jury questionnaire information); *see also Jenkins v. Gulledge*, 1982 Del. Super. LEXIS 773, at *2 (Del. Super. Jan. 25, 1982) (incorporating a statutory provision barring disclosure of DOC records to inmates). The Federal FOIA exceptions are different in kind from the type of statutes meant to be incorporated by § 10002(l)(6).[5]

III. The law enforcement privilege protects information connected to particular investigations, and does not apply to the records sought in this case

A. Delaware has not recognized the expanded law enforcement privilege discussed in cases like *Ringmaiden*, and the Court should not expand it here

The Delaware courts recognize a law enforcement privilege limited to "the confidentiality of communications it receives during criminal investigations." *Griffin v. Sigma Alpha Mu Fraternity*, 2011 Del. Super. LEXIS 199, at *5 (Del. Super. Apr. 26, 2011) (quoting *Brady v. Suh*, 2009 Del. Super. LEXIS 524, at *10 (Del. Super. July 31, 2009)); *see also Henry v. Ribbons & Bows Daycare, Inc.*, 2016 Del. Super. LEXIS 410, at *5 (Del. Super. Aug. 12, 2016) (describing the privilege). It is not a free-floating exception that might be applied to any law enforcement record. Such an exception does not exist to Delaware FOIA. *See Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1239 (Del. 2003) (requiring the production of records because "[d]espite its factual determination that release of police officer identification information would pose a threat to officer safety," there was no exception to FOIA based on law enforcement officer safety).

Some courts outside of Delaware have expanded the privilege beyond communications received during criminal investigations to other aspects of particular criminal investigations. *E.g., United States v. Ringmaiden*, 844 F. Supp. 2d 982, 989 (D. Ariz. 2012) ("In this case, the government contends that the technology used to locate Defendant's aircard, the manner in which the technology was employed, and the identities of the agents who operated the equipment all

[5] Even if § 552(b)(7)(E) were incorporated, it would not categorically bar the redacted portions of the purchase orders at issue in the Statement of Interest—much less the other records sought in this case—for the reasons set forth *infra* at Part III.B.

constitute sensitive law enforcement information subject to the qualified."). But the Delaware General Assembly has made a careful judgment about what law enforcement techniques should be secret and which should be transparent under § 10002(l)(17) and has separately provided a FOIA exception covering the traditional content of the law enforcement privilege—information gained from an investigation. § 10002(l)(3). As with the assertion of the application of a Federal FOIA exception, it is notable that the DSP did not attempt to assert law enforcement privilege before the Chief Deputy or in the merits briefing in this appeal.

Exceptions to FOIA "pose a barrier to the public's right to access," and so they are interpreted narrowly. *ACLU of Delaware v. Danberg*, 2007 Del. Super. LEXIS 61, at *11 (Del. Super. March 15, 2007). The General Assembly, and not this Court, should decide whether to expand the scope of FOIA's incorporation of common law to non-Delaware common law. *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453, 464 (Del. Super. 2002) *rev'd in part*, 840 A.2d at 1234 ("The legislature recently has expressed great interest in the FOIA laws and has quickly changed the laws in response changing needs. Therefore, if the State determines that the relevant statute lacks clarity, then it should properly seek legislative change in the law.").

B. Even an expanded version of the privilege would not apply to records sought by Petitioner

Even an expanded version of the law enforcement privilege would not cover the records sought by Mr. Rudenberg. Importantly, the arguments raised by the Statement of Interest concern only one category of the records sought in this case, namely the redacted portion of the purchase orders, which the United States says contain "the makes and model numbers of cell site simulators purchased by DSP, and information regarding component parts and software." Statement of Interest of the United States, Trans. No. 59624044, *Rudenberg v. Chief Deputy AG*, No. N16A-02-006 RRC, at 8 (Del. Super. Sept. 28, 2016) (hereinafter "Statement of Interest").[6] The United States concedes that the district court in *ACLU of N. Cal. v.*

[6] The United States mistakenly believed that Petitioner was only seeking the unredacted purchase orders. It erroneously assumed, in at least one instance, that Petitioner was referring to those records when he was referring to others. *See* Statement of Interest, at 10 (accusing Petitioner of misstating the precedent concerning courts "routinely" ordering disclosure of this information because the United States incorrectly believed that Petitioner was referring to the content of the purchase orders and not the records disclosed in the cases cited by Petitioner in the relevant paragraph of the opening brief).

DOJ, 2015 U.S. Dist. LEXIS 79340, at *40 (N.D. Cal. June 17, 2015) permitted the disclosure of "legal templates for applications and proposed orders related to cell site simulators; legal guidance memoranda regarding use of cell site simulators; an excerpt from the USA Book; and a sealed search warrant, application, and affidavit," and makes no argument that the same result should not obtain here. Statement of Interest, at 11.

As to the narrow issue of the purchase orders, neither *Ringmaiden* nor any case cited by the United States stands for the proposition that the names and model numbers of surveillance equipment owned by a police department are law enforcement privileged in the abstract, as distinct from the disclosure of which devices were used in a particular investigation or information about the capabilities of those devices. *Ringmaiden*, 844 F. Supp. 2d at 994; *United States v. Garey*, 2004 U.S. Dist. LEXIS 23477, at *14 (M.D. Ga. Nov. 15, 2004) ("The Court emphasizes that the surveillance technology that the Government asserts is privileged relates only to how it determined the geographic location of the phone"); *Hodai v. City of Tucson*, 365 P.3d 959, 965 (Az. Ct. App. 2016) (protecting from disclosure "information about how the specific technology at issue here worked"). The court in *Ringmaiden* concluded that "the precise equipment used by the FBI and the precise manner in which it was used constitutes sensitive law enforcement information." *Id.* at 994. This was not because the existence or name of the equipment was privileged in the abstract, but instead because "the precise technology used by the FBI in this case and the precise manner in which it was used, if disclosed, would educate the public and adversaries of law enforcement on how precisely to defeat FBI surveillance efforts" because it would, among other things, "disclose how the FBI seeks to track mobile electronic devices such as the aircard." *Id.* at 994.

By contrast, general information about cell site simulators, including model names—such as that contained in the documents produced in the California Stingray litigation—when not sought with respect to how they have been deployed in any particular investigation, is not protected. *See ACLU of N. Cal*, 2015 U.S. Dist. LEXIS 79340, at *40 (ordering the disclosure of, among other things, a record concerning cell site simulators that uses model names and describes the underlying technology, the legal basis for its use, and "the unique capacities of a CSS that present significant litigation risk").

There is no reason to reach a different result based on the record in this case. The basic factual claim made by counsel for the United States is that "Disclosure of

[makes and models of cell site simulator systems and component parts and software purchased by DSP] could harm federal criminal and national security investigations by allowing criminals and terrorists to piece together information about cell site simulators' use and capabilities and thereby develop methods to evade them." Statement of Interest, at 1. But this claim is not substantiated by any evidence in the record.

While the nondisclosure agreement makes several claims about what will happen if certain information is disclosed, this claim concerning the threat posed by disclosing model names does not appear in the FBI nondisclosure agreement. The only support for it was the late-filed affidavit that this Court has decided not to consider. But even that affidavit merely stated the claim without explaining or supporting it in any meaningful way.[7] The claim that there is a connection between knowledge of model names and criminal evasion does not make sense on its face and should not be accepted in the absence of additional evidence or explanation. Presumably—and we have to presume because the connection is never explained—the idea is that someone might independently discover a vulnerability inherent in some particular hardware from the Harris Corporation not present in other models, and if Delaware happened to be using only the vulnerable model or models, then public disclosure of the model names would allow criminals operating inside Delaware to avoid detection by exploiting that vulnerability (or at least increase their chances of avoiding Stingray detection probabilistically as described in the "heat map" theory).

This logic is flawed in at least two ways. First, it assumes that there are no other law enforcement agencies operating different models of Stingrays in the state. Information about vulnerabilities in a model or models used by the DSP would only be useful if wrongdoers could be assured that there were not other models in use in their area of operations—and nothing in this record suggest that could ever be known. In addition to other state agencies, the DEA, FBI, ATF, and U.S. Marshals, are all known to deploy different models of Stingrays.

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[7] Among many other things, it is unclear whether the claim applies to the mere disclosure of model names, or only to the disclosure of the additional information that the United States has represented is redacted. As noted in Petitioner's October 12, 2016 letter, Petitioner was not aware that the redacted information contained the component parts and software necessary to configure CSS systems until the United States disclosed this in its filing. Because counsel for the State Police represented that the redacted information was model names, the parties have only briefed the disclosure of model names. Br. 22- 23; Opp. Br. 15-16, 24, 26, 32, 34; Reply Br. 10-14.

Second, this logic posits the existence of sophisticated criminals or terrorists who will scour the results of FOIA cases to avoid detection by Stingrays, but who will not thwart all models of Stingrays (and many other forms of surveillance besides) by simply turning off their phones. *See ACLU of N. Cal.*, 2015 U.S. Dist. LEXIS 79340, at *37 ("The Government has not distinguished this case from *ACLU I*, for instance by addressing 'the fact that the public is already aware that minimizing vehicular or cell phone usage will allow them to evade detection.' Thus, as in *ACLU I*, '[t]o the extent that potential law violators can evade detection by the government's location tracking technologies, that risk already exists.' And for that matter, the ACLU has presented evidence that the public already has tools that can detect CSS.").

The Statement of Interest appears to argue that knowledge of the model names of the technology purchased by the State Police—with the addition of other hypothetical information—could somehow aid a criminal enterprise. The same speculation can always be made; any FOIA record could somehow aid a criminal when you combine it with other hypothetical and damaging information. In the absence of further clarification or substantiation, such a threat is too speculative and attenuated to justify non-disclosure. This representation by the United States about a hypothetical threat of disclosing model names should not outweigh Petitioner's interest, as a citizen and taxpayer in Delaware, in knowing how no-bid contracts worth hundreds of thousands of dollars were spent.[8]

[8] Ultimately, since law enforcement privilege is a qualified privilege subject to being overridden if the party seeking the information evidences a sufficient need for it, if the Court believes it may apply here then Petitioner must be given the opportunity to enter evidence to show that it does not.

Conclusion

Under the Freedom of Information Act, every Delaware citizen has a right to know basic information about how the State Police operate. This includes what kind of court authority they seek, if any, in order to track one's cell phone, and how they have spent hundreds of thousands of dollars. To protect this right to know, this Court should order the relief sought in the Notice of Appeal.

Sincerely,

Ryan Tack-Hooper (No. 6209)
Richard H. Morse (No. 531)
ACLU of Delaware Foundation
100 West 10th Street, Suite 706
Wilmington, DE 19801
(302) 654-5326 x 105

cc: Patricia Davis-Oliva, Esq.
Joseph Handlon, Esq.

Compendium of Unreported Cases Cited in Letter Memorandum

1. *ACLU of N. Cal. v. DOJ*, 2015 U.S. Dist. LEXIS 79340 (N.D. Cal. June 17, 2015)

2. *ACLU v. Danberg*, 2007 Del. Super. LEXIS 61(Super. Ct. March 15, 2007)

3. *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.,* 2001 Del. Super. LEXIS 538 (Super Ct. Dec. 28, 2001)

4. *Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing*, 2014 Del. LEXIS 373 (Del. Aug. 22, 2014)

5. *Griffin v. Sigma Alpha Mu Fraternity*, 2011 Del. Super. LEXIS 199 (Super. Ct. Apr. 26, 2011)

6. *Henry v. Ribbons & Bows Daycare, Inc.*, 2016 Del. Super. LEXIS 410 (Super. Ct. Aug. 12, 2016)

7. *Jacobs v. City of Wilmington*, 2002 Del. Ch. LEXIS 6 (Ch. Ct. Jan. 3, 2002)

8. *Jenkins v. Gulledge*, 1982 Del. Super. LEXIS 773 (Super. Ct. Jan. 25, 1982)

9. *United States v. Garey*, 2004 U.S. Dist. LEXIS 23477 (M.D. Ga. Nov. 15, 2004)

10. Del. Op. Atty. Gen. 05-IB19, 105 DEGR 7 (Aug. 1, 2005)

ACLU of N. Cal. v. DOJ

United States District Court for the Northern District of California

June 17, 2015, Decided; June 17, 2015, Filed

Case No. 13-cv-03127-MEJ

Reporter
2015 U.S. Dist. LEXIS 79340 *; 2015 WL 3793496

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.

Subsequent History: Summary judgment granted by, Judgment entered by *ACLU v. DOJ, 2015 U.S. Dist. LEXIS 90672 (N.D. Cal., July 13, 2015)*

Prior History: ACLU of N. Cal. v. DOJ, *70 F. Supp. 3d 1018, 2014 U.S. Dist. LEXIS 139273 (N.D. Cal., Sept. 30, 2014)*

Core Terms

documents, Exemption, templates, withheld, disclosure, sealing, technology, attorneys, declaration, withhold, tracking, parties, work product, anticipation, procedures, email, anticipation of litigation, summary judgment, investigations, authorization, applications, materials, provides, cell, in camera, techniques, records, attorney's work product, law enforcement, proposed order

Counsel: **[*1]** For American Civil Liberties Union of Northern California, Plaintiff: Linda Lye, Michael Temple Risher, LEAD ATTORNEYS, ACLU Foundation of Northern California, Inc., San Francisco, CA.

For Department of Justice, Defendant: Lynn Yuhee Lee, U.S. Dept. of Justice, Civil Division - Federal Programs Branch, Washington, DC.

Judges: MARIA-ELENA JAMES, United States Magistrate Judge.

Opinion by: MARIA-ELENA JAMES

Opinion

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 35, 36

INTRODUCTION

Plaintiff American Civil Liberties Union (the "ACLU") filed this lawsuit under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*, seeking to compel the release of records concerning the federal Government's use of mobile tracking technology known as a cell site simulator[1] or "CSS." Compl. ¶ 1, Dkt. No. 1. Pending before the Court are the parties' cross-motions for summary

[1] Cell site simulators, also known as "StingRays" (a brand name **[*2]** of one such device) or IMSI catchers (referring to the unique International Mobile Subscriber Identity number assigned to wireless devices), function by masquerading as the cellular phone towers used by wireless companies such as AT&T and T-Mobile. Lye Decl. ¶ 15, Dkt. No. 37, and Ex. 9, Dkt. No. 37-12. In doing so, they are used to identify each phone's unique numeric identifier and location, or capture the communications content of targets and bystanders alike. Lye Decl. ¶ 15.

judgment. Dkt. No. 35 ("Gov. Mot."); Dkt. No. 36 ("Pl. Mot."). Having considered the parties' positions, relevant legal authority, and the record in this case, the Court GRANTS IN PART and DENIES IN PART the Government's Motion and GRANTS IN PART and DENIES IN PART the ACLU's Motion for the reasons set forth below.

BACKGROUND

A. The FOIA Request and Stipulated Search Parameters

On April 11, 2013, the ACLU submitted a FOIA request to the United States Department of Justice's ("DOJ") Criminal Division and the Executive Office for United States Attorneys ("EOUSA") for records "pertaining to the federal government's use of mobile tracking technology commonly known as a StingRay but more generically known as an International Mobile Subscriber Identity or IMSI Catcher." Compl., Ex. 2; Sprung Decl., Ex. A, Dkt. No. 35-2. Specifically, the FOIA request sought the following:

> 1) Policies, procedures, practices, legal opinions, memoranda, briefs, correspondence (including e-mails) and training materials, template applications, template **[*3]** affidavits in support of applications, template proposed court orders or warrants, and any other document referencing or relating to IMSI catchers;
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> 2) Policies, procedures, practices, legal opinions, memoranda, briefs, correspondence (including e-mails), training materials, and any other document referencing or relating to the Wireless Intercept and Tracking Team of the Federal Bureau of Investigation; and
>
> 3) All documents relating to the disclosure to the public and media coverage of [a] May 23, 2011 email attached to [plaintiff's request].

Id. The FOIA request also sought documents identified in response to an earlier FOIA request by Christopher Soghoian from August 1, 2011 (the "Soghoian Request"). *Id.* The ACLU asked for expedited processing of its request pursuant to 5 U.S.C. § 552(a)(6)(E) on the grounds that this matter is of "widespread and exceptional media interest" in which there exists "possible questions about the government's integrity which affect public confidence." *Id.*

On July 8, 2013, the ACLU filed the present suit, alleging that the Government had not yet provided a substantive response. Compl. ¶ 3. In a letter dated July 10, 2013, the DOJ granted the ACLU's request for expedited processing. **[*4]** Lye Decl. ¶ 2 & Ex. 18, Dkt. No. 37-15. The parties later enter into a stipulation regarding the scope and processing of the ACLU's request, with some documents to be processed by the EOUSA and others to be process by the Criminal Division. *See* Dkt. No. 14. Among other things, the stipulation did the following:

- limited the search period to between January 1, 2008 and August 30, 2013;
- limited the search for Parts 1-2 to "final policies, procedures and practices referencing or relating to either IMSI catchers or the Wireless Intercept and Tracking Team of the Federal Bureau of Investigation [FBI]" using agreed-upon search terms;
- limited the search for Part 3 to "documents relating or referring to the disclosure to the public and media coverage pertaining to the May 23, 2011 email[;]"
- provided that the Criminal Division would have its Computer Crime and Intellectual Property Section ("CCIPS") and Electronic Surveillance Unit ("ESU") search for responsive documents within its possession, custody, or control;
- provided that EOUSA's FOIA unit would work with the Criminal Chiefs for the United States Attorney's Offices for ten specified federal districts, as well as the directors and **[*5]** deputy directors of certain other specified EOUSA component offices, to

identify responsive documents within their possession, custody, or control; and

• provided that the Government would process all documents identified in response to the Soghoian Request.

Id. at 2-4. Both the Criminal Division and EOUSA have confirmed that they searched for records in compliance with the stipulation, and the ACLU has not contended otherwise. *See* Sprung Decl. PP 11-20; Kornmeier Decl. ¶ 5.

B. The Government's Response

In December 2013, EOUSA disclosed one page and informed the ACLU that it was withholding 138 pages in full pursuant to *FOIA Exemptions 5*, *7(C)*, and *7(E)*. Kornmeier Decl.¶ 5 and Exs. A & B. The Criminal Division disclosed seven pages in part and informed the ACLU it was withholding 209 pages in full pursuant to *FOIA Exemptions 5*, *6*, *7(A)*, *7(C)*, *7(E)*, and *7(F)*. Sprung Decl. ¶ 24 and Ex. F.

In the course of briefing their motions for summary judgment, the parties exchanged additional information and some additional documents, narrowing the focus of their dispute as to the Criminal Division documents. *See generally* Suppl. Sprung Decl. & Suppl. Lye Decl. On February 3, 2015, the Court requested that the **[*6]** parties submit a joint statement clarifying the scope of the ACLU's remaining challenges. Dkt. No. 43. The Order also gave the Government an opportunity to submit additional declarations or evidence supporting asserted exemptions. *Id.* The ACLU was likewise given the opportunity to submit additional declarations as needed. *Id.*

The parties responded with a joint statement on March 3, 2015. Dkt. No. 46. The Government submitted an additional declaration in support of the Criminal Division documents, but stated that "with respect to the EOUSA templates, defendant rests on the *Vaughn* descriptions for these documents and the Declaration of John Kornmeier submitted with defendant's opening motion for summary judgment (ECF No. 35-1)." Jt. Stmnt. at 23.

As it stands, in the dispute with the EOUSA, the ACLU seeks two different set of legal templates described more fully below. *Id.* at 21-23. In the dispute with the Criminal Division, the issue is whether it should produce: (1) templates or "go-bys" relating to applications and proposed orders for authorization to use CSS and related technology; (2) legal guidance memoranda, including an email with an attached description of how CSS is utilized by law enforcement; (3) an excerpt **[*7]** from the USA Book, a DOJ agency manual; and (4) a sealed search warrant and supporting application and affidavit. *See id.* at 1-21.

C. Hearing and *In Camera* Review

On April 2, 2015, the Court held a hearing on this matter. Dkt. No. 50. Much of the parties' arguments involved comparing this case to a prior order in the related case, *Am. Civil Liberties Union of N. Cal. v. Dep't of Justice ("ACLU I"), F. Supp. 2d , 70 F. Supp. 3d 1018, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *9 (N.D. Cal. Sept. 30, 2014)*, which involved the same parties and a similar subject matter. The Government has appealed that Order. *See ACLU I*, No. 12-CV-04008-MEJ, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277 (N.D. Cal.), Dkt. No. 66. At the hearing, the Court asked the parties whether they would consider staying this case pending the outcome of the related action. *See* Dkt. No. 50. The parties both agreed that they preferred a ruling on this case before the Court of Appeals decides *ACLU I*. *See id.*

The parties agreed, however, to allow the Government to submit the EOUSA documents as well as a sampling of the Criminal Division documents for the Court's *in camera* review. *Id.* Consequently, the Court ordered Documents 3 and 4 from the Kornmeier Declaration to be lodged with the Court, as well as the following documents from the Third Sprung Declaration: CRM-Lye-39451-39484 (only **[*8]** the portion containing the sealing order); CRM-Lye-2541 (USA Book); and

internal memorandum at CRM-Lye-2948, CRM-Lye-3818-3825, CRM-Lye-9853-9897, CRM-Lye-15311-15316, CRM-Lye-28119-28126, CRM-Lye-34065-34066, and CRM-Lye-17543-17544. Dkt. No. 49. Additionally, the Court asked the Government to submit a list of documents that it proposed the Court should view as a representative sample of the Criminal Division templates. *Id.* The Court gave the ACLU the opportunity to respond if it believed that other or additional documents should be submitted. *Id.*

The Government submitted its proposed list on April 17, 2015. Dkt. No. 51. The ACLU did not file a response. Accordingly, the Court ordered that the Government lodge with the Court the documents it proposed on its list. Dkt. No. 52. This sample of documents includes the following: CRM-Lye-9002-9010; CRM-Lye-9011-9019; CRM-Lye-00015173-00015181; CRM-Lye-00015200-00015207; CRM-Lye-00031754-00031777; and CRM-Lye-00038268-00038270. *Id.* According to the Government, these documents are substantially similar to other withheld documents. *See* Dkt. No. 51 at 1-2 n.1-5. The Government has timely lodged all documents for the Court's *in camera* review. **[*9]** Now, having had the opportunity to conduct an *in camera* review of the above-referenced documents, the Court issues the following Order.

LEGAL STANDARD

A. The FOIA Statutory Scheme

FOIA's "core purpose" is to inform citizens about "what their government is up to." *Yonemoto v. Dep't of Veterans Affairs, 686 F.3d 681, 687 (9th Cir. 2012)* (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 775, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989))*. This purpose is accomplished by "permit[ting] access to official information long shielded unnecessarily from public view and attempt[ing] to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink, 410 U.S. 73, 80, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*. Such access "ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989)* (citation omitted). Congress enacted FOIA to "clos[e] the loopholes which allow agencies to deny legitimate information to the public." *U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 150 (1989), 109 S. Ct. 2841, 106 L. Ed. 2d 112* (citations and internal marks omitted).

At the same time, FOIA contemplates that some information can legitimately be kept from the public through the invocation of nine "Exemptions" to disclosure. *See 5 U.S.C. § 552(b)(1)-(9)*. "These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7-8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001)* (citation omitted). "Consistently with this purpose, as **[*10]** well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dep't of State v. Ray, 502 U.S. 164, 173, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991)*.

B. Summary Judgment Standard in FOIA Cases

"Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." *Nat'l Res. Def. Council v. U.S. Dep't of Def., 388 F. Supp. 2d 1086, 1094 (C.D. Cal. 2005)* (quoting *Mace v. EEOC, 37 F. Supp. 2d 1144, 1145 (E.D. Mo. 1999)*, *aff'd sub nom. Mace v. EEOC, 197 F.3d 329 (8th Cir. 1999))*. The underlying facts and possible inferences are construed in favor of the FOIA requester. *Id. at 1095* (citing *Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350, 227 U.S. App. D.C. 253 (D.C. Cir. 1983))*. Because the facts are rarely in dispute in a FOIA case, the Court need not ask whether there is a genuine issue of

material fact. *Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996)*.

The standard for summary judgment in a FOIA case generally requires a two-stage inquiry. *See Animal Legal Def. Fund v. FDA, 2013 U.S. Dist. LEXIS 120417, 2013 WL 4511936, at *3 (N.D. Cal. Aug. 23, 2013)*. Under the first step of the inquiry, the Court must determine whether the agency has met its burden of proving that it fully discharged its obligations under FOIA. *Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985)* (citing *Weisberg, 705 F.2d at 1350-51*). In the second stage of the inquiry, the Court examines whether the agency has proven that the information that it withheld falls within one of the nine FOIA exemptions. *5 U.S.C. § 552(a)(4)(B)*; *Ray, 502 U.S. at 173* ("The burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document."); **[*11]** *Dobronski v. FCC, 17 F.3d 275, 277 (9th Cir. 1994)*. When an agency chooses to invoke an exemption to shield information from disclosure, it bears the burden of proving the applicability of the exemption. *See Reporters Comm., 489 U.S. at 755*. An agency may withhold only that information to which the exemption applies, and must provide all "reasonably segregable" portions of that record to the requester. *5 U.S.C. § 552(b)(9)*; *see Mead Data Cent., Inc. v. Dep't of Air Force, 566 F.2d 242, 260, 184 U.S. App. D.C. 350 (D.C. Cir. 1977)*.

To carry their burden on summary judgment, "agencies are typically required to submit an index and 'detailed public affidavits' that, together, 'identify[ ] the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.'" *Yonemoto, 686 F.3d at 688* (quoting *Lion Raisins v. Dep't of Agric., 354 F.3d 1072, 1082 (9th Cir. 2004))* (modification in original). These submissions—commonly referred to as a *Vaughn* Index—must be from "affiants [who] are knowledgeable about the information sought" and "detailed enough to allow [a] court to make an independent assessment of the government's claim [of exemption]." *Id.* (citing *Lion Raisins, 354 F.3d at 1079*; *5 U.S.C. § 552(a)(4)(B)*). The government may also submit affidavits to satisfy its burden, but "the government 'may not rely upon conclusory and generalized allegations of exemptions.'" *Kamman v. IRS, 56 F.3d 46, 48 (9th Cir. 1995)* (quoting *Church of Scientology v. Dep't of the Army, 611 F.2d 738, 742 (9th Cir. 1980))*. The government's "affidavits must contain 'reasonably detailed descriptions of the documents **[*12]** and allege facts sufficient to establish an exemption.'" *Id.* (quoting *Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987))*. Courts "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption." *Shannahan v. IRS, 672 F.3d 1142, 1148 (9th Cir. 2012)* (citing *Hunt v. CIA, 981 F.2d 1116, 1119-20 (9th Cir. 1992))*.

Finally, FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *5 U.S.C. § 552(b)*.

DISCUSSION

Because the parties have previously agreed upon the scope and methods of the DOJ's search for responsive documents, the only issue for the Court to decide on summary judgment is whether the Government properly withheld records under the FOIA exemptions. The Government contends that it is authorized to withhold documents under the following exemptions:

- *Exemption 5* (attorney work product privilege, attorney-client privilege, and deliberative process privilege)
- *Exemption 6* (private personnel and medical files)
- *Exemption 7* (law enforcement records or information)

In addition to these exemptions, the Government

argues that (1) it may not disclose records courts have sealed in other cases, and (2) it has already produced all reasonably segregable portions of responsive records. The Court considers **[*13]** each of the documents at issue below.

A. Templates

Both the EOUSA and the Criminal Division withheld templates: the EOUSA withheld templates under *FOIA Exemption 5*, and the Criminal Division withheld templates pursuant to both *FOIA Exemptions 5* and *7(E)*.

1. EOUSA Templates

FOIA *Exemption 5* protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *5 U.S.C. § 552(b)(5)*. This provision essentially grants an agency the same power to withhold documents as it would have in the civil discovery context. *See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)*.

The EOUSA withheld the following documents on attorney work-product grounds: (1) a set of templates from the U.S. Attorney's Office ("USAO") for the Central District of California, consisting of (a) an Application for Use of an Electronic Serial Number Identifier, with a suggested memorandum of points and authorities and a proposed order, and (b) an Ex Parte Application for a Warrant Authorizing the Disclosure of GPS and Cell Site Information and Use of Mobile Electronic Device, with a request to seal the agent's declaration and the warrant (Kornmeier Decl., Ex. B at 2-3 ("Doc. #3")); and (2) **[*14]** a set of templates from the USAO for the Eastern District of Wisconsin consisting of an Application for a Warrant Authorizing the Disclosure of Data Relating to a Specified Cellular Telephone, with a warrant authorizing the disclosure (*Id.* at 3-4 ("Doc. #4")).[2] The DOJ contends that these documents reflect the opinions and thought processes of attorneys "in the clear anticipation of serial litigation" and fall squarely within the definition of work product. Gov. Mot. at 8-9; Kornmeier Decl. PP 7-8; Ex. B at 2-4.

Attorney work-product protects "against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" as well as "documents prepared in anticipation of litigation." *Fed. R. Civ. P. 26(b)(3)*. The purpose **[*15]** of this protection is to "protect[] the attorney's thought processes and legal recommendations from the prying eyes of his or her opponent." *In re EchoStar Commc'ns Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006)* (quotation and internal marks omitted), *cert. denied sub nom. TiVo, Inc. v. EchoStar Commc'ns Corp., 549 U.S. 1096, 127 S. Ct. 846, 166 L. Ed. 2d 665 (2006)*; *see also Hickman v. Taylor, 329 U.S. 495, 508, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*. Importantly, "[i]f a document is fully protected as work product, then segregability is not required." *Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 371, 369 U.S. App. D.C. 49 (D.C. Cir. 2005)* ("factual material is itself privileged when it appears within documents that are attorney work product"); *see also Tax Analysts v. IRS, 117 F.3d 607, 620, 326 U.S. App. D.C. 53 (D.C. Cir. 1997)* ("[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under *exemption 5*."). "'In light of the strong policy of the FOIA that the public is entitled to know what its government is doing and why, *[E]xemption 5* is to be applied as narrowly as consistent with efficient Government operation.'" *Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 979 (9th Cir.*

[2] The EOUSA also withheld a one-page email from an FBI Assistant General Counsel to an Assistant United States Attorney ("AUSA") in the District of Arizona regarding a criminal case, which discusses the best way to describe the use of a particular tracking technique in response to a question from the criminal defendant (Kornmeier Decl., Ex. B at 1-2 (Doc. #2)). The ACLU does not seek disclosure of this document. Pl. Mot. at 25.

2009) (quoting Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 (9th Cir. 1997)), cert. denied, 561 U.S. 1007, 130 S. Ct. 3493, 177 L. Ed. 2d 1057 (2010).

The parties dispute whether EOUSA's withheld documents were "prepared in anticipation of litigation." The ACLU contends that the templates and proposed orders are not attorney work product because they do not pertain to any particular matter or specific case. Pl. Mot. at 12-13, 25. It argues that the Government offers no legal **[*16]** or factual basis to distinguish this case from *ACLU I*. In *ACLU I*, this Court considered whether template applications for court authorization to conduct electronic surveillance were protected as work product. 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *7-10. The *ACLU I* templates were an "application and order for the use of a pen register and trap and trace device." 2014 U.S. Dist. LEXIS 139273, [WL] at *7. On review of the Government's supporting declarations and *Vaughn* Index, the Court concluded that the Government had not shown that these templates were protected as work product because there was no indication that they "provide legal theories or strategies for use in criminal litigation." 2014 U.S. Dist. LEXIS 139273, [WL] at *9. "Rather, they instruct government attorneys on how to apply for an order for location tracking information." *Id.; see also* Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 926 F. Supp. 2d 121, 143 (D.D.C. 2013) ("While the memorandum may be, in a literal sense, 'in anticipation of litigation'—it simply does not anticipate litigation in the way the work-product doctrine demands, as there is no indication that the document includes the mental impressions, conclusions, opinions, or legal theories of . . . any [] agency attorney, relevant to any specific, ongoing or prospective case or cases.").

While the foregoing was the Court's primary basis for its opinion, **[*17]** it also found that the DOJ had "failed to establish that the template pertains to a specific claim or consists of more than general instructions to its attorneys with regard to applying for location tracking orders." *ACLU I*, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *10. Where government lawyers act "as legal advisors protecting their agency clients from the possibility of future litigation," the work product privilege may apply to documents advising the agency as to potential legal challenges. 2014 U.S. Dist. LEXIS 139273, [WL] at *9 (quoting In re Sealed Case, 146 F.3d 881, 885, 330 U.S. App. D.C. 368 (D.C. Cir. 1998)). But when government lawyers are acting as "prosecutors or investigators of suspected wrongdoers," the specific-claim test applies. *Id.* (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864-66, 199 U.S. App. D.C. 272 (D.C. Cir. 1980) and SafeCard Servs. Inc. v. SEC, 926 F.2d 1197, 1202-03, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)). As a result, the work product privilege only attaches to documents prepared "in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party." 2014 U.S. Dist. LEXIS 139273, [WL] at *10 (quoting Safecard, 926 F.2d at 1203 and citing Judicial Watch, 926 F. Supp. 2d at 139-42). The Court found that U.S. Attorneys act as prosecutors in utilizing these applications and orders, and not as attorneys advising an agency client on the agency's potential liability. *Id.* Consequently, the Court ultimately found that the documents the DOJ sought to withhold were not work product as they "set forth general legal standards, not an analysis **[*18]** of issues arising in 'identified litigation' or strategic decisions regarding any particular investigation." 2014 U.S. Dist. LEXIS 139273, [WL] at *10 n.5. The ACLU now urges the Court to adopt a similar holding here.

But the Court did not limit its holding to the degree the ACLU seeks. Specifically, the ACLU argues that the Court's earlier holding in *ACLU I* drew a distinction between "offensive and defensive postures" in determining whether the specific claim test applies. *See* Pl. Reply at 4, Dkt. No. 41. To the extent the ACLU reads the Court's holding this broadly, that was not the Court's intent. Importantly, in *ACLU I*, in addition to considering the "templates," the Court also considered whether

certain internal memoranda were covered as attorney work product. The internal memoranda, like the templates here, were "prepared because of ongoing litigation and the prospect of future litigation" and were "intended to outline possible arguments and or litigation risks prosecutors could encounter" and to "assess the strengths and weaknesses of alternative litigating positions." 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *11. Consequently, the Court found that the memoranda were protected as work product because they were "created to assist AUSAs with recurring litigation **[*19]** issues . . . that have arisen in current litigation." *Id.* The Court concluded that "[w]here, as here, the purpose of the documents is to convey litigation strategy, rather than convey routine agency policy, they are entitled to work product protection." *Id.* (citing *Am. Immigration Council v. U.S. Dep't of Homeland Sec., 905 F. Supp. 2d 206, 221 (D.D.C. 2012))*. As indicated, the primary concern in determining whether a document is protected as work product was and continues to be whether it was created in anticipation litigation in the way the work-product doctrine demands, i.e., by risking revealing mental impressions, conclusions, opinions, or legal theories of an agency attorney, relevant to any specific, ongoing, or prospective case or cases.

The Ninth Circuit has stated that "[t]o qualify for work-product protection, documents must: (1) be 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or by or for that other party's representative." *United States v. Richey, 632 F.3d 559, 567 (9th Cir. 2011)* (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. ("Torf"), 357 F.3d 900, 907 (2004))*. *Torf* further elaborates that:

> [t]he "because of" standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection **[*20]** when it can fairly be said that the "document was created because of anticipated litigation, and *would not have been created in substantially similar form but for the prospect of that litigation* [.]"

Id. at 908 (quotation omitted; emphasis added). In concluding that the privilege applied on *Torf*'s facts, the Ninth Circuit stated that "[t]he documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose *so permeates any non-litigation purpose that the two purposes cannot be discretely separated* from the factual nexus as a whole." *Id. at 910* (emphasis added); *see also City & Cnty. of Honolulu v. U.S. EPA, 2009 U.S. Dist. LEXIS 25621, 2009 WL 855896, at *9 (D. Haw. Mar. 27, 2009)* ("Under Ninth Circuit law, the test is whether the attorney would have generated the material 'but for' the prospect of litigation, though it is immaterial whether or when the litigation actually begins."); *Elkins v. D.C., 250 F.R.D. 20, 26 (D.D.C. 2008)* ("Plaintiffs argue that some documents were not prepared in anticipation of *this* litigation, *i.e.* they were prepared in anticipation of obtaining the search warrant and thus in anticipation of the administrative proceeding. But the doctrine protects documents prepared in anticipation of litigation; it does not have to be for this district court proceeding." **[*21]** (citations omitted; emphasis in original)).

This case presents a novel question in the work product realm as the Government's applications and proposed orders seek authorization to obtain and collect information that will be used in investigations of suspected criminals and that may ultimately lead to the prosecution of those individuals. According to the Government's supporting declaration, these templates were prepared in anticipation of "serial litigation." Kornmeier Decl., Ex. B at 2-4. They contain "specific research" by Government attorneys and those attorneys' "opinions and thought processes." *Id.* Specifically, the EOUSA's *Vaughn* Index entries for the withheld documents state in relevant part:

> Government attorneys, based on their research and analysis, have prepared this document as

> legal advice, in the clear anticipation of serial litigation. They contain specific research that the attorneys for the USAO think are pertinent to criminal litigation involving tracking devices. [They contain instructions for alternative situations.][3] These are the opinions and thought processes of attorneys in anticipation of litigation[.]

Kornmeier Decl., Ex. B at 2-4.[4] The Government explains that **[*22]** "the templates were intended to assist prosecutors in anticipating and addressing potential legal risks and pitfalls in applying for the CSS." Gov. Reply at 6, Dkt. No. 40.

The actual purpose of the documents is to obtain the sought-after information, but the ultimate goal of that information is to use it towards the prosecution of alleged criminals. In that prosecution, a criminal defendant may challenge the Government's evidence through a motion to suppress, which in turn may implicate a number of the same factual and legal issues addressed in these **[*23]** withheld documents. In this sense, the Court cannot divorce the non-litigation purpose—i.e., simply procuring court authorization to obtain the suspected evidence—from the litigation purpose—i.e., forming the support for the criminal case and developing arguments to protect against attempts to prevent the acquired evidence's use. *See Gen. Elec. Co. v. Johnson, 2006 U.S. Dist. LEXIS 64907, 2006 WL 2616187, at *11 (D.D.C. Sep. 12, 2006)* ("a work-product assertion must be supported by some articulable, specific fact or circumstance that illustrates the reasonableness of a belief that litigation was foreseeable."). Put another way, there are two stages at which the Government must support that the evidence acquired can be used in criminal litigation: first, in applying for the authorization to obtain the evidence, and second, in defending a potential motion to suppress. In reviewing the *in camera* documents, the Government's legal analysis is geared toward the first stage but that same analysis could readily be applied later in the criminal litigation including on a motion to suppress. The litigation purpose and concerns in the later adversarial setting permeate the document's non-litigation purpose. Accordingly, the Court finds these documents protected as work product. *See also Elkins, 250 F.R.D. at 26* (finding **[*24]** documents prepared in anticipation of obtaining a search warrant protected as work product).

Additionally, if a document is covered by the attorney work-product privilege, the Government need not segregate and disclose its factual contents. *See 5 U.S.C. § 552(b)*; *Maricopa Audubon Soc'y, 108 F.3d at 1092*; *Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008)*. Having reviewed the *in camera* documents, and finding the legal analysis within closely tied to the facts of how this technology is used, the Court finds that the documents were created in whole in anticipation of litigation.

2. Criminal Division Templates

The Criminal Division also withheld templates under *Exemption 5* as protected by the attorney work product privilege,[5] as well as *Exemption 7(E)*. These templates include applications, agent affidavits, memorandums of law, and proposed orders for the use of a CSS and other investigative techniques. Second Sprung Decl. ¶ 27; Third Sprung Decl. ¶ 8.

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[3] This sentence was only included for Doc. #3, not Doc. #4.

[4] *Compare ACLU I*, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *7, where *Vaughn* Index stated:

> These 16 pages were created by the U.S. Attorney's Office for the Northern District of California. The 16 pages are templates for an application and order for the use of a pen register and trap and trace device. The templates incorporate the interpretation of the law by the U.S. Attorney's Office and give advice on what information to include in particular situations. These templates represent the opinions of attorneys for the U.S. Attorney's Office on the applicable law and are prepared to provide legal advice and in anticipation of litigation[.]

[5] The Government previously asserted that these templates were protected by the deliberative process privilege, but the Government has withdrawn its claim to this privilege as to these documents. *See* Third Sprung Decl. at 4 n.1; *see also* Jt. Stmnt. at 1-14.

The Government maintains that the templates withheld by the Criminal Division were prepared "in anticipation of specific **[*25]** litigation—to wit, a criminal prosecution in which evidence derived from a CSS was to be instrumental." Gov. Mot. at 18-19. It argues that the withheld materials are "litigation strategy documents that were provided by DOJ attorneys—frequently Criminal Division subject matter experts, addressing questions from prosecutors arising from specific cases—to advise prosecutors on the types of legal risks and challenges confronting them in applying for permission to use CSS." Gov. Reply at 8. "These documents anticipate a foreseeable prosecution of the individuals implicated in the investigation of the criminal activity in which the template will be used and are disseminated for the purpose of assisting prosecutors to defend subsequent motions to suppress filed by criminal defendants." Third Sprung Decl. ¶ 8; Sec. Sprung Decl. ¶ 27; *see also* First Sprung Decl. ¶ 42(h). "They are drafted or collected by Criminal Division legal advisors who are subject matter experts for the use of federal prosecutors who are working on active investigations." *Id.* (all). "The templates do not instruct government attorneys on how they must apply for location tracking information, although they do contain Criminal **[*26]** Division attorneys' interpretation of recent case law and reflect the strategies that prosecutors may use to obtain court authorization." *Id.* (all).

These descriptions parallel the Court's analysis above. Specifically, the Government uses these template applications, affidavits, memorandums of law, and proposed orders to secure court permission to utilize CSS and related technology, which results in the foreseeable prosecution of the individuals implicated in the investigation of the criminal activity. The templates also provide advice on the types of "legal risks" and challenges in applying for permission to use CSS and may later help prosecutors in defending subsequent motions to suppress. *See* *Schiller v. NLRB, 964 F.2d 1205, 1208, 296 U.S. App. D.C. 84 (D.C. Cir. 1992))* (protecting an internal NLRB memorandum that "contain[ed] advice on how to build an [Equal Access to Justice Act] defense and how to litigate EAJA cases," as well as other documents that outlined instructions for preparing and filing pleadings, contained legal arguments, and identified supporting authorities), *abrogated on other ground by* *Milner v. Dep't of the Navy, 562 U.S. 562, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011)*. As with *ACLU I*'s legal memoranda, these documents reflect strategies, opinions, and advice that arise from "specific cases" and are used by attorneys working on "active **[*27]** investigations" and "foreseeable prosecution[s]." Third Sprung Decl. ¶ 8. In accordance with the Court's analysis above, and having reviewed these documents *in camera*, the Court finds the Criminal Division templates protected as work product under *Exemption 5*.

B. Memorandums

The Government also withheld a variety of legal memoranda and an email under various Exemptions described in turn below. *See* Third Sprung Decl. ¶¶ 9-15; Suppl. Lye Decl. ¶¶ 12-13.

1. Documents Withheld Under Exemptions 5 and 7(E)

First, several of the documents described as internal memorandum are substantially similar to the so-called "template" or "go-by" documents the Court found protected as attorney work product. According to that same analysis, and having conducted an *in camera* review of the following documents, the Court finds them protected as work product:

- **CRM-Lye-2948**, which contains "model language for federal prosecutors to include in a proposed order authorizing the use of a CSS by DEA and other law enforcement personnel under the PR/TT statute." Third Sprung Decl. ¶ 9.

- **CRM-Lye-9853-9897**, which contains "advice of CCIPS legal advisors for

prosecutors to follow when seeking court-authorization to use Title III and **[*28]** PR/TT orders authorizing the use of location tracking information in various scenarios arising in criminal investigations." *Id.* ¶ 11. "The document describes how the Government may obtain location tracking information, what types of information is available from wireless providers, when emergency authorization is available, what kind of legal process is required under various circumstances, notification requirements, and extraterritorial jurisdiction issues." *Id.* The document also includes with it "template applications and proposed orders for using each of the various technologies, and contains links for consent forms, model pleadings and briefs, selected court opinions, and training materials." *Id.* "Access to these materials is restricted to prosecutors and Criminal Division attorneys via the CCIPS intranet site." *Id.*

• **CRM-Lye-34065-34066** "contains advice of legal advisors in the Criminal Division for prosecutors to follow when handling kidnapping cases, including how to seek emergency authorization to engage in electronic surveillance and to use location tracking technologies when time is of the essence." *Id.* ¶ 14.

• **CRM-Lye-15311-15316 and CRM-Lye-19179-19184** are "copies of template **[*29]** applications and proposed orders for federal prosecutors to use when seeking court-authorization to use a CSS under the PR-TT statute. They also include cover memorandum from the Associate Director of the Criminal Division's Office of Enforcement Operations that describes the technology and provides legal guidance concerning what kinds of information may lawfully be obtained." *Id.* ¶ 12. The Government withheld these documents under *Exemption 5* as attorney work product. *Id.*[6]

A review of these documents reveals that they were prepared in contemplation of issues arising in future litigation, and as such, the Court finds that a litigation purpose permeates these documents. Accordingly, *Exemption 5* applies and these documents are properly withheld.

However, second, the Government has not demonstrated that the following documents are protected as attorney work product:

• **CRM-Lye-3818-3825, CRM-Lye-23249-23256, CRM-Lye-33358-33365** are "copies of a document containing advice of legal advisors **[*30]** in the Criminal Division for AUSAs to follow when seeking court-authorization to utilize different location tracking technologies for wireless devices in various scenarios in particular criminal investigations." *Id.* ¶ 10. The document "discusses legal requirements, procedures to be followed, when an individual's consent may be used in lieu of a court order, and a description of the underlying technologies." *Id.*

• **CRM-Lye-28119-28126** is "a collection and analysis of technical terminology, legal authorities, and internal DOJ procedures prepared for the purpose of assisting federal prosecutors and law enforcement agents concerning various types of electronic surveillance used in criminal investigations, including location tracking technologies for wireless devices." *Id.* ¶ 13.

According to the Government, all the documents described above "were prepared because the Department of Justice was conducting a criminal prosecution or anticipating doing so" and were created "to assist the Department in prosecutions and investigations." *Id.* ¶ 16.

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[6] Additionally, the Government withheld the documents under ***Exemptions 6*** and ***7(C)*** for "reveal[ing] the name and other personal information of the Associate Director for the Criminal Division's OEO." Third Sprung Decl. ¶ 12.

But the Government has not shown how these documents were prepared in anticipation of litigation in the way the work product doctrine contemplates. Rather **[*31]** the documents provide instructions to government attorneys about how they might seek to use the technology in various circumstances. In other words, they instruct government attorneys on how they must apply for location tracking information. *Compare ACLU I*, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *9 (finding no attorney work product where the Government's *Vaughn* Index and related affidavits established only that the documents "instruct[ed] government attorneys on how to apply for an order for location tracking information."). Nothing about these documents or their supporting declarations demonstrates that a litigation purpose permeates these documents. Rather, the first set of documents provides instructions about how to obtain authorization for use of the technology, functioning more like an agency manual rather than revealing mental impressions. And the second set of documents contains a list of terms, regurgitating statutory definitions and, in some cases, dictionary definitions, with no indication that the disclosure of such a document would reveal mental impressions that would be detrimental or prejudicial in the adversarial process. Accordingly, the Court cannot find these documents protected as work product.

The question then is whether **[*32]** they are protected by *Exemption 7(E)*. FOIA *Exemption 7* permits the government to withhold "records or information compiled for law enforcement purposes" under certain enumerated conditions. *5 U.S.C. § 552(b)(7)*. Particularly, *Exemption 7(E)* provides that "records or information compiled for law enforcement purposes" may be withheld if they "would disclose techniques and procedures for law enforcement investigations or prosecutions." *Id.* However, "*Exemption 7(E)* only exempts investigative techniques not generally known to the public." *Rosenfeld v. Dep't of Justice, 57 F.3d 803, 815 (9th Cir. 1995)*. The Government may also withhold detailed information regarding a publicly known technique where the public disclosure did not provide "a technical analysis of the techniques and procedures used to conduct law enforcement investigations." *See Bowen v. U.S. Food & Drug Admin., 925 F.2d 1225, 1228-29 (9th Cir 1991)*; *see also Elec. Frontier Found. v. Dep't of Defense, 2012 U.S. Dist. LEXIS 137010, 2012 WL 4364532, at *4 (N.D. Cal., Sep. 24, 2012)*. "[T]he government must show, by evidence admissible on summary judgment, that release of the withheld information 'would reasonably be expected to risk circumvention of the law.'" *2012 U.S. Dist. LEXIS 137010, [WL] at *3* (quoting *5 U.S.C. § 552(b)(7)(E)*).

The threshold test under *Exemption 7* is whether the documents have a law enforcement purpose, which requires an examination of whether the agency serves a "law enforcement function." *Church of Scientology Int'l v. IRS, 995 F.2d 916, 919 (9th Cir. 1993)* (internal citation and quotation marks omitted). **[*33]** In order to satisfy *Exemption 7*'s threshold requirement, a government agency with a clear law enforcement mandate "'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld, 57 F.3d at 808* (internal citation omitted). There is no dispute here that the DOJ has a clear law enforcement mandate and the two documents as to which the Criminal Division asserts law enforcement exemptions bear a rational nexus to enforcement of federal law.

The Government, however, provides little explanation as to how the disclosure of any of the documents above "could reasonably be expected to risk circumvention of the law." *5 U.S.C. § 552(b)(7)(E)*. The Government presents two primary arguments as to why *Exemption 7(E)* applies to the materials it has withheld. First, it argues in a footnote that *Exemption 7(E)* is best interpreted as providing categorical protection to materials describing "techniques and procedures" while its inquiry into whether "disclosure could reasonably be expected to risk circumvention" applies only to "guidelines." Gov. Reply at 7 n.4;

see also 5 U.S.C. § 552(b)(7)(E). As the withheld materials relate to techniques and procedures, presumably—by the Government's **[*34]** logic—these materials would be categorically protected and properly withheld. In support, the DOJ cites *Asian Law Caucus v. U.S. Dep't of Homeland Sec., 2008 U.S. Dist. LEXIS 98344, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008)*, which found that the Ninth Circuit had yet to "squarely address" the distinction between guidelines and techniques and procedures, but ultimately did not rule on whether categorical protection existed as to techniques and procedures. With respect to that court's finding, the Court agrees with the ACLU that the Ninth Circuit's holding in *Rosenfeld* "adopted [] as the law of this Circuit," that "*Exemption 7(E)* only exempts investigative techniques not generally known to the public." *Rosenfeld, 57 F.3d at 815*. This holding establishes that techniques and procedures are not categorically withheld under *Exemption 7(E)*. *See id.* & n.9. The Court sees no cause to distinguish the Ninth Circuit's holding here.

Second, the Government argues that the information it seeks to protect "goes beyond" the known fact that the government can and does track individuals using CSS and instead provides "particularized detail on what tactics and factors DOJ attorneys take into account in deciding whether, how, and when to use CSS—information that could assist unlawful actors in evading detection." Gov. Reply at 7. However, several **[*35]** courts, including this one, have found inadequate an agency's conclusory assertions that *Exemption 7(E)* protects specifics about how and when the technique at issue is used if the technique itself is otherwise generally known to the public. *See Rosenfeld, 57 F.3d at 815* (holding that the government "simply by saying that the 'investigative technique' at issue is not the practice but the application of the practice to the particular facts underlying that FOIA request" cannot be adequate under *Exemption 7(E)* because otherwise it would prove too much); *Am. Civil Liberties Union v. FBI, 2013 U.S. Dist. LEXIS 93079, 2013 WL 3346845, at *9 (N.D. Cal. July 1, 2013)* ("The FBI's conclusory assertion that, even though the technique is generally known, the specifics on how and when the technique is used is not generally known, is not adequate."); *Feshbach v. SEC, 5 F. Supp. 2d 774, 787 (N.D. Cal. 1997)* (rejecting *Exemption 7(E)* withholding where government failed to "provide non-conclusory reasons why disclosure of each category of withheld documents would risk circumvention of the law."); *ACLU I*, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *15 (*Exemption 7(E)* unavailable where declarations "set forth only conclusory statements that the public is not aware of the specifics of how or when the techniques are used, but do not state that the techniques are not generally known to the public."). This is not to suggest a categorical exception **[*36]** to *Exemption 7(E)*; in other words, the fact that the technique is generally known will not make specific applications of that technique or procedure always subject to disclosure. But the Government cannot rely on conclusory assertions to show that release of the withheld information risks circumventing of the law. "*Exemption 7(E)* requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Am. Civil Liberties Union v. FBI, 2014 U.S. Dist. LEXIS 130501, 2014 WL 4629110, at *11 (N.D. Cal. Sept. 16, 2014)* (citing *Mayer Brown LLP v. IRS, 562 F.3d 1190, 1194, 385 U.S. App. D.C. 250 (D.C. Cir. 2009)*).

The ACLU has put forward substantial evidence—including evidence the DOJ itself had made public—that the techniques and procedures relating to the use of cell site simulators is generally known to the public. *See* Lye Decl., Ex. 1 (Electronic Surveillance Issues) at 151, 153; Ex. 2 (Electronic Surveillance Manual) at 40[7], 48; Ex. 4 (Electronic Surveillance Manual Chapter XIV, dated August

[7] *See* Dkt. No. 48 for page 40 of the Electronic Surveillance Manual.

21, 3013, entitled "Cell Site Simulators/Digital Analyzers/Triggerfish"). CSS and its use by the federal government has also been the subject of extensive news coverage. Lye Decl. ¶¶ 12, 13, & Exs. 6-7 (dozens of news articles about the government's use of CSS). The public domain evidently contains enough information about the technology behind CSS that members of the public have actually created their **[*37]** own CSS devices. Lye Decl. ¶ 16, Ex. 10. This evidence demonstrates that the public in general knows that the government possesses and utilizes such cell phone technology in its investigations to locate and obtain information about the cell-phone holder. The Government has not distinguished this case from *ACLU I*, for instance by addressing "the fact that the public is already aware that minimizing vehicular or cell phone usage will allow them to evade detection." *ACLU I*, 2014 U.S. Dist. LEXIS 139273, 2014 WL 4954277, at *14. Thus, as in *ACLU I*, "[t]o the extent that potential law violators can evade detection by the government's location tracking technologies, that risk already exists." *Id.* And for that matter, the ACLU has presented evidence that the public already has tools that can detect CSS. Lye Decl. ¶ 17, Ex. 11.

Of course, that is not to say that the mere existence of an already present risk or threat to effectiveness of the Government's investigative techniques is enough, alone, to make *Exemption 7(E)* inapplicable. However, where, as here, the Government provides only conclusory statements showing no distinct risk associated with the disclosure of documents it seeks to withhold, **[*38]** application of *Exemption 7(E)* is improper. *Rosenfeld, 57 F.3d at 815* ("It would not serve the purposes of FOIA to allow the government to withhold information to keep secret an investigative technique that is routine and generally known."); *compare Bowen, 925 F.2d at 1228-29* (government may withhold detailed information regarding a publicly known technique where the public disclosure provides "a technical analysis of the techniques and procedures used to conduct law enforcement investigations."); *Asian Law Caucus, 2008 U.S. Dist. LEXIS 98344, 2008 WL 5047839, at *4* (while use of watchlists to screen travelers was a matter of common knowledge, government could withhold information about the operation of those lists, which was not generally known or understood by the public). Unlike *Bowen* and *Asian Law Causus*, the Government has not provided any indication, other than conclusory statements, that the withheld documents contain information that "goes beyond" what is already generally available to the public. The Government bears the burden of demonstrating that the material is exempt from disclosure, but its current evidence—including the supplemental declaration ordered by the Court and the *in camera* documents—fails to provide the necessary support to meet its burden. *See Maricopa Audubon Soc'y, 108 F.3d at 1092* ("To meet its burden, the agency **[*39]** must offer oral testimony or affidavits that are 'detailed enough for the district court to make a de novo assessment of the government's claim of exemption.'" (citation omitted)). Even reviewing these documents *in camera*, the Court cannot say that they reveal more than what is generally available to the public or that they risk circumvention of the law such that the application of *Exemption 7(E)* is required.

2. Email Withheld Under Exemptions 5, 6, and 7.

The Government also argues that it properly withheld the following document:

> • **CRM-Lye-17543-17544**, "an email message dated August 22, 2012 from an ESU attorney to another Criminal Division attorney containing the Criminal Division's legal advice on how law enforcement may use its own equipment to obtain location information for a particular wireless device." Third Sprung Decl. ¶ 15. "The email describes the technology, what type of legal process is necessary, and what type of information the device can gather." *Id.* The government withheld the email under the attorney work product, the deliberative process, and the attorney-client privileges of *Exemption 5*, as well as *Exemptions 6* and *7(C)*. *Id.*

The *Vaughn* Index describes this document **[*40]** as "**EMAIL. *Subject***: N/A ***Re***: Attached description and guidance on how cell site simulators and related technologies are utilized and implemented by law enforcement." *Vaughn* Index at 134, Dkt. No. 35-7; Jt. Stmnt. at 21. While the Government contests release of this document under several exemptions, it also acknowledges that the document "excerpts test of a document in the public domain, which has been released to Plaintiff." Third Sprung Decl. ¶ 15.

Theoretically what remains for this Court's review is the non-public portion, but it is not evident which portion of the document the Government has continued to withhold. For clarity, the Government shall file a declaration following this Order indicating which portion of the document is non-public and presently withheld. The Court will issue an order regarding this email following its review of that declaration.

C. USA Book

The Government describes withheld document CRM-Lye-2541 as a page from USA Book on cell site simulators, Triggerfish, and cell phones, which "describes the underlying technology, discusses the legal basis for its use, identifies certain of the unique capacities of a CSS that present significant litigation risk, names the ESU attorney who is a legal expert **[*41]** on the subject, and references other relevant DOJ legal resources." Suppl. Sprung Decl. ¶ 26; Third Sprung Decl. ¶ 7. The Index describes it as "USA Book, Electronic Surveillance, Cell Site Simulators, Triggerfish, Cell Phones Re: Description of the technology." Jt. Stmnt. at 1. The Government asserts that it properly withheld this document under the attorney work product of *Exemption 5*. Third Sprung Decl. ¶ 7; Jt. Stmnt. at 1.

The Government provides no grounds for why CRM-Lye-2541 is protectable as such. First, its supporting declarations provide no indication that the material was prepared in anticipation of litigation. While the Third Sprung Declaration indicates that this document contains the "legal basis" for the CSS's use, names an expert attorney on the subject, and refers to legal resources, there is no indication that any part of this document was created in anticipation of litigation, either current or prospective. The *Vaughn* Index itself provides little explanation other than that the document contains a "description of the technology." *See* Jt. Stmnt. at 1. This does not show anything connecting the document to attorney work product. Nothing in the government's evidence shows that disclosure of this page from the **[*42]** USA Book threatens the attorney work product protection's aim of "protect[ing] the attorney's thought processes and legal recommendations from the prying eyes of his or her opponent." *In re EchoStar, 448 F.3d at 1301*; *see also Hickman, 329 U.S. at 508*.

Second, having reviewed this document *in camera*, the Court finds nothing that would be protected as work product. There is no indication that this page of the USA Book was prepared in anticipation of litigation or that its "litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Torf, 357 F.3d at 910*. The document informs government officials about the technology, its legal basis, and which resources are available in the event the technology is needed, but there is nothing that demonstrates this document was created in anticipation of litigation in the way the work product doctrine contemplates.

As the Government only sought protection of this document under *Exemption 5*, the Court cannot find that this document is entitled to exemption.

D. Sealed Documents

The parties' final dispute concerns CRM-Lye-39451-39484, which contains a search warrant issued by the U.S. District Court for the Central District of California, a supporting *ex parte* ***[*43]*** application and agent affidavit, and a sealing order authorizing the use of CSS in a particular investigation. Third Sprung Decl. ¶ 6. Previously, the ACLU asserted that the "DOJ

should be ordered to produce the search warrant and supporting application and affidavit unless it submits a declaration averring that the investigation at issue remains active." Pl. Reply at 14. The Government's latest declaration states that "the underlying investigation has concluded and that none of the subjects of the investigation were charged." Third Sprung Decl. ¶ 6. Nevertheless, the matter "remains under seal." *Id.* According to the Government, "[t]he documents were properly withheld because the language of the sealing order indicates that it was intended to preclude disclosure while the seal remains in effect and therefore the DOJ has no discretion to release the documents in this matter." *Id.*[8]

"[T]he mere existence of a court seal is, without more, insufficient to justify nondisclosure under the FOIA. Instead, only those sealing orders intended to operate as the functional equivalent **[*44]** of an injunction prohibiting disclosure can justify an agency's decision to withhold records that do not fall within one of the specific FOIA exemptions." *Concepcion v. FBI, 699 F. Supp. 2d 106, 111 (D.D.C. 2010)* (quoting *Morgan v. United States, 923 F.2d 195, 199, 287 U.S. App. D.C. 372 (D.C. Cir. 1991))*; *cf. GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 387, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980)*. The agency bears "the burden of demonstrating that the court issued the seal with the intent to prohibit the [agency] from disclosing the [document] as long as the seal remains in effect." *Id.* (quoting *Morgan, 923 F.2d at 198* (alterations in original)). The Government can demonstrate intent through "(1) the sealing order itself; (2) extrinsic evidence, such as transcripts and papers filed with the sealing court, casting light on the factors that motivated the court to impose the seal; (3) sealing orders of the same court in similar cases that explain the purpose for the imposition of the seals; or (4) the court's general rules or procedures governing the imposition of seals." *Morgan, 923 F.2d at 198* (footnote omitted).

Having reviewed the sealing order itself,[9] the Court finds that there is no evidence that it was intended to operate as the functional equivalent of an injunction. The sealing order was originally a proposed order submitted by the Government and adopted and signed by the court. It provides that the document is kept under seal until the Government **[*45]** notifies the court that it is appropriate to unseal the documents. Accordingly, the Government's assertion that the court intended the documents to remain sealed is inconsistent with the Order that for all intents and purposes allows the Government to decide when to unseal those documents.

Additionally, as the Government admits that the investigation related to these materials has concluded, the common law right of access applies. *See United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont., 658 F.3d 1188, 1194 (9th Cir. 2011)* (holding that "the public has a qualified common law right of access to warrant materials after an investigation has been terminated."). "When the common law right of access applies to the type of document at issue in a particular case, a 'strong presumption in favor of access' is the starting point" and the party seeking to restrict access to the document "bears the burden of overcoming this strong presumption by . . . 'articulat[ing] compelling reasons' . . . that outweigh the general history of access and the public policies favoring disclosure." *Id. at 1194-95* (citations and internal marks omitted). The **[*46]** Government has not argued that any such compelling reasons exist as to why maintaining the secrecy of these documents outweighs the public policy favoring disclosure.

However, the Government has raised concerns that

[8] The Government does not assert that these documents contain materials covered under the Pen Register Statute (*18 U.S.C. § 3123(d)*) or Title III (*18 U.S.C. § 2518(8)(b)*).

[9] The Court reviewed only the sealing order, not any of the related documents.

these documents "contain the names and other personal information about the subjects, as well as personal information about the prosecutor and agent and a third party/witness victim." Third Sprung Decl. ¶ 6. As such, the DOJ asserts that the documents are properly withheld under *Exemption 6* and *Exemption 7(C)*. *Id.*

Exemption 7(C) permits withholding of "records or information compiled for law enforcement purposes" to the extent that their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*. Such information is protected from disclosure unless "the public interests in disclosing the *particular* information requested outweigh those privacy interests." *Yonemoto, 686 F.3d at 694* (emphasis in original). *Exemption 6* is similar but distinct from *Exemption 7(C)*; specifically, *Exemption 6* provides that an agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." **[*47]** *5 U.S.C. § 552(b)(6)*; *see Yonemoto, 686 F.3d at 693 n.7*. The Court is thus required "to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information." *Lane v. Dep't of the Interior, 523 F.3d 1128, 1137 (9th Cir. 2008)*. The Court must "balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." *Reporters Comm., 489 U.S. at 776*; *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 n.2 (9th Cir. 2008)*.

The Government's arguments do not support that *Exemption 6* or *7(C)* should be used to withhold these documents in their entirety. Rather, the more appropriate solution under these Exemptions is to disclose the documents and redact the personal information of the persons described in those documents. Accordingly, the Government will produce the documents at CRM-Lye-39451-39484, redacted in accordance with this Order.

CONCLUSION

Based on the analysis above, the DOJ's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART** and the ACLU's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. The Government properly withheld under *Exemption 5* the following documents: (1) EOUSA Docs. #3 and #4; (2) Criminal Division internal memoranda, CRM-Lye-2948; CRM-Lye-9853-9897; CRM-Lye-34065-34066; CRM-Lye-15311-15316; CRM-Lye-19179-19184; and (3) Criminal Division templates, CRM-Lye-9002-9010; **[*48]** CRM-Lye-9011-9019; CRM-Lye-00015173-00015181; CRM-Lye-00015200-00015207; CRM-Lye-00031754-00031777; CRM-Lye-00038268-00038270. However, the Government must produce CRM-Lye-39451-39484 (sealing order, warrant, and application); CRM-Lye-2541 (USA Book); CRM-Lye-3818-3825, CRM-Lye-23249-23256, CRM-Lye-33358-33365, and CRM-Lye-28119-28126 (internal memoranda). The Government must also file a declaration by June 24, 2015, indicating which portion of CRM-Lye-17543-17544 (email) is non-public and presently withheld.

IT IS SO ORDERED.

Dated: June 17, 2015

/s/ Maria-Elena James

MARIA-ELENA JAMES

United States Magistrate Judge

End of Document

ACLU v. Danberg

Superior Court of Delaware, New Castle

December 6, 2006, Submitted ; March 15, 2007, Decided

C.A. NO. 06C-08-067-JRS

Reporter
2007 Del. Super. LEXIS 61 *; 2007 WL 901592

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE, v. CARL C. DANBERG, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE DELAWARE DEPARTMENT OF CORRECTION.

Notice: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Prior History: Upon Consideration of American Civil Liberties Union of Delaware's Motion for Protective Order.

Disposition: GRANTED in part and DENIED in part.

Core Terms

discovery, potential litigation, public body, inmates, parties, custody, medical care, protective order, facilities, documents, admissible evidence, requesting party, public record, interrogatories, requesting, verified

Case Summary

Procedural Posture
Plaintiff filed a complaint seeking to compel defendant, the Commissioner of the Delaware Department of Correction (DOC), to comply with the Freedom of Information Act (FOIA) in connection with plaintiff's request for information regarding the delivery of health care services within prison facilities. The Commissioner made requests for production of documents. Plaintiff objected to the discovery and sought a protective order.

Overview
As grounds for the refusal, the DOC pointed to various exceptions enumerated in FOIA which designated certain information as not subject to public inspection. The court held that the pending or potential litigation exception could not serve as a platform from which to initiate the broad discovery sought by the Commissioner. However, the Commissioner produced correspondence from plaintiff that suggested that plaintiff might be contemplating litigation against the DOC based on alleged inadequate medical care. The court found that when a public body had reasonable, objective, and articulable grounds to believe that the requesting party was preparing for litigation, it was appropriate to allow the public body to seek to confirm the requesting party's intentions in order to determine if the potential litigation exception was applicable. Accordingly, the court directed plaintiff to provide a verified response to the Commissioner's interrogatories number six and seven, but only to the extent that those interrogatories asked plaintiff to identify whether it had been engaged by a client to investigate and/or pursue a potential claim for alleged inadequate medical care.

Outcome

The motion for protective order was granted in part, and denied in part, and plaintiff was ordered to provide a verified statement as to whether plaintiff was investigating or pursuing a claim, on behalf of a client or in its own right, based on inadequate medical care at DOC facilities.

Counsel: Julia M. Graff, Esquire, American Civil Liberties Union of Delaware, Wilmington, Delaware. Michael T. Kirkpatrick, Esquire, Jennifer Soble, Esquire, Public Citizen Litigation Group, Washington, DC. Attorneys for Plaintiff.

Aaron A. Goldstein, Deputy Attorney General, Wilmington, Delaware. Attorney for Defendant, Carl C. Danberg, as Commissioner of the Delaware Department of Correction.

Amy A. Quinlan, Esquire, Morris James, LLP, Wilmington, Delaware. K. Lee Marshall, Esquire, Bryan Cave, LLP, St. Louis, Missouri. Attorneys for Intervenor, Defendant, Correctional Medical Services, Inc.

Judges: Judge Joseph R. Slights, III.

Opinion by: Joseph R. Slights, III

Opinion

MEMORANDUM OPINION.

SLIGHTS, J.

I.

In this opinion, the Court considers the elements of the so-called "pending or potential litigation exception" to Delaware's Freedom of Information Act ("FOIA") and the scope of permissible discovery relating to this defense. **[*2]** [1] The plaintiff, American Civil Liberties Union of Delaware ("ACLU"), has filed a complaint in this court seeking to compel the Defendant, Carl C. Danberg ("defendant"), the Commissioner of the Delaware Department of Correction ("DOC"), [2] to comply with FOIA in connection with the ACLU's request for information regarding the delivery of health care services within Delaware's prison facilities. The defendant filed an answer in which he raised several defenses, including that the requested information was comprised of protected trade secrets, and that the ACLU was seeking the information on behalf of its clients in order to prosecute litigation against the defendant or others. At the time he served his answer to the complaint, the defendant also propounded interrogatories and requests for production of documents directed to the ACLU which, *inter alia,* sought information relating to the various defenses raised in the answer. The ACLU objected to the discovery and sought protection from the Court.

[*3] After receiving supplemental briefing from the parties, and oral argument, the Court has concluded that the ACLU's objections to the discovery are well-founded, assuming it will verify that it has not been engaged by any client for the purpose of investigating a potential claim against the defendant or CMS for inadequate medical care in Delaware's correctional facilities. The "pending or potential litigation exception" cannot serve as a platform from which to initiate the broad discovery that has been propounded here. The defendant is, however, entitled to a verified statement as to whether the ACLU is investigating and/or pursuing a claim, on behalf of a client or in its own right, based on inadequate medical care at DOC facilities. Accordingly, the ACLU's motion for protective order is **GRANTED in part and DENIED in part.** [3]

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[1] *DEL. CODE ANN., tit. 29, §§ 10001 et. seq.* (2003).

[2] The original complaint named Mr. Danberg's predecessor, Stanley W. Taylor, Jr., as defendant. By stipulation, Mr. Danberg has been substituted as the defendant to reflect his recent appointment to the Commissioner's position. Defendant, Correctional Medical Services, Inc. ("CMS"), has been permitted by the Court to intervene as a defendant in this litigation but has not taken a position with respect to this discovery dispute.

[3] The Court issued an oral ruling on the motion *sub judice* at the outset of a conference with counsel on January 9, 2007. The Court indicated to the parties that it would further articulate the bases for the decision

[*4] II.

The ACLU initiated this action on August 6, 2006, and alleged that the defendant, on behalf of the DOC, had refused to comply with the ACLU's written FOIA request in which it demanded access to five designated categories of documents, all of which related to the medical care rendered to inmates while in the custody of the DOC. The DOC responded to the FOIA request by producing certain documents but declining to produce others. As grounds for the refusal, the DOC pointed to various exceptions enumerated in FOIA which designate certain information that will not be subject to public inspection. The defendant's answer in this court reiterated these defenses and requested judgment in his favor as to all claims raised in the complaint.

As stated, the defendant propounded his discovery at the same time he served his answer to the complaint. In his interrogatories, the defendant asked the ACLU to identify, *inter alia:* all communications it has had with inmates in the custody of the DOC; all ACLU clients who are past or current inmates in the custody of the DOC; any inmate in the custody of the DOC that the ACLU has sought as a client; any advice given to inmates derived from **[*5]** public records disclosed pursuant to FOIA; any advice given to inmates regarding the means by which to preserve claims against the DOC; any decision made by the ACLU to pursue concerted legal action against the DOC; and past instances where the ACLU has litigated against Delaware or its employees or agencies. In his requests for production of documents, the defendant asked the ACLU to produce, *inter alia:* any medical records obtained by ACLU regarding any past or current inmate in the custody of the DOC; any written accounts of medical care prepared by past or current inmates in the custody of the DOC regarding medical care received while in custody; and any correspondence between the ACLU and pastor current inmates in the custody of the DOC within the last year.

The ACLU objected to the discovery and moved for a protective order on the grounds that the discovery was premature, irrelevant, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and sought information protected by the attorney-client privilege and/or the work product immunity. [4] The motion has been fully briefed and argued and the matter is now ripe for decision.

[*6] III.

As the arguments of the parties were refined through litigation, it became clear that the discovery most troublesome to the ACLU was the discovery that addressed the ACLU's intent to pursue litigation against the DOC. Specifically, it is evident that several of the defendant's interrogatories and requests for production are intended to develop facts that might support the defendant's claim, asserted as an affirmative defense, that the ACLU was seeking documents in its FOIA request for the purpose of pursuing litigation against the DOC for inadequate medical care rendered to inmates. The ACLU claims that this sort of discovery is not appropriate in FOIA litigation. Indeed, according to the ACLU, "it is highly unusual for a defendant in a FOIA case to take **[any]** discovery of the FOIA requester." [5] The ACLU argues that the discovery requests at issue here arc particularly inappropriate because they go to one of the defendant's proffered excuses for refusing to produce information. Under the circumstances, the ACLU contends that the defendant should have been well aware of the factual bases for his denial of the FOIA demand at the time he refused to provide the requested **[*7]** information. Alternatively, the ACLU argues that the discovery is premature because the defendant has yet to state specifically

in a written opinion. To the Court's knowledge, the verified statement contemplated here has already been supplied by the ACLU.

[4] D.I. 13 (ACLU Motion for Protective Order).

[5] D.I. 13, at 4 (emphasis supplied).

why he has refused to comply with the FOIA demand.

The defendant counters that discovery is not as uncommon in FOIA cases as the ACLU would have the Court believe. He has cited a number of cases in Delaware where some limited discovery of the relevant issues was pursued, apparently without challenge. He also contends that he is entitled to confirm his belief - - supported by some limited information he has uncovered without discovery - - that the ACLU intends to prosecute litigation against the DOC, either in its own name or on behalf of clients, for alleged inadequate medical care at DOC facilities. [6]

[*8] IV.

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court … may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." [7] In determining whether to grant a protective order, the court will consider whether the discovery will impose an undue burden on the responding party, whether it is calculated to lead to the discovery of admissible evidence and whether it seeks information that is subject to a recognized privilege or immunity (e.g., attorney-client privilege or work product immunity). [8] Whether or not to enter a protective order lies within the sound discretion of the court. [9]

V.

The parties disagree as to the extent to which discovery is permitted **[*9]** in FOIA actions generally and also, more specifically, the extent to which a defendant's reliance upon the "pending or potential litigation" exception will justify discovery into the FOIA requester's plans for litigation. The Court will consider these issues in turn.

A. Discovery In FOIA Litigation

Delaware's FOIA law is intended "to ensure government accountability, inform the electorate and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know." [10] **[*10]** FOIA contemplates a process whereby "citizens [will] have easy access to public records in order that the society remain free and democratic." [11] The statute's emphasis of "easy access to public records" suggests a legislative intent that the proceedings to enforce a FOIA request will be appropriately streamlined to accommodate the public's "right to know" while also affording all parties procedural due process. Needless to say, prolonged, involved and expensive discovery would be contrary to the summary process envisioned by the General Assembly when it enacted FOIA.

Generally, the motives of the party requesting information from a "public body" [12] **[*11]** are not relevant to the determination of whether that party is entitled to access public records under FOIA. [13]

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[6] The defendant attached as exhibits to his response to the motion for protective order several letters from the ACLU, some directed to inmates in the custody of the DOC, which he contends evidence the ACLU's intent to pursue litigation against him and/or the DOC. These letters will be addressed below in the discussion of the "pending or potential litigation" exception to FOIA.

[7] *Del. Super. Ct. Civ. R. 26(c)*.

[8] *See Williams v. Morris, 223 A.2d 390, 391 (Del. 1966)*.

[9] *See American Ins. Co. v. Synvar Corp., 57 Del. 315, 199 A.2d 755, 757, 7 Storey 315 (Del. 1964)*.

[10] *Mell v. New Castle County, 835 A.2d 141, 146 (Del. Super. Ct. 2003)*(citation omitted).

[11] *DEL. CODE ANN., tit. 29, § 10001* (2003).

[12] FOIA contemplates that requests for information will be directed to a "public body," defined by the statute as "any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State?." *See DEL. CODE ANN., tit. 29, §§ 10002(a), 10003(a)*.

[13] *See Del. Op. Atty. Gen.* 06-IB09 (2006) ("To inquire into a requestor's purpose would turn FOIA into a battleground for

Accordingly, discovery directed to the requesting party in order to elicit his purpose in seeking information under FOIA rarely will lead to admissible evidence. Such discovery, therefore, typically is not appropriate. [14] This general rule is consistent with the notion that it is the public body's burden, in the first instance, to establish the factual and legal bases for its refusal to provide information in response to a FOIA request. [15] The citizen initiating the FOIA request need not demonstrate that his request is proper unless and until the public body to whom the request is directed raises legitimate concerns regarding the *bona fides* of the request. [16] Simply stated, the public body rarely will require to discovery to support its denial of a FOIA request.

B. The Pending or Potential Litigation Exception

The enumerated statutory exceptions to FOIA, including the "pending or potential litigation" exception, pose a barrier to the public's right to access and are, therefore, narrowly **[*12]** construed. [17] **[*13]** Nevertheless, even when construing statutory language narrowly, the court "cannot ignore the plain meaning of the words of the statute." [18] The statutory provision applicable here provides: "For purposes of this chapter, the following records shall not be deemed public [and shall, therefore, be excepted from FOIA]: [a]ny records pertaining to pending or potential litigation which are not records of any court." [19] The rationale for this exception is easy to discern with respect to "pending litigation." As this court has observed:

> The pending litigation exception to FOIA addresses a practical reality: when parties to pending litigation against a public body seek information from that public body relating to the litigation, they are doing so not to advance 'the public's right to know,' but rather to advance their own personal stake in the litigation. Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure. [20]

The exception is somewhat more complicated in its application, however, when dealing with "potential litigation." As the Attorney General has recognized, "[i]n our litigious society, a governmental agency always faces some threat of suit. To construe the term 'potential litigation' to include an unrealized or idle threat of litigation would seriously undermine the purpose of [FOIA]." [21] To address this dynamic, the Attorney General has adopted a two pronged test to determine if the "potential litigation" exception would justify a refusal to supply information in response to a FOIA request: (1) litigation must be likely or reasonably foreseeable; and (2) there must be a "clear nexus" between the requested documents and the subject matter of the

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disputes…. The inevitable delays of such a system would frustrate the statute's purpose of 'easy access to public records.'"). *See also* U.S. Dept of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989)(holding that applicability of FOIA will "turn on the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.").

[14] *See* U.S. Dept. of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 489 (1994), 114 S. Ct. 1006, 127 L. Ed. 2d 325.

[15] *See* Guy v. Judicial Nom. Comm'n, 659 A.2d 777, 781 (Del. Super. Ct. 1995).

[16] *Id.*

[17] *See Chem. Indus. Council of Delaware, Inc. v. State Coastal Zone Indus.,* 1994 WL 274295, at *12 (Del. Ch. May 19, 1994).

[18] Bd. of Educ. of Town of Ridgefield v. Freedom of Information Comm'n, 217 Conn. 153, 585 A.2d 82, 85 (Conn. 1991) (construing Connecticut's equivalent to the "pending or potential litigation" exception).

[19] DEL. CODE ANN., tit. 29, § 10002(g)(9) (2003).

[20] Mell, 835 A.2d at 147.

[21] *Del. Op. Atty. Gen.,* 02-IB12 at 4 (May 21, 2002) (quoting Claxton Ent. v. Evans County Bd. Of Comm'r, 249 Ga. App. 870, 549 S.E.2d 830, 834 (Ga. App. 2001)).

litigation. **[*14]** [22] This test strikes a balance between the need to construe the exceptions to FOIA narrowly and the need to give effect to the actual words of the statute which provide for the exception. Accordingly, the test will be adopted here.

When determining whether litigation is "likely or reasonably foreseeable," the public body should look for objective signs that litigation is coming. [23] For instance, a written demand letter in which a claim is asserted, or action is demanded, may give rise to a proper inference that litigation will soon follow. [24] Other indicators of "potential litigation" might include "previous or preexisting litigation between the parties or proof of ongoing litigation concerning similar claims or [] proof that a party has both retained counsel with respect to the claim **[*15]** at issue and has expressed an intent to sue." [25] In any event, whatever the indicator, the public body must be able to point to a "realistic and tangible threat of litigation … characterized with reference to objective factors" before it may avail itself of the "potential litigation" exception to FOIA. [26]

Setting the standard by which the public body may ultimately prevail on a "potential litigation" defense to a FOIA request does not necessarily answer the question of when, if ever, the public body may seek discovery from the requesting **[*16]** party to determine if litigation is in the works. While courts generally hold that the requesting party's motives are irrelevant in the FOIA analysis, this is not so when the requesting party seeks information from a public body to advance that party' s private interest in litigation. [27] The relevancy of the requesting party's motives in such circumstances is the same whether litigation is "pending" or simply a "potential" course of action. Thus, when a public body has reasonable, objective and articulable grounds to believe that the requesting party is preparing for litigation, it is appropriate to allow the public body to seek to confirm the requesting party's intentions in order to determine if the "potential litigation" exception is applicable. This is not to say that the public body is entitled to discover the specifics of the "potential litigation," such as potential theories of recovery, potential evidence or witnesses in support of the claim, or potential parties to the claim. Rather, when the public body is able to convince the court that "potential litigation" may be the sole or primary purpose of the FOIA request, the court may determine that it is appropriate to allow **[*17]** the public body to propound discovery to the requesting party for the mere purpose of ascertaining whether that party was intending to pursue litigation against the public body, or one of its employees or representatives, at the time the FOIA request was made.

In this case, the defendant has produced correspondence from the ACLU, some addressed to inmates in the custody of the DOC, that suggest that the ACLU may be contemplating litigation against the DOC based on alleged inadequate medical care at DOC facilities. In one letter, the attorney for the ACLU involved in this litigation informs an inmate: "The ACLU is currently in the initial stages of collecting and analyzing information from Delaware inmates who suffer from inadequately treated medical conditions, and we are conferring with colleagues about the feasibility of collective legal action or other forms of advocacy." [28] In another form letter apparently

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[22] *Del. Op. Atty. Gen.,* 02-IB30 at 2 (Dec. 2, 2002).

[23] *Id.* at 3 ("The potential litigation exception applies only when there is a 'realistic and tangible threat of litigation' based on 'objective factors….'") (citation omitted).

[24] *See, e.g., Bd. of Educ. of the Town of Ridgefield, 585 A.2d at 86* (demand letter constituted objective evidence of potential litigation); *Claxton Ent., 549 S.E.2d at 834* (same).

[25] *Claxton Ent., 549 S.E.2d at 834-35*.

[26] *Id.*

[27] *See Mell, 835 A.2d at 147*.

[28] D.I. 14, Ex. C.

sent to several inmates, the ACLU states: "We will **[*18]** seriously consider bringing a class action lawsuit on behalf of Delaware prisoners, seeking improvements in the medical and mental care system in the State's prisons and jails." [29] This same letter goes on to advise inmates regarding the proper means by which to perfect a "medical grievance" within the prison system. [30]

The Court is satisfied that the ACLU's letters to inmates give rise to reasonable, objective and articulable grounds to believe that the ACLU may be preparing for litigation, and that the litigation may implicate the same issues that are the subject of the ACLU's FOIA request to the DOC. Although perhaps inadequate to carry DOC's ultimate burden to prove the "potential litigation" defense, these letters suggest that there may be more in the works than "unrealized or idle threats of litigation." [31] Limited discovery on this subject may lead to admissible evidence. Accordingly, the Court will direct the ACLU to provide a verified response **[*19]** to the defendant's interrogatories number six and seven, but only to the extent that these interrogatories ask the ACLU to identify whether it has been engaged by a client to investigate and/or pursue a potential claim against the defendant, DOC, or CMS (or their agents or representatives) for alleged inadequate medical care within the DOC's facilities. The ACLU shall also provide a verified statement as to whether it currently intends, in its own right, to pursue such a claim The ACLU will not, however, be compelled to answer any of the remaining discovery which sought the identity of such clients, the evidence supporting the claim(s), or the specifics of communications with client(s) or potential clients. Such information is not relevant to the limited question of whether or not the "pending or potential litigation" exception applies here, nor would it lead to the discovery of admissible evidence.

VI.

Based on the foregoing, the **[*20]** ACLU's motion for protective order is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

Judge Joseph R. Slights, III

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[29] *Id.*

[30] *Id.*

[31] *Del. Op. Atty. Gen.* 02-1812 at 4 (May 21, 2002) (citation omitted).

Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.

Superior Court of Delaware, Kent

September 18, 2001, Submitted ; December 28, 2001, Decided

C. A. No. 01C-01-039

Reporter
2001 Del. Super. LEXIS 538 *; 2001 WL 1752515

BOARD OF MANAGERS OF THE DELAWARE JUSTICE INFORMATION SYSTEM, an agency of the State of Delaware, RONALD J. TORGERSON, Executive Director of the Board of Managers, STATE BUREAU OF IDENTIFICATION, an agency of the State of Delaware, and CAPTAIN DAVID E. DEPUTY, Director of the State Bureau of Identification, Plaintiffs, v. GANNETT CO., t/a THE NEWS JOURNAL, Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co., 808 A.2d 453, 2002 Del. Super. LEXIS 257 (Del. Super. Ct., 2002)*

Prior History: *Gannett Co. v. Del. Justice Info. Sys., 765 A.2d 951, 2000 Del. LEXIS 544 (Del., 2000)*

Disposition: [*1] CROSS MOTIONS FOR SUMMARY JUDGMENT DENIED.

Core Terms

vertical, summary judgment, histories, invasion of privacy, prior action, evidentiary, individuals, linking, parties, issues

Case Summary

Procedural Posture

The parties filed cross motions for summary judgment in plaintiff board of managers' lawsuit against defendant newspaper, in which the board of managers sought a declaratory judgment determining whether or not the board was permitted to release certain criminal file information to the newspaper.

Overview

The newspaper sought access to the Delaware Justice Information System. Evidence was submitted by the board asserting that the newspaper could identify the individuals on the system by name and could match external personal information with arrest histories so as to associate names with full criminal histories in the system. *Del. Code Ann. tit. 29, § 10002(d)* prohibited the dissemination of criminal file data constituting an invasion of privacy. The newspaper editor asserted that it was possible to match a few very high profile cases to the system; for nearly all other cases, a match was impossible. The court found that there was a factual dispute as to whether or not the newspaper was able to identify individuals, and this dispute was material to interpreting the issue of invasion of privacy under *§ 10002(d)*. Res judicata did not preclude the declaratory judgment action. In the prior action, in which the trial court found that the disclosure of the mass amounts of information requested by the newspaper constituted an invasion of privacy, the issue of whether the disclosure of each piece of data requested by the newspaper was an invasion of

privacy was not litigated.

Outcome
The cross motions for summary judgment were denied.

Counsel: Michael J. Rich, Esquire, and W. Michael Tupman, Esquire, Deputy Attorneys General, Dover, Delaware, for the State of Delaware.

Richard G. Elliott, Jr., Esquire, and Jennifer C. Bebko, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for the Gannett Co., t/a The News Journal.

Judges: William L. Witham, Jr., J.

Opinion by: William L. Witham, Jr.

Opinion

ORDER

WITHAM, J.

Upon consideration of the briefs and oral arguments regarding the parties' cross motions for summary judgment, it appears to the Court that summary judgment may not be granted in this matter. There are genuine issues of material fact and no party is entitled to judgment as a matter of law.

Summary Judgment Standard

Superior Court Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [1] The burden is on the moving party to show, with reasonable certainty, that no genuine issue of material fact exists **[*2]** and judgment as a matter of law is permitted. [2] When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. [3] Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate.

Discussion

The history and facts of this case (and of the various statutes at issue herein) have been set forth in prior decisions of this Court [4] and will not be repeated here. Suffice it to say that Plaintiffs, the Board of Managers ("Board") of the Delaware Criminal Justice Information System ("DELJIS"), brought the instant suit for declaratory judgment against the Gannett Co., t/a The News Journal ("The News **[*3]** Journal") to determine whether or not the Board may release certain criminal file information to The News Journal. Under *29 Del. C. § 10002(d)*, Delaware's Freedom of Information Act ("FOIA"), criminal file data constituting an invasion of privacy cannot be disseminated.

The parties maintain that there is no material dispute regarding the facts and **[*4]** the Court is free to interpret the applicable statutes; however, the Court disagrees. The parties have made the following arguments.

First, the Board has submitted the affidavits of Ronald J. Torgerson, Executive Director of

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[1] Super. Ct. Civ. R. 56.

[2] *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Martin v. Nealis Motors, Inc., Del. Supr., 247 A.2d 831 (1968)*.

[3] *McCall v. Villa Pizza, Inc., Del. Supr., 636 A.2d 912 (1994)*.

[4] *See* *Gannett Co. v. Delaware Criminal Justice Info. Sys., Del. Super., 768 A.2d 508 (1999)*, *aff'd per curiam*, ***Del. Supr., 765 A.2d 951, 2000 WL 1769513 (2000)*** (hereinafter "*Gannett I*"); *Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, Del. Super., C.A. No. 01C-01-039, Witham, J. (Apr. 2, 2001) (ORDER), *cert. denied per curiam*, ***Del. Supr., 781 A.2d 692, 2001 WL 474635 (2001)*** (ORDER); *Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, slip op., Del. Super., C.A. No. 01 C-01-039, 2001 WL 1198674, Witham, J. (Sept. 14, 2001) (ORDER).

DELJIS, and John P. O'Connell, Jr, Director of the Statistical Analysis Center, stating, respectively, that "The News Journal can identify the individuals in the DELJIS database by name," and can "associate external personal information with arrest histories" so as to "associate names . . . with full criminal histories in the [DELJIS] file." [5]

In contrast, The News Journal has submitted the affidavit of Editor, Merritt Wallick, stating that although "it might be possible to match a few very high profile cases to the DELJIS database . . . [for] nearly all other cases, a match would be impossible."

Obviously, a dispute as to whether or not The News **[*5]** Journal can identify individuals is material to interpreting the issue of invasion of privacy under FOIA. Criminal file data constituting an invasion of privacy cannot be disseminated under the statute. Importantly, no evidentiary hearing has ever been held on this issue.

For this reason, the Court will deny the motions for summary judgment, and hold an evidentiary hearing specifically on the issue of whether or not The News Journal can obtain identities of individuals, in any manner, using the information sought from DELJIS. If "it may be possible to deduce a particular individual's name and thereby recreate arrest and/or conviction records by simply cross-referencing . . . it would be improper to permit the dissemination of this information . . . ." [6]

Other Issues

In addition to the above, several threshold matters need to be addressed. First, The News Journal contends that the Board and DELJIS are barred from **[*6]** bringing this present declaratory judgment action under the doctrines of Res Judicata, Collateral Estoppel, Waiver and Defense Preclusion. For the reasons outlined below the Court finds that these doctrines do not prevent the present action.

Res Judicata

There are five requisites that must be met before res judicata is applied.

> 1. The court making the prior adjudication must have had jurisdiction over the subject matter of the suit and of the parties to it.
>
> 2. The parties to the prior action were the same as the parties, or their privies, in the pending case.
>
> 3. The prior cause of action was the same as that in the present case, or the issues necessarily decided in the prior action were the same as those raised in the pending case.
>
> 4. The issues in the prior action were decided adversely to the contentions of the plaintiffs in the pending case.
>
> 5. The prior decree is final. [7]

[*7] In the present case, the issues in the prior action were not decided adversely to the contentions of the plaintiffs in the pending case. In fact, the *Gannett I* court explicitly found for the plaintiff. The court found that the disclosure of the "immense scope" of information requested by The News Journal did "constitute an invasion of privacy;" [8] however, the court did not examine each piece of data requested by The News Journal. For this reason, it was never decided in the prior action whether or not the disclosure of the particular

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[5] The Board alleges this can be done by cross-referencing various data sources (e.g. "electronic police blotters" and newspaper articles).

[6] *Gannett Co. v. Delaware Criminal Justice Info. Sys., 768 A.2d at 515-16*.

[7] *RSS Acquisition, Inc. v. Dart Group Corp., 1999 Del. Super. LEXIS 591, Del. Super., C.A. No. 99 C-05-275, 1999 WL 1442009* at *3-4, Quillen, J. (Dec. 30, 1999) (Letter Op.); *see also, Rumsey Elec. Co. v. University of Delaware, Del. Super., 334 A.2d 226 (1975), aff'd per curiam, Del. Supr., 358 A.2d 712 (1976)*.

[8] *Gannett Co. v. Delaware Criminal Justice Info. Sys., 768 A.2d at 515*.

"linking" [9] number at issue here would also constitute an invasion of privacy.

[*8] *Collateral Estoppel*

Likewise, collateral estoppel is not available. "Under the doctrine of collateral estoppel, if a court has decided an issue of fact that is necessary to its judgment, then that decision precludes relitigation in another lawsuit on a different cause of action involving a party to the first case." [10] The issue of fact in this case (i.e. whether a "linking" number will provide a means to identify individuals) was not necessary to the prior court's judgment in *Gannett I*. Any particular data field was not relevant to the *Gannett I* decision, and no evidentiary or factual conclusions were drawn as to the implications of releasing a particular piece of data. The *Gannett I* decision on the issue of invasion of privacy was based solely on the *cumulative* effect of The News Journal's 300-plus data field request.

Waiver/Defense Preclusion

The News Journal suggests that by not bringing its **[*9]** current arguments before the court in the prior action, the Board has waived its right to seek a declaratory judgment in the present action. The statutory duties of the Board, and DELJIS administrators, cannot be "waived" simply because there has been prior litigation on the same issues.

The jurisdictional authority for judicial review, and the declaratory judgment action here is *29 Del. C. § 10005*, the FOIA "Enforcement" section. FOIA [11] must be construed with the enabling statutes of the Board and DELJIS. [12] Although, it is perhaps troublesome that, since *Gannett I*, the Board has interpreted the applicable statutes so as to give The News Journal the requested "linking" numbers, and then take them away, the fact still remains that an administrative body cannot be precluded from interpreting its enabling statute, or prevented from performing its duty to enforce and apply statutory mandates.

[*10] Moreover, "there is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. This and other courts have approved such administrative 'changes in course,' as long as the new interpretation is consistent with [legislative] intent." [13]

[*11] *Vertical Histories*

Next, the Court notes that it is undisputed that if a "linking" number is provided to The News Journal, as requested, vertical histories will be established. This has been admitted by The News-Journal, [14] **[*12]** and this is the position of the State. The

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[9] The News Journal has used various terminology throughout this litigation for the type of number, or data field, it seeks. These include the following terms: "surrogate identifier," "linking number," "random identifiers" and "scrambled identifiers." "Linking" number will be used herein to identify the data field at issue.

[10] ***Madanat v. Alpha Therapeutic Corp., Del. Supr., 719 A.2d 489 (1998)***.

[11] Under *29 Del. C. § 10002(d)(6)*.

[12] 11 *Del. C.*, Chapters 85 and 86.

[13] *Bankamerica Corp. v. United States, 462 U.S. 122, 149, n.10, 76 L. Ed. 2d 456, 103 S. Ct. 2266 (1983)* (White, J., dissenting).

See, *e.g.*, *United States v. Generix Drug Corp., 460 U.S. 453, 103 S.Ct. 1298, 75 L. Ed. 2d 198 (1983)* (approving new agency statutory interpretation despite many years of contrary interpretation); *NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L. Ed. 2d 171 (1975)* (same); *NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953)* (same); *United States v. San Francisco, 310 U.S. 16, 31-32, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940)* (same). The rule that an agency can change the manner in which it interprets a statute is often said to be subject to the qualification that, if it makes a change, the reasons for doing so must be set forth so that meaningful judicial review will be possible. See *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L. Ed. 2d 350 (1973)* (plurality opinion); 4 K. Davis, Administrative Law Treatise §§ 20:11 (2d ed. 1983).

[14] *See* Tr. of Hr'g on Mot. at 28. Counsel for the News Journal stated that, "We have established a vertical history." Counsel also argued that the State cannot say there are privacy concerns because of this--as long as no names are attached to the vertical record.

vertical history will be for a limited time period, but it will provide a "window" or "snapshot" of the criminal record of unnamed individuals for the limited time period of the data request. [15] Since there is no dispute as to this fact, the Court must determine if the dissemination of this information violates either the FOIA statute or Chapters 85 and 86 of Title 11, so as to preclude release of this information. The Court does not decide this issue today, for the reason that if it is proven that The News Journal can cross-reference vertical histories with names, the Court will not need to reach this issue.

User Agreements

Finally, the Court addresses The News Journal's argument regarding the effect of a user agreement on the privacy concern here. This issue was addressed in *Gannett I*. "The fact that The News Journal is amenable to signing a user's agreement in order to prevent data manipulation is of little importance. Rather, the dispositive factor here is the mere possibility of such misuse." [16]

Conclusion

The material dispute of fact in this case concerns whether or not The News Journal can take vertical histories and cross-reference them with various other sources (such as The News Journal articles, or arrest warrant database to which The News Journal has access), thereby determining names to go with the vertical histories. [17] The News Journal's **[*13]** position is that there is no way that names can be matched with vertical histories from the DELJIS database. [18] Both sides need to provide evidence beyond mere assertions in affidavits. The State must show how The News Journal can attach a name to a vertical history. Obviously, The News Journal will need to rebut any such proof. Summary judgment in this matter is reserved until such evidentiary submissions are made in this matter. [19]

[*14] For the foregoing reasons the cross motions for summary judgment are hereby ***DENIED.***

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

End of Document

[15] In this case, the requested data will cover a ten-year period.

[16] *Gannett Co. v. Delaware Criminal Justice Info. Sys., 768 A.2d at 516, n. 9*.

[17] Affidavit of R. J. Torgerson, Pl. Op. Br., Exh. 4, Para 16; *see also* Pl. Op. Br. at 5, 7 regarding allegations of potential for cross-referencing with other data fields.

[18] *See* Tr. of Hr'g on Mot. at 29 (stating that The News Journal's position is that there is no privacy issue without a name).

[19] The Court makes one last observation that there appears to be no material dispute of fact regarding whether or not The News Journal seeks the identity of police officers; however, the Court reserves summary judgment on the propriety of releasing this data as well, until after the evidentiary submissions requested above. The Court notes that such evidentiary submissions may also be useful when considering the issue of the release of police identifiers.

Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing

Supreme Court of Delaware

May 23, 2014, Submitted; August 22, 2014, Decided

No. 91, 2014

Reporter
2014 Del. LEXIS 373 *; 100 A.3d 1020; 2014 WL 4179199

CAMTECH SCHOOL OF NURSING AND TECHNOLOGICAL SCIENCES, Appellant Below-Appellant, v. DELAWARE BOARD OF NURSING, Appellee Below-Appellee.

Notice: PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Subsequent History: Case Closed September 9, 2014.

Prior History: **[*1]** Court Below: Superior Court of the State of Delaware, in and for New Castle County. C.A. No. N13A-05-004.

Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing, 2014 Del. Super. LEXIS 40 (Del. Super. Ct., Jan. 31, 2014)

Core Terms

Nursing, withdraw, state approval, education program, good cause, requirements, notice, deficiencies, proceedings, correcting, regulation, measures, graduates, argues

Case Summary

Overview

HOLDINGS: [1]-Notice and hearing was properly provided to a nursing school by the Delaware Board of Nursing regarding its withdrawal of the school's state approval pursuant to *Del. Code Ann. tit. 24, § 1919(b)*, because the Board had continually informed the school of its deficiencies since 2009, and the school's proposed corrective action would not improve its graduates' exam score results; [2]-The Board had the discretion to determine whether the school showed "good cause" for extension of the time in which to correct the program's deficiencies under *Del. Code Ann. tit. 24, § 1919(b)* and 24 Del. Code Regs. § 1900-2.5.9.1.2; there was no requirement that the Board define "good cause" or adhere to rigid standards.

Outcome

Judgment affirmed.

Judges: Before STRINE, Chief Justice, HOLLAND, and RIDGELY, Justices.

Opinion by: Henry duPont Ridgely

Opinion

ORDER

On this 22nd day of August 2014, it appears to the Court that:

(1) Appellant-Below/Appellant Camtech School of Nursing and Technological Sciences ("Camtech") appeals from a Superior Court Opinion and Order affirming the decision of the Delaware Board of

Nursing (the "Nursing Board" or "Board") withdrawing state approval of Camtech's nursing education program. Camtech raises three claims on appeal. First, Camtech contends that the Board's revocation of its state approval violated procedural due process and Delaware law. Second, Camtech argues that the Board erred as a matter of law in its interpretation of "good cause" under Delaware law. Finally, Camtech argues that the Board erred in its factual findings. We find no merit to Camtech's claims. Accordingly, we affirm.

(2) Camtech applied to the Nursing Board for approval of its nursing education program in August 2005. It obtained Phase I approval in September 2006, which allowed students to enroll at Camtech as it proceeded through Phase II. Camtech **[*2]** never completed Phase II of its program requirements and has never obtained Full Approval. On February 17, 2009, the Board informed Camtech that it would be placed on probation due, in part, to the inadequate pass rate of its graduates who took the National Counsel Licensure Exam ("NCLEX").

(3) In September 2012, while Camtech was still on probation, the Board notified Camtech that the Board intended to withdraw Camtech's state approval pursuant to *24 Del. C. § 1919(b)*. Camtech timely requested a hearing, which was held on November 14, 2012. At this hearing, Camtech presented testimony from its Director of Practical Nursing and its President. Camtech also submitted documentary evidence of its Proposed Corrective Plan of Action and related Appendix. At the conclusion of the initial hearing, the Board continued the matter until January 9, 2013, so that it could deliberate on the new evidence Camtech had submitted. At the January 9th hearing, the Board voted to withdraw approval of Camtech's Practical Nursing Program. Thereafter, Camtech submitted a Request for Reconsideration based, in part, on its most recent NCLEX pass rates.

(4) On April 10, 2013, the Nursing Board issued an opinion and order explaining **[*3]** its decision to withdraw state approval. The Board also denied Camtech's Request for Reconsideration in a separate order, finding that Camtech's NCLEX first-time pass rates were still inadequate. Camtech appealed to the Superior Court, which affirmed the decision of the Board.[1] This appeal followed.

(5) This Court's review of an administrative agency's decision is the same as the Superior Court's.[2] That is, we review the decision of the Nursing Board "to determine whether [it] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on sufficient substantial evidence and is not arbitrary."[3] Substantial evidence is defined as evidence that "a reasonable mind might accept as adequate to support a conclusion."[4] Questions of law are reviewed de novo.[5] But we also give judicial deference to "an administrative agency's construction of its own rules in recognition of its expertise in a given field."[6] Thus, an agency's interpretation of its own rules or regulation will only be reversed when it is "clearly wrong."[7]

(6) "In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like

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[1] *Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing, 2014 Del. Super. LEXIS 40, 2014 WL 604980 (Del. Super. Ct. Jan. 31, 2014)*.

[2] ***Kopicko v. State Dep't of Servs. for Children, Youth & their Families, 846 A.2d 238, 2004 WL 691901, at *2 (Del. 2004)***.

[3] *Avallone v. State/Dep't of Health & Soc. Servs. (DHSS), 14 A.3d 566, 570 (Del. 2011)* (alteration **[*4]** in original) (quoting *Hopson v. McGinnes, 391 A.2d 187, 189 (Del. 1978)*).

[4] *Stanford v. State Merit Emp. Relations Bd., 44 A.3d 923, 2012 WL 1549811, at *3 (Del. 2012)* (quoting *Avallone, 14 A.3d at 570*).

[5] *Avallone, 14 A.3d at 570* (citing *Person-Gaines v. Pepco Holdings, Inc., 981 A.2d 1159, 1161 (Del. 2009)*).

[6] ***Stanford, 44 A.3d 923, 2012 WL 1549811, at *3*** (quoting *Div. of Soc. Servs. v. Burns, 438 A.2d 1227, 1229 (Del. 1981)*).

[7] *Id.* (quoting *Burns, 438 A.2d at 1229*).

judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings."[8] As it relates to administrative proceedings, due process requires that the parties are given an "opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends."[9] Appropriate notice "requires that the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings."[10]

(7) The Delaware Code provides additional requirements that the Nursing Board must follow in order to withdraw state approval of a deficient nursing education program. The provision states:

> If the Board determines that any approved **[*5]** nursing education program is not maintaining the standards required by this chapter and by the Board, written notice thereof, specifying the deficiency and the time within which the same shall be corrected, shall immediately be given to the program. The Board shall withdraw such program's approval if it fails to correct the specified deficiency, and such nursing education program shall discontinue its operation; provided, however, that the Board shall grant a hearing to such program upon written application and extend the period for correcting specified deficiency upon good cause being shown.[11]

(8) Camtech argues that the Board failed to follow the prescribed procedure for withdrawing state approval. Camtech first alleges that the Board failed to provide written notification of its intention to withdraw state approval before February 2012. This argument is contradicted by the record. On February 17, 2009, the Board sent Camtech a letter explaining that Camtech was granted "continuing conditional approval (probation)" of its nursing education program, citing concerns with its NCLEX pass-rate.[12] Then in May 2009, the Board continued its conditional, probationary approval after receiving **[*6]** Camtech's improvement plan. And Camtech recognized the Board's concerns with its NCLEX passage rate, explaining that it was implementing "[a] plan for improving graduates' performance on the NCLEX-PN with measures of effectiveness of identified actions and a timeline for periodic re-evaluation."[13] In February 2012, following a January meeting of the Nursing Board, Camtech received written notice that the Board intended to withdraw its initial, conditional approval of Camtech's nursing education program. Then in September 2012, the Board fully delineated Camtech's deficiencies in its written notice to withdraw state approval. This was sufficient notice under the Delaware Code and does not violate notions of fundamental fairness.

(9) Camtech next argues that the Board failed to specify Camtech's deficiencies in a timely manner so that it could adequately correct them and continue its nursing education program. Again, the record demonstrates otherwise. The Board has continually informed Camtech since 2009 of its concern with regard to its nursing education program. Primary among these concerns has been Camtech's NCLEX passage rate. During this **[*7]** time, Camtech never achieved the eighty-percent threshold on the NCLEX passage rate

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[8] *Vincent v. E. Shore Markets, 970 A.2d 160, 163-64 (Del. 2009)* (quoting *Phillips v. Delhaize Am., Inc., 2007 Del. Super. LEXIS 201, 2007 WL 2122139, at *2 (Del. Super. Ct. July 20, 2007)*.

[9] *Id. at 164* (citing *Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))*.

[10] *Id*. (citing *Mathews, 424 U.S. at 333*).

[11] *24 Del. C. § 1919(b)*.

[12] Appellant's Op. Br. Appendix at A1-2.

[13] *Id*. at A4.

mandated by state regulation.[14] The Board also identified other ongoing deficiencies in its September 2012 notice to withdraw state approval. Specifically, the Board noted that "Camtech's curriculum does not comply with the Board's requirements," citing concerns with its credit allocation and course structure as well as its lab facilities and clinical experiences.[15] Moreover, during this entire period, Camtech was on constructive notice of the Board's regulatory requirements for a nursing education program, which are clearly laid out in the Delaware Administrative Code.[16] The Board provided sufficient notice of Camtech's regulatory deficiencies.

(10) Camtech next argues that the Board failed to fully consider Camtech's plan to restore the integrity of its nursing education program. This is based on the claim that Camtech provided a large amount of documentary evidence to the Board in November 2012, and the Board issued its **[*8]** decision withdrawing state approval less than two months later. Such an amount of time, according to Camtech, would have been insufficient to consider all of the pertinent evidence. Camtech provides no legal support for this argument. Moreover, there is nothing in the record to suggest that the Board's deliberations were insufficient to consider the evidence put before it. Camtech's argument lacks merit.

(11) Camtech next contends that the Board erred as a matter of law in its interpretation of the "good cause" requirement to permit Camtech's continued operations because its opinion was arbitrary and capricious. As previously noted, the Nursing Board is permitted under Delaware statute to "extend the period for correcting [a] specified deficiency upon good cause being shown."[17] The Delaware Administrative Code provides similar authority to the Board.[18] Camtech alleges that the Board has never articulated a definition of "good cause" or provided objective measures to satisfy good cause. But Camtech does not provide any authority for which an administrative agency is required to provide such a definition or objective measures. Nevertheless, "[s]tatutory interpretation is ultimately the responsibility **[*9]** of the courts."[19] And where a statute is clear, the plain language of the text controls.[20]

(12) The plain language of *Section 1919(b)*—as well as the regulation—provides the Nursing Board with discretion to determine the requirements of good cause. That is, if the Board finds that good cause has been shown, it has the discretion to extend the correction period. There is nothing in either the statute or the coordinating regulation that requires the Board to define "good cause" or provide objective measures to satisfy such a requirement. Thus, the Board in its discretion is free to decide what conduct is demonstrative of good cause—even on a case-by-case basis. Judicial review of the Board's decision will thus be for an abuse of that discretion.[21] "An agency abuses its discretion only where its decision has exceeded the

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[14] 24 *Del. Admin. C.* § 1900-2.5.4.2.2.

[15] Appellant's Op. Br. Appendix at A30-33.

[16] *See* 24 *Del. Admin. C.* § 1900-2.5.4 (providing the bases for the denial or the withdrawal of initial approval of a nursing education program).

[17] *24 Del. C. § 1919(b)*.

[18] *See* 24 *Del. Admin. C.* § 1900-2.5.9.1.2 ("The Board shall grant a hearing to such program that make a written application and the Board shall extend the period for correcting specified deficiency upon good cause being shown.").

[19] *Pub. Water Supply Co. v. DiPasquale, 735 A.2d 378, 382 (Del. 1999)*.

[20] *See LeVan v. Independence Mall, Inc., 940 A.2d 929, 932-33 (Del. 2007)* ("An unambiguous statute precludes the need for judicial interpretation, and 'the plain meaning of the statutory language controls.'" (quoting *Eliason v. Englehart, 733 A.2d 944, 946 (Del. 1999)*)).

[21] *See Sweeney v. Del. Dep't of Transp., 55 A.3d 337, 342 (Del. 2012)* ("Absent an error of law, we review an agency's decision for abuse of discretion.").

bounds of reason under the circumstances." **[*10]** [22]

(13) Here, the Board did not abuse its discretion when it found that Camtech had not shown good cause as to why it should be permitted additional time to fix its deficiencies. The Board placed Camtech on probation in 2009 because it was concerned with Camtech's NCLEX pass rate. Then in 2012, the Board notified Camtech that it was programmatically deficient because it (1) had three consecutive years of substandard NCLEX passage rates, (2) failed to attain compliance with Board regulations, (3) failed to correct previously identified deficiencies, and (4) failed to obtain national accreditation. In response, Camtech submitted a plan that sought to increase the NCLEX pass rate by limiting admittees, requiring NCLEX examination within ninety days of graduation, and partnering with a third party to conduct exam preparation services. It also included other confusing and internally inconsistent remedial actions.

(14) The Board found that Camtech's corrective action plan *in toto* failed to address the systemic deficiencies raised by the Board. This was because increasing the qualifications for **[*11]** admittees merely would decrease the pool of exam takers rather than improve the quality of Camtech's nursing education program. And stipulating that graduates must take the NCLEX within ninety days of graduation did not result in any measured success when such a regulation was in place from 2008 through 2010. Finally, the Board found that Camtech's partnership with a third party, Assessment Technologies Institute Nursing Education, provided no measurable objective to ensure improvement in its program or NCLEX pass rate. The NCLEX violation alone was sufficient for the Board to reject Camtech's state approval.[23] And the Board's decision that Camtech lacked good cause does not exceed the bounds of reason under the circumstances. Nor has Camtech presented any basis to conclude that this decision was arbitrary or capricious.[24] Thus, Camtech's second claim is without merit.

(15) Finally, Camtech claims in its Summary of Argument section and the header of its Argument section that the Board's factual findings are erroneous and not supported by substantial evidence in the record. But in the body of its Argument section, Camtech contends that (1) the Board failed to consider new evidence of its improved passage rate, (2) Camtech presented evidence to counter the Board's bases for withdrawal of state approval, and (3) the Board's decision was based on issues not raised during the proceedings.

(16) In *Roca v. E.I. du Pont de Nemours & Co*., this Court explained: "It is well established that 'to assure consideration of an issue by the court, the appellant must both raise it in [the Summary of the Argument] and pursue it in the Argument portion of the brief.'"[25] *Supreme Court Rule 14* further provides that a **[*13]** brief must contain "[a] summary of argument, stating in separate numbered paragraphs the legal propositions upon which each side relies," and that the body of the brief shall state

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[22] *Id*. (citing *Person-Gaines, 981 A.2d at 1161*).

[23] *See 24 Del. C. § 1919(b)* (requiring the Board to withdraw state approval of a program with a deficiency unless the program can show good cause to extend the period to correct the specified deficiency); 24 *Del. Admin. C.* § 1900-2.5.4.2.2 (providing that the Board may withdraw initial state approval where a program has three consecutive years of a NCLEX pass **[*12]** rate below eighty percent).

[24] *See Harmony Const., Inc. v. State Dep't of Transp., 668 A.2d 746, 750 (Del. Ch. 1995)* ("'Arbitrary and capricious' is usually ascribed to action which is unreasonable or irrational, or in that which is unconsidered or which is wilful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case . . . ." (omission in original) (quoting *Willdel Realty v. New Castle County, 270 A.2d 174, 178 (Del. Ch. 1970))*).

[25] *Roca v. E.I. du Pont de Nemours & Co., 842 A.2d 1238, 1242 (Del. 2004)* (alteration in original) (quoting Charles A. Wright et al., *Federal Practice and Procedure* § 3974.1, at 504-08 (1999 & Supp. 2003)).

"the merits of the argument."[26] But where "an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned that issue on appeal irrespective of how well the issue was preserved at trial."[27] Because the body of Camtech's brief differs drastically from the third claim raised in its Summary of Argument, we need not address that claim because it has been abandoned.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely

Justice

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[26] *Del. Supr. Ct. R. 14(b)(iv), (vi)(A)(3).*

[27] *Roca, 842 A.2d at 1242* (citing *Turnbull v. Fink, 644 A.2d 1322, 1324 (Del. 1994)*; *Murphy v. State, 632 A.2d 1150, 1152 (Del. 1993))*; *see also Del. Supr. Ct. R. 14(b)(vi)(A)(3)* ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

Griffin v. Sigma Alpha Mu Fraternity

Superior Court of Delaware, New Castle

April 26, 2011, Decided

C.A. No. 09C-04-067 JAP

Reporter
2011 Del. Super. LEXIS 199 *

TIMOTHY GRIFFIN AND JULIE GRIFFIN, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF BRETT GRIFFIN, Plaintiffs, v. THE SIGMA ALPHA MU FRATERNITY, INDIVIDUALLY AND T/A DELTA LAMBDA CHAPTER AT THE UNIVERSITY OF DELAWARE, ET AL, Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Sanctions allowed by *Griffin v. Sigma Alpha Mu Fraternity, 2012 Del. Super. LEXIS 119 (Del. Super. Ct., Mar. 15, 2012)*

Core Terms

confidentiality, disclosure, investigating, materials, criminal investigation, law enforcement, big brother, parties, Night

Case Summary

Procedural Posture
Non-party city filed a motion to prevent disclosure of information gathered by its law enforcement officers in connection with a criminal investigation into the death of plaintiff parents' son (the student) during an initiation ritual by members of defendant fraternity.

Overview
After participating in a fraternity ritual, the student died from acute alcohol consumption. As part of their survival and wrongful death action, the parents issued a subpoena duces tecum to the city seeking production of notes and recordings of interviews conducted by the police, photographs and videotapes taken by them, and a telephone call placed to a 911 dispatcher. The court found, inter alia, that the parents had a genuine need for the investigative materials. No harm would be done by the release of the information, which was necessary for a fair understanding of what happened. The parents' need for witness statements far outweighed any negligible future chilling effect their production might cause. The requested information was not available from other sources, and did not inquire into the thought processes of the investigating officers. The investigation had been completed. The parents' claims were not frivolous. Accordingly, the city was to produce the requested information to counsel for the parents and the fraternity.

Outcome
The motion was denied.

Counsel: **[*1]** Bruce L. Hudson, Esquire, Law Office of Bruce L. Hudson, Wilmington, Delaware, for the Plaintiffs.

R. Stokes Nolte, Esquire, Reilly Janiczek &

McDevitt, P.C., Wilmington, Delaware, for Defendant Sigma Alpha Mu.

David C. Malatesta Jr., Esquire and Jon F. Winter, Esquire, Kent & McBride, P.C., Wilmington, Delaware, for Defendant Jason Matthew Aaron.

Dennis D. Ferri, Esquire and Allyson M. Britton, Esquire, Morris James LLP, Wilmington, Delaware, for Defendant Michael Jeremy Bassett.

Arthur D. Kuhl, Esquire, Reger Rizzo & Darnall LLP, Wilmington, Delaware for Defendant Daniel P. Okin.

Robert K. Pearce, Esquire, Ferry, Joseph & Pearce, Wilmington, Delaware, for Defendant Daniel P. Okin.

Stephen P. Casarino, Esquire, Casarino, Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, for Defendant Matthew P. Siracusa.

Kevin J. Connors, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, for Defendant Christopher Squeo.

Michael A. Pedicone, Esquire, Michael A. Pedicone, P.A., Wilmington, Delaware, for Defendant Daniel Zachary Troper.

Scott L. Silar, Esquire, Margolis Edelstein, Wilmington, Delaware, for Defendant Matthew D'Amour.

Roger A. Akin, Esquire, City Solicitor's Office, **[*2]** City of Newark, Newark, Delaware.

Ralph K. Durstein, Esquire and Judy O. Hodas, Esquire, Department of Justice, Wilmington, Delaware.

Judges: John A. Parkins, Jr., Superior Court Judge.

Opinion by: John A. Parkins, Jr.

Opinion

MEMORANDUM OPINION

Presently before the court is a motion by the City of Newark which requires this court to consider and apply the so-called law enforcement privilege. The City seeks to prevent disclosure to parties in this civil case of information gathered by its law enforcement officers in connection with a criminal investigation into the death of Brett Griffin.

Facts

According to the Complaint, in 2008 Brett Griffin, a freshman at the University of Delaware, accepted a "bid" to become a member of Sigma Alpha Mu national fraternity. That bid was extended by the local chapter of Sigma Alpha Mu. As part of the process leading to full membership, Mr. Griffin was required to attend a so-called "Big Brother Night" at which time Mr. Griffin and other aspiring members would learn the names of their "big brothers." A big brother is a fraternity member who mentors an aspiring member during the process leading to initiation into the fraternity.

The Big Brother Night at the local chapter consists of rituals, **[*3]** many, if not all, of which involve consumption of alcohol, often in excessive amounts. Mr. Griffin was apparently one of those who consumed excessive amounts of alcohol. Around 3 a.m. on the morning of November 8, he was found unresponsive, pale and with slightly blue lips. Emergency medical assistance was summoned, and Mr. Griffin was taken to Christiana Hospital, where he died of acute alcohol consumption.

The Newark Police Department investigated this matter, conducting many interviews of those present, photographing the scene, as well as collecting other evidence. The police investigation led to comparatively minor criminal charges being brought against several individuals in attendance at the ill-fated function. Those criminal charges have all been resolved.

Mr. Griffin's parents have brought a survival and wrongful death action against the national

fraternity, the local chapter and several members of the local chapter. They have issued a subpoena duces tecum to the City of Newark seeking production of notes and recordings of interviews conducted by the Newark police as well as photographs and videotapes taken by them. They also seek production of the telephone call placed to the **[*4]** 9-1-1 dispatcher on November 8. Defendant Sigma Alpha Mu has made a similar discovery request. All requesting parties have limited their requests so as to exclude the thought processes of the investigating officer.

The City of Newark filed an objection to the subpoenas. At this court's direction, the City submitted responsive materials to the court for an *in camera* inspection. Because this court's ruling might be of significance to other police agencies in this state, the court invited the Delaware Department of Justice to file an amicus brief. The Attorney General subsequently filed such a brief.

Analysis

The court has reviewed the materials submitted by the City and has reviewed portions of the depositions of some of the witnesses. After comparing these, the court concludes that Plaintiffs have a genuine need for the investigative materials.

Ordinarily, materials gathered by a police agency during the course of a criminal investigation are not subject to disclosure to third parties. Over time, this privilege has come to be known as the "law enforcement privilege." [1] Two years ago this court upheld the existence of such a privilege and defined its parameters even though it did not use **[*5]** the phrase "law enforcement privilege." In *Brady v. Suh* [2] it held that:

> This Court has consistently held the State has a strong interest in protecting the confidentiality of communications it receives during criminal investigations. The privilege has been traditionally upheld because disclosure of such materials would be "prejudicial to the public interest" and the State's ability to conduct productive criminal investigations. Accordingly, a reviewing court should maintain a strong presumption that the privilege of the State will apply. [3]

Although the law enforcement privilege protects the state's strong interest in maintaining the confidentiality of criminal investigations, the privilege is not absolute. Courts have repeatedly recognized that a litigant's need for information gathered by the police sometimes outweighs the state's interest in protecting the confidentiality of that information. In determining whether to apply the privilege, the court must balance "the **[*6]** government's interest in confidentiality against the litigant's need for the documents." [4]

In 1973 then District Judge Edward Becker developed criteria for balancing these competing interests in *Frankenhauser v. Rizzo.* [5] These criteria, which have come to be known as the *Frankenhauser* factors, have been widely adopted by other courts. [6] Those factors are:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government

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[1] *E.g.* *Landry v. FDIC, 204 F.3d 1125, 1135, 340 U.S. App. D.C. 237 (D.C. Cir. 2000)* (using term "law enforcement privilege").

[2] *2009 Del. Super. LEXIS 524, 2009 WL 6312181 (Del. Super.)*.

[3] *2009 Del. Super. LEXIS 524, [WL] at *3*.

[4] *Coughlin v. Lee, 946 F.2d 1152, 1160 (5th Cir.1991)*; *Dellwood Farms v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1991)*.

[5] *59 F.R.D. 339 (E.D. Pa. 1973)*, abrogated on other grounds, *Startzell v. City of Philadelphia, 2006 U.S. Dist. LEXIS 74579, 2006 WL 2945226 (E.D. Pa.)*.

[6] *Al-Kidd v. Gonzales, 2007 U.S. Dist. LEXIS 90548, 2007 WL 4391029 (D. Idaho)* (describing *Frankenhauser* as "most often relied upon decision"); *Rhodenizer v. City of Richmond Police Dept., 2009 U.S. Dist. LEXIS 95551, 2009 WL 3334744 (E.D. Va.)* (describing *Frankenhauser* as the "leading case ... which is cited frequently for its thorough analysis").

> information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings **[*7]** have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. [7]

The applicable *Frankenhauser* factors demonstrate that no harm will be done by the release of this information, which the court believes is necessary for a fair understanding of what happened on the night of November 7-8.

> 1. *The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information*
>
> There is little reason to believe that the disclosure of this information will discourage citizens from giving statements **[*8]** to the police in future cases. Witness statements are routinely turned over to the defendant in criminal cases which, in the court's view, far outweighs any chilling effect arising from turning them over to plaintiffs in a civil matter. Moreover, the instant plaintiffs' need for these statements far outweighs any negligible future chilling effect their production might cause. [8]
>
> 2. *The impact upon persons who have given information of having their identities disclosed*
>
> There is little or no impact upon the persons who give statements to the police. No one giving a statement is a confidential informant; indeed, their identities are well known as each of the witnesses was present at the scene at some point during the night of November 7-8.
>
> 3. *The degree to which governmental self-evaluation ... will be chilled by disclosure*
>
> This is not an issue here.
>
> 4. *Whether the information sought is factual data or an evaluative summary*
>
> The information sought here does not inquire into the thought processes of the investigating officers.
>
> 5. *Whether the party seeking the discovery is an actual or potential defendant in a criminal proceeding*
>
> This is not the case here.
>
> 6. *Whether the police investigation has been* ***[*9]*** *completed*
>
> The investigation has been completed.
>
> 7. *Whether any intradepartmental disciplinary proceedings have arisen*
>
> This criterion is not applicable here.
>
> 8. *Whether plaintiff's suit is non-frivolous*
>
> Plaintiffs' claims are not frivolous.
>
> 9. *Whether the information sought is available through other sources*

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[7] *59 F.R.D. at 344*.

[8] *See Register v. Wilmington Medical Center, 377 A.2d 8 (Del. Supr. 1977)*.

Given the lapses of memory of some of the witnesses, it appears the requested information is not available from other sources.

10. *The importance of the information to Plaintiffs' case*

Perhaps the central factual issue in this case is what occurred at Big Brother Night.

There are other factors which move the court to order production.

1. There are no statements from confidential informants, and there is no reason to believe that the persons interviewed will be put at risk or harmed by release of this information.

2. There are no on-going criminal prosecutions relating to this investigation and therefore release of this information will not prejudice the rights of any criminal defendant.

3. Nothing in the information sought reveals any confidential investigative techniques.

4. Nothing in the information sought reveals any **[*10]** information about possible future investigations or other on-going investigation.

The City shall produce the requested information to counsel for Plaintiffs and Sigma Alpha Mu within 21 days of this order. Those parties shall each pay half of the City's cost of production. The remaining defendants may obtain copies from counsel for Sigma Alpha Mu upon informal request. With one exception, the materials provided shall be subject to a confidentiality order negotiated by the requesting parties and the City. Until that order is negotiated, counsel shall treat the documents as for reserved for attorneys' eyes only. The sole exception to the confidentiality order shall be the recording of two 9-1-1 calls. The court finds that this is not confidential, except that portion of one of the two calls during which the caller recites his cell phone number.

The court has no opinion as to who, if anyone, is responsible for this tragedy. However, if it had any say in the matter (and it does not) it would make the recording of these calls required listening for college students.

Dated: _

/s/

John A. Parkins, Jr.

Superior Court Judge

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Henry v. Ribbons & Bows Daycare, Inc.

Superior Court of Delaware

August 12, 2016, Decided

C.A. No. 09C-01-183 CLS

Reporter
2016 Del. Super. LEXIS 410 *

ANNETTE R. WHITE and KORIE D. HENRY, SR., Individually and as Personal Representatives of the Estate of KORIE D. HENRY, JR., deceased, Plaintiffs, v. RIBBONS & BOWS DAYCARE, INC., Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Core Terms

governmental privilege, disclosure, copies, investigatory file, public interest, discovery, Parties

Case Summary

Overview
HOLDINGS: [1]-In parents' survival and wrongful death action, arising from their child's death while at a daycare facility, the facility's motion to compel the attorney general's office to produce records related to the homicide investigation of the child's death lacked merit because the criminal investigation was ongoing and involved possible murder charges, the medical examiner's autopsy and toxicology results were already shared with the parties, and the facility did not show that its interests outweighed the interests of the public and the State.

Outcome
Motion denied.

Judges: **[*1]** Honorable Calvin L. Scott, Jr.

Opinion by: Calvin L. Scott, Jr.

Opinion

ORDER

On this 12th day of August, 2016, after having heard oral argument on July 12, 2016, and upon further consideration of Defendant Ribbons & Bows Daycare, Inc.'s ("Defendant") Motion to Compel and the State of Delaware's ("State") Response thereto, the Court finds as follows:

Plaintiffs, Annette R. White and Korie D. Henry, Sr., ("Plaintiffs") filed this survival and wrongful death action against Defendant on January 22, 2009, arising out of the death of their child while at Defendant's daycare facility on September 24, 2007. Because the Medical Examiner's Office determined that the manner of death was homicide, the matter was turned over to the Department of Justice. In conjunction therewith, the Wilmington Police Department ("WPD") initiated a criminal investigation, which, at present, is listed as "suspended" by the WPD—but not closed. In December, 2015, the Office of the Attorney General ("AG's Office") released the Medical Examiner's autopsy report and toxicology results to the Parties, despite express statutory protection of

such records.[1]

On May 9, 2016, Defendant filed the instant motion, seeking to compel the AG's Office to produce "any and all records regarding the homicide investigation involving the death of Korie Henry, Jr."[2] Defendant argues that, pursuant to the Court's liberal civil discovery rules, it is entitled to the State's criminal file, because the governmental privilege does not apply where the information being withheld is material and essential to the civil claims and defenses, there is no ongoing investigation and the statute of limitations has run on all but a homicide charge, it will suffer unjust prejudice and great hardship in defending this action, and this action risks proceeding upon a factual and/or legal fiction perhaps created by Plaintiffs.

The State argues that Defendant has failed to overcome the well-established common law governmental privilege that safeguards the public's interest in maintaining the confidentiality of criminal investigatory files, because the investigation is **[*4]** ongoing, disclosure of the file would prejudice the investigation and any future prosecution, and the State is not a party. According to the AG's Office, because the child died from an excessive overdose of diphenhydramine, there is criminal liability for his death and, while the case is "unsolved," meaning the actual perpetrator has not yet been confirmed, its investigation is still open pending a murder charge.[3] The State also argues that the scope of Defendant's subpoena is too broad—a "fishing expedition"—and asserts that Defendant ignored its previous intimation that a narrower scope may avoid a resort to the courts.

On a motion to compel the production of documents, the Court, in its discretion, determines whether the discovery sought is reasonably calculated to lead to admissible, non-privileged evidence.[4] "A party asserting a privilege bears the burden of establishing that the requested documents or communications are in fact, and as a matter of law, protected by privilege."[5] The burden **[*5]** then shifts to the moving party, who must affirmatively show that good cause exists for production.[6] As applied to a claim of privilege, the non-privileged party must show that the evidence sought is material to his or her claim or defense and, then, that it cannot be obtained from any other source.[7] Whether good cause exists should be determined by the facts and circumstances, on a case by case

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[1] *See* 29 Del. C. § 4707(e) ("[T]he next of kin of the deceased shall receive a copy of the postmortem examination report, **[*2]** the autopsy report and the laboratory reports, unless there shall be a criminal prosecution pending in which case no such reports shall be released until the criminal prosecution shall have been finally concluded.").

[2] Defendant specifically requests, *inter alia*, (1) copies of all reports, memorandum, and/or notes prepared in the investigation of the referenced homicide, (2) copies of all written statements, confessions or admissions of any suspect, defendant **[*3]** or any co-defendant, as well as the substance of any oral statements, including testimony before a grand jury, (3) notes, records, and reports of all forensic or scientific tests conducted by the police, medical examiner, FBI, DEA, prosecution, or experts retained for these purposes, including copies of any underlying data used in the tests, (4) copies of notes, records, and reports of any physical or mental examinations of alleged victims by a physician or psychologist, (5) a listing and opportunity to inspect any physical evidence seized from any suspect or defendant or collected by the State in its investigation, (6) copies of all application for, returns from, and affidavits in support of all search warrants, whether executed or unexecuted, (7) copies of all arrest warrants, including supporting affidavits, and information pertaining to any warrantless arrests, and (8) the identity of any and all informants and past or present witnesses.

[3] *See* 11 Del. C. § 205(a) ("A prosecution for murder or any class A felony . . . may be commenced at any time."); 11 Del. C. §205(b)(1) ("A prosecution for any [other] felony . . . must be commenced within 5 years after it is committed.").

[4] *Commonwealth Land Title Ins. Co. v. Funk*, 2015 Del. Super. LEXIS 301, 2015 WL 3863192, at *2 (Del. Super. June 17, 2015) (citing Super. Ct. Civ. R. 26(b)(1)).

[5] *Id.* (citing *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)).

[6] *Brady v. Suh*, 2009 WL 6312181, at *2 (Del. Super. July 8, 2009) (citing *Papen v. Suburban Propane Gas Corp.*, 229 A.2d 567, 571 (Del. Super. 1967)).

[7] *Beckett v. Trice*, 1994 Del. Super. LEXIS 275, 1994 WL 319171, at *4 (Del. Super. June 6, 1994).

basis.[8]

A governmental privilege for material obtained in the furtherance of a criminal investigation—also referred to as the law enforcement or prosecutorial privilege—exists in Delaware at common law.[9] In support of this privilege, Delaware courts point to the public interest in justice and effective criminal prosecutions by the State, which generally depend on the confidentiality of criminal investigations to function effectively.[10] However, this Court has consistently held that, despite the public interest, this governmental privilege is not absolute.[11] Therefore, where a non-privileged party seeking disclosure of a criminal investigatory file shows that his or her interest in acquiring certain parts of the file outweighs the public interest in protecting the **[*6]** confidentiality of the file, the privilege may be overcome.[12]

In *Williams v. Alexander*, after weighing the competing interests of the State and the parties seeking the State Fire Marshal's investigatory file in conjunction with a fire classified as a possible arson, this Court ordered the disclosure of all material relating to the factual investigation of the fire, but not any information relating to interviews with non-parties, despite the fact that the statute of limitations for arson had not yet expired.[13] In so holding, this Court relied on a another court's examination of the governmental privilege and finding that courts consistently refuse to require disclosure of statements of third party witnesses, but require disclosure of those portions of the files consisting of factual investigations and, at times, conclusions made as to causation.[14]

In *Griffin v. Sigma Alpha Mu*, this Court ordered the City of Newark to disclose the parts of a closed **[*7]** criminal file pertaining to the factual investigation of the death of college freshman during a fraternity initiation, where the criminal charges arising from the police investigation had all been resolved.[15] In making its decision, the Court noted that the investigation was complete, the parties were not actual or potential defendants in the criminal proceeding, and the information sought was factual and not available from other sources due to the witnesses' lapses in memory, which was evident from the Court's review of certain deposition testimony.[16]

At the outset, consideration must be given to the fact that the State is not a party to this litigation. Thus, while the modern approach to discovery under the Court's current civil rules is often described as broad and liberal, Defendant has no *per se* right to the materials it seeks. Such point is bolstered by the fact that Delaware's Freedom of Information Act expressly excludes from "public" files "[investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files."[17] It is against this backdrop that the Court will consider Defendant's

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[8] *Id.*

[9] *Griffin v. Sigma Alpha Mu Fraternity, 2011 Del. Super. LEXIS 199, 2011 WL 2120064, at *2 (Del. Super. Apr. 26, 2011)* (citing *Brady v. Suh*, 2009 WL 6312181, at *3 (Del. Super. July 8, 2009)); *Williams v. Alexander, 1999 Del. Super. LEXIS 410, 1999 WL 743082, at *1 (Del. Super. June 29, 1999)* (citing *Beckett, 1994 Del. Super. LEXIS 275, 1994 WL 319171*; *State v. Brown, 16 Del. 380, 2 Marv. 380, 36 A. 458, 463-64 (Del. 1996)*).

[10] *Griffin, 2011 Del. Super. LEXIS 199, 2011 WL 2120064, at *2*; *Williams, 1999 Del. Super. LEXIS 410, 1999 WL 743082, at *2*; *see Brown, 36 A. at 463-64* ("Such communications [between witnesses and the prosecuting officer] are regarded as secrets of state, or matters the disclosure of which would be prejudicial to the public interests.").

[11] *Williams, 1999 Del. Super. LEXIS 410, 1999 WL 743082, at *2* (citing *Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 783 (Del. Super. 1995)*).

[12] *Id.*

[13] *Id.*

[14] *Id.* (quoting *Cooney v. Sun Shipbldg. & Drydock Co., 288 F. Supp. 708, 716 (E.D. Pa. 1968)*).

[15] *2011 Del. Super. LEXIS 199, 2011 WL 2120064, at *2-3*.

[16] *Id.*

[17] *29 Del. C. § 10002(d)(3)*.

request.

Where, as here, the criminal investigation **[*8]** remains open and involves possible murder charges for the death of an infant who had been in the care of the Parties to this civil litigation, the Court thinks it improvident under the circumstances to require the AG's Office to open the doors to its criminal file at this juncture, especially where it has already shared with the Parties the Medical Examiner's autopsy report and toxicology results. While the Court's discovery rules may be liberal, Defendant has neither demonstrated that its interests yet outweigh the public's and the State's nor made any showing that it cannot acquire what it is seeking elsewhere in order to justify overcoming the board protection afforded by Delaware's governmental privilege to criminal investigatory files.[18]

Accordingly, for the foregoing **[*9]** reasons and for the time being, Defendant's Motion to Compel is **DENIED**.

IT IS SO ORDERED.

/s/ CALVIN L. SCOTT, JR.

The Honorable Calvin L. Scott, Jr.

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[18] To be sure, Defendant has neither identified what it is that it seeks nor claimed any actual prejudice beyond a theoretical, nay, speculative concern that Plaintiffs will benefit in this action from their inaction in the criminal investigation. Of course, this Court's discovery rules provide Defendant with an arsenal of tools to discover any relevant, non-privileged information in Plaintiffs' possession. *See generally* Super. Ct. Civ. R. 26.

Jacobs v. City of Wilmington

Court of Chancery of Delaware, New Castle

November 8, 2001, Submitted ; January 3, 2002, Decided

Civil Action No. 18679

Reporter
2002 Del. Ch. LEXIS 6 *; 2002 WL 27817

BRYANT JACOBS d/b/a DELAWARE MEDICAL GROUP and BACK TO HEALTH CHIROPRACTIC, INC., Plaintiffs, v. CITY OF WILMINGTON, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: **[*1]** Defendant's motion for summary judgment was granted, and Plaintiff's motion for summary judgment was denied.

Core Terms

driver, accidents, summary judgment, public record, Reporting, Threshold, traffic accident, confidentiality, contends, records, public inspection, accident report, police agency, disclosure, property damage, chiropractic, requirements, purposes, duties

Case Summary

Procedural Posture
Plaintiff chiropractor sued defendant city seeking full, unredacted access to certain accident reports. The chiropractor moved for summary judgment and the city cross moved for summary judgment.

Overview
The practice of the city's police department was to submit traffic accident reports not only when required by *Del. Code Ann. tit. 21, § 4203(d)* but also every other traffic accident. The chiropractor sought to compel disclosure of the information in these non-mandatory accident reports. The chiropractor contended that although the plain language of *Del. Code Ann. tit. 21, § 313* stated that accident reports were not to be open to public inspection, the "reports" referenced in that provision referred only to mandatory reports-that is, those produced for accidents which met the *Del. Code Ann. tit. 21, § 4203(d)* reporting threshold. The court held that records exempted from public disclosure were not public records under the Freedom of Information Act (FOIA), *Del. Code Ann. tit. 29, § 10001 et seq.* It was not reasonable to conclude that the legislative intent was that only mandatory reports under *Del. Code Ann. tit. 21, § 4203(d)* were to be confidential. Non-mandatory accident reports were not public records under FOIA and the city had no duty to disclose those reports.

Outcome
The city's motion for summary judgment was granted, and the chiropractor's motion for summary judgment was denied.

Counsel: David L. Finger, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

Rosemaria Tassone, Esquire, CITY OF

WILMINGTON LAW DEPARTMENT, Wilmington, Delaware, Attorney for Defendant.

Judges: STRINE, Vice Chancellor.

Opinion by: STRINE

Opinion

MEMORANDUM OPINION

STRINE, Vice Chancellor

On these cross-motions for summary judgment, this court is asked to determine whether certain traffic accident reports compiled by the Wilmington Police Department must be disclosed to a private citizen under Delaware's Freedom of Information Act ("FOIA"). [1] Whenever a non-minor traffic accident occurs in the State of Delaware -- *i.e.*, one involving an impaired driver, personal injury or death, or apparent property damage of $ 1,500 or more -- police agencies are required by *21 Del. C. § 4203(d)* to complete and file a "Uniform Traffic Collision Report" (or "Report") with the state Department of Public Safety (the "Department"). [2] By statute, "accident reports … shall be for the information of the Department of Public Safety and shall not be open to public inspection. **[*2]** " [3]

Some police agencies, like the Wilmington Police Department (the "City"), apparently go beyond the statutory reporting requirements and submit a Report to the Department of Public Safety for every traffic accident reported by a driver within their jurisdiction. In practice, then, some of the Reports filed by the City are not statutorily mandated -- that is, they do not meet one of the reporting requirements in *§ 4203(d)* (collectively, "the *§ 4203(d)* Reporting Threshold"). These "Non-Mandatory Reports" are the subject of this dispute.

Plaintiff Bryant Jacobs had been using FOIA to acquire City traffic accident Reports to market his chiropractic business. Using biographical **[*3]** information contained in the Reports, he phoned victims and offered them an evaluation. In recent months, however -- after a resident's complaint -- the City began redacting information relating to the identity of those mentioned in the Reports. Jacobs contends that under FOIA, he is entitled to full, unredacted access to these Non-Mandatory Reports.

I disagree. Because Jacobs's argument is inconsistent with the statutory promise of confidentiality for reports of traffic accidents made by drivers under the statutory reporting scheme, I hold that the Non-Mandatory Reports are specifically exempted from public disclosure. As such, per *29 Del. C. § 10002(d)(6)*, they are not public records subject to disclosure under FOIA.

I. Factual Background

Since 1998, Bryant Jacobs has operated several chiropractic-related entities in Delaware, including the 4th Street Chiropractic Clinic and the Delaware Medical Group (collectively, "DMG"). [4] Jacobs contends that DMG is also a research entity, ostensibly charged with studying the effects of low-impact collisions on drivers and passengers. The research is "intended to be used, in conjunction with prior studies **[*4]** by others, to challenge the actions of the insurance industry in dealing with chiropractic and other medical professionals who treat victims of such collisions." [5]

But commerce, not science, appears to be Jacobs's principal passion. In December of 1999, in an effort

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[1] *29 Del. C. § 10001 et seq.*

[2] *21 Del. C. § 4203(d)*. The original dollar threshold was $ 1,000, but has been increased annually since January 1, 1997 by $ 100 per year, to a maximum of $ 1,500. *21 Del. C. § 4203(f)*.

[3] *Id. § 313(b)*.

[4] Another Jacobs-related entity, Back-to-Health Chiropractic, Inc., was dismissed as a party to this action by stipulation on May 17, 2001. Because he is the principal for each of the remaining entities, I generally refer only to Jacobs.

[5] Jacobs Op. Br. at 2.

to solicit business for DMG, he hired an individual to obtain Reports from the City under FOIA. Using the biographical data contained therein, Jacobs "cold-called" the persons involved in those accidents by reading from a prepared script. His pitch went as follows:

> Good morning/afternoon. May I speak to Mr./Mrs. ___. My name is Bryant Jacobs. I'm with the Delaware Medical Group. My call regards your automobile accident, and I'm calling to see how you are feeling as a result of **[*5]** the accident you were in. How do you feel? Delaware Medical Group specializes in assisting those people who have been injured in an auto accident, but first let me explain how I got your name and number, then I'll explain the nature of my call.
>
> *Anytime there's an accident in the State of Delaware, the police prepare a report. Based on the Delaware statute, we are privy to the information that the officers have provided*; therefore, we give you a courtesy call to see how you are feeling. If you tell me that you are hurt, we then invite you in to our clinic for a comprehensive orthopedic and neurological examination. It does not cost you any out[-]of[-]pocket money at all. Insurance covers all costs. [6]

If they were so inclined, accident participants were then scheduled for an appointment at DMG. No mention was made of a scientific study.

After six months of using a middle-man, Jacobs decided to procure the Reports for himself. On numerous occasions, he filled **[*6]** out FOIA request forms and filed them with Jerri Cherry, the records coordinator for the records division of the Wilmington Police. As gatekeeper for the request, Cherry would scrutinize the forms to ensure that their stated purpose was, in her view, appropriate. If she had a question as to their appropriateness, she would refer inquiries to the City's law department. In the request forms, Jacobs represented that he was with DMG. Under the section marked "Purpose for Request," he stated that the "information is utilized for educational purposes." [7]

Jacobs's business-solicitation strategy did not go over well with at least one putative beneficiary of his phone calls. In January of 2001, Rosalie O. Rutkowski reportedly received a call from someone representing himself to be part of a chiropractic business on 4th Street in Wilmington. [8] Rutkowski was "offended and distressed" by the solicitation, and called the Wilmington Police Department **[*7]** to complain about the release of what she perceived to be personal information. [9]

Her complaint wound up in the hands of Captain Victor Ayala, Cherry's supervisor. Acting on advice from the City law department, Captain Ayala instructed records office staff to redact all personal information from requested accident reports, [10] unless the requesting party was one of the persons involved in the accident or a representative of one of their insurance companies.

[*8] Jacobs has commenced an action seeking full, unredacted access to the Non-Mandatory Reports -- *e.g.*, those Reports filed for accidents where the § 4203(d) Reporting Threshold has not been met. Jacobs contends that though the plain language of § 4203's "companion" statute, 21 Del. C. § 313, states that "accident reports … shall be for the information of the Department of Public Safety and shall not be open to public inspection," the

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[6] *Id.* at 3 (emphasis added).

[7] Exs. A-1 and A-2 of Def. Br. In Sup. of Cross-Motion for Summary Judgment.

[8] In a rather unusual argument, Jacobs claims he never called Rutkowski, contending that he targets for his clinic only individuals whom he believes are of African-American descent. Since Rutkowski has a name Jacobs contends is not normally associated with African-Americans, Jacobs asserts that he never would have called her. This factual dispute has no bearing on my ultimate disposition of this case.

[9] Rutkowski Aff. P13.

[10] The redacted information included the participant's name, address, phone number, social security number, date of birth, driver's license number, and vehicle registration number. *See* Exs. of Aff. of Sgt. Robert Transue; Ayala Dep. at 6.

"reports" referenced in that provision refer only to Mandatory Reports -- that is, those produced for accidents meeting the *§ 4203(d)* Reporting Threshold. On August 9, 2001, Jacobs filed a motion for summary judgment in this case. On September 24, 2001, the City cross-moved for summary judgment.

II. Legal Analysis

A. Standard for Cross-Motions for Summary Judgment and Other Preliminary Issues

A motion for summary judgment shall be granted where the court's review of the record demonstrates that there are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. [11] The mere fact that there are cross-motions for summary judgment does not act by itself as a concession **[*9]** that no factual issues exist. [12] In this case, however, I find there is no material factual dispute precluding me from entering summary judgment at this time.

I note also at the outset that there is nothing, in itself, improper about the use for which Jacobs put the information he gleaned from the Reports. [13] **[*10]** Commercial speech is protected under the *First Amendment to the United States Constitution*. [14] Rather, the question before me requires me not to look at the purposes for which Jacobs used the Reports, but solely whether the Non-Mandatory Reports are public records as contemplated by FOIA. For the reasons described below, I conclude that they are not.

B. The Structure of Delaware's Freedom of Information Act

Delaware's FOIA is designed to in part to ensure that "citizens have easy access to public records in order that the society remain free and democratic." [15] To that end, all documents defined as "public records" under FOIA are broadly open to inspection and copying "by any citizen of the State," and "reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen." [16]

The term "public record," defined in *29 Del. C. § 10002(d)*, is broadly hewn to include **[*11]**

> 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, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

Delimiting that broad definition, however, are fourteen specific types of documents which are specifically deemed *not* to be public records. Among them is *§ 10002(d)(6)*, which states that "any records specifically exempted from public disclosure by statute or common law" shall not be considered a public record.

C. As Records Specifically Exempted From Public Disclosure By Statute, The Non-Mandatory Reports Are Not Required to Be Disclosed Under FOIA

Jacobs's argument is one of statutory construction; he contends that despite the mandate in *§ 313(b)* that "accident reports … shall be for the information of the Department of Public Safety and

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[11] *Williams v. Geier, Del. Supr., 671 A.2d 1368, 1375 (1998)*.

[12] *United Vanguard Fund, Inc. v. Takecare, Inc., Del. Supr., 693 A.2d 1076, 1079 (1997)*.

[13] The fact that Jacobs falsely asserted to the City that he was using the reports "for educational purposes" is, of course, another matter entirely.

[14] *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976)*; *Edenfield v. Fane, 507 U.S. 761, 767, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993)*.

[15] *29 Del. C. § 10001*.

[16] *Id.* § 10003(a).

shall not be open to public inspection," I should read that language as applying only to those Reports filed with the Department regarding accidents **[*12]** meeting the *§ 4203(d)* Reporting Threshold. In my view, this approach violates the "Golden Rule" of statutory construction. [17]

An examination of the statutory scheme governing the reporting of traffic accidents makes this point clear. Whenever a traffic accident occurs in this state, Title 21, Chapters 42 and 3 of the Delaware Code work in tandem to trigger a series of duties required to be carried out by drivers, police agencies, and the Department. Because the sections within these Chapters **[*13]** are sequential [18] and mutually referential, [19] these sections are most appropriately viewed together.

Generally speaking, the Department is charged with collecting, analyzing, and publishing summaries about the cause and frequency of traffic accidents [20] -- in essence, serving as the State's informational repository for roadway safety. [21] The accident Reports the Department receives under the relevant statutes are critical tools the General Assembly has provided the Department to fulfill its informational and analytical objectives.

[*14] Most important of all, the requirements pertaining to a driver's statutory responsibilities contain an important promise of confidentiality. The General Assembly has made clear that the Reports the Department receives from agencies "shall be for the information of the Department of Public Safety and shall not be open to public inspection." [22] Indeed, Reports submitted to the Department by police agencies are not admissible in either civil or criminal trials. [23] This promise of confidentiality advances the Department's statutory goal of compiling complete and accurate data regarding accidents in Delaware.

A driver involved in a traffic accident in Delaware is charged with a series of statutory duties. Whenever an accident apparently results in property damage, the driver must stop, and ascertain whether there was an injury. [24] If another **[*15]** party was indeed injured, the driver must render "reasonable assistance," and provide the other driver with her license and other pertinent information. [25] If there is apparent property damage to the other vehicle, the driver must also stay at the scene of the accident. [26]

In addition, after fulfilling the above requirements, *21 Del. C. § 4203(a)* holds that driver of a vehicle involved in an accident must report it to the police whenever (1) injury or death occurs, (2) either driver appears to be impaired by alcohol or drugs, or (3) there is apparent property damage of *$ 500* or more -- a threshold substantially lower than the $ 1,500 *§ 4203(d)* damage threshold. If the $ 500 damage threshold of *§ 4203(a)* is not met, a driver *may* still report the accident to the appropriate

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[17] That Rule holds that "unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *State Dep't of Correction v. Worsham, Del. Supr., 638 A.2d 1104, 1107 (1994)*, *citing* *Coastal Barge Corp. v. Coastal Zone Indus. Ctrl. Bd., Del. Supr., 492 A.2d 1242, 1247 (1985)*, 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 45.12 (5th ed. 1992).

[18] *See* *21 Del. C. §§ 4201-03* (sequence of duties of drivers in accident).

[19] *See id.* *§ 4203* (reference to compliance with *§§ 4201*, *4202*); *§ 313(b)* (companion to *§ 4203(d)*).

[20] *21 Del. C. § 313(b)*.

[21] *See* *Halko v. State, Del. Supr., 58 Del. 47, 204 A.2d 628 (1964)* (purpose of *§ 313* is to permit collection of statistical information as to highway accidents in order to take preventative action).

[22] *21 Del. C. § 313(b)*.

[23] *Id.* The fact that such reports have been made is admissible solely to prove compliance with this provision.

[24] *Id.* *§ 4201(a)*.

[25] *Id.* *§ 4202(a)*.

[26] *See id.* *§ 4201(a)*.

police agency under the statute. [27]

[*16] Intertwined with these provisions is the following incentive: If a driver fulfills her statutory duties, she can expect that the information she provides to her local police agency will be held in confidence. This incentive is made specific not only by the language of *§ 313(b)*, but also by another provision in the very section describing the driver's duty to report accidents. *Section 4203(e)* states that the Department may request supplemental reports of accidents from either a driver or the police when the original report is, in the Department's view, insufficient. These supplemental reports, by the language of *§ 4203(e)*, "shall not be open to public inspection."

In addition -- and this point cannot be overstated -- the promise of confidentiality cannot be sensibly read to apply only when a "major" accident occurs. First, a driver often has no idea (and indeed, probably does not care) whether the damage resulting from his auto accident will be severe enough to trigger the *Departmental* reporting requirement set forth in *§ 4203(d)*. The driver's rightful expectation is one of privacy for all Reports the driver provides under the Act. It is illogical to read the law as having **[*17]** that expectation hinge on whether an accident resulted in damage of at least $ 1,500 -- a determination drivers cannot reasonably be expected to make. In this respect, I assume that most drivers are not insurance adjusters intimately familiar with the going rates for specific automobile parts and repairs. Adopting Jacobs' interpretation would create an incentive for drivers to avoid reporting arguably marginal accidents, because his interpretation deprives them of the certainty that their cooperation with the statutory scheme will involve the production of a Report that can only be used for specific, statutorily authorized purposes.

Second, from a public policy standpoint, it makes little sense to infer that the General Assembly chose to explicitly make Reports of "major" accidents confidential, while permitting Reports of "minor" accidents to be disclosed. It is in these major accidents -- ones involving significant property damage, impaired drivers, and/or injury -- that the public arguably has the greatest interest in disclosure. Having made the policy decision that these Reports are not public records, it is difficult to believe that the General Assembly intended that Reports **[*18]** of minor accidents -- where the public interest served by disclosure is minimal -- would be open for public inspection under FOIA. [28]

Given the underlying assurance of confidentiality running through Chapters 42 and 3 of Title 21, the only reasonable interpretation is that the General Assembly did not intend to implicitly (and arbitrarily) create a scheme whereby Reports of accidents meeting the *§ 4203(d)* Reporting Threshold are confidential, while those of accidents not meeting that Threshold are public records. Instead, it intended to protect the confidentiality of all Reports generated at the instance of citizens acting in accordance with their statutory reporting duties. I therefore find that because the Non-Mandatory Reports are specifically exempted by the statutory scheme described in Chapters 42 and 3 of Title 21 of the Delaware Code, **[*19]** they are not public records under FOIA per *29 Del. C. § 10002(d)(6)*. The City thus has no duty to disclose the Non-Mandatory Reports to Jacobs.

III. Conclusion

For the foregoing reasons, the City's motion for summary judgment is granted, and Jacobs's motion for summary judgment is denied. The City shall submit to me a conforming order within seven days, upon approval as to form by Jacobs.

End of Document

[27] *Id.* 4203(b).

[28] The statutory accident reporting scheme pre-dated FOIA and the later adoption of FOIA cannot be reasonably read as drawing the dividing line Jacobs contends exists.

Jenkins v. Gulledge

Superior Court of Delaware

January 25, 1982, Decided

No. 81M-AU-15

Reporter
1982 Del. Super. LEXIS 773 *; 1982 WL 593167

Jenkins, et al. v. Gulledge

Core Terms

records, denial of access, mandamus, inmates, exempt, days

Counsel: **[*1]** Leonard B. Jenkins, William O. Young, Jr., Matthew Majors, Jr., Delaware Correctional Center, RD #1, Box 500, Smyrna, DE 19977; John J. Polk, Esquire, Deputy Attorney General, Department of Justice, 820 N. French Street, Wilmington, DE 19801

Opinion by: BALICK

Opinion

BERNARD BALICK, JUDGE

UNREPORTED OPINION

This is an action formandamus filed by inmates at the Delaware Correctional Center. The action was transferred to this court from the Court of Chancery. The inmates seek access to records at the Correctional Center. They claim that they are given this right to access by the Freedom of Information Act.29 *Del.C.* Ch. 100. The defendant has filed a motion to dismiss on the grounds that this action was not filed within 10 days of denial of access, asrequired by *29 Del.C. §10005*, and also that the records sought are exempt from public disclousure by statute. *11 Del.C. §4322*.

The petition states that the request for access was denied by letter datedSeptember 9, 1980. The petition for a writ of mandamus was filed in the Court of Chancery on November 17, 1980. The petition was therefore not filed within 10 days of the denial of access.

11 Del.C. § 4322 says, **[*2]** among other things, "No person committed to the Department shall have access to any of said records." The plaintiffs in effect argue that this provision was impliedly repealed by the Freedom of Information Act. This contention must be rejected, because the Freedom of Information Act expressly provides that some kinds of records shall not be deemed public, including: "Any records specifically exempted from public disclosure by statute or common law." *29 Del.C § 10002 (d) (6)*.

For these reasons, it is ORDERED that the petition for mandamus is DISMISSED.

End of Document

United States v. Garey

United States District Court for the Middle District of Georgia, Macon Division

November 15, 2004, Decided ; November 15, 2004, Filed

CASE NO. 5:03-CR-83

Reporter
2004 U.S. Dist. LEXIS 23477 *; 2004 WL 2663023

UNITED STATES OF AMERICA v. EDDIE MILTON GAREY, JR., Defendant

Subsequent History: Later proceeding at United States v. Garey, *2005 U.S. Dist. LEXIS 17449 (M.D. Ga., Aug. 10, 2005)*

Disposition: Defendant's motion for specific discovery denied.

Core Terms

surveillance, national security, phone, tracing, disclosure, witnesses, investigative technique, informer, cellular telephone, technology, telephone call, privileged, Redacted, details, tapes, governmental interest, search warrant, geographic, outweighed, Discovery, disclose, surveillance equipment, technical analysis, indictment, balancing, accuracy, discover

Case Summary

Procedural Posture
Defendant, who was charged with commerce by threats and threatening to use weapons of mass destruction, filed a motion for specific discovery.

Overview
Defendant sought information regarding the nature and details pertaining to the use of surveillance equipment and technology employed by the government during the investigation leading to his indictment. The government refused to provide this information, arguing that it was protected by a privilege not to disclose sensitive investigative techniques and a national security privilege. The court did not doubt the legitimacy of the government's concerns regarding the sensitivity of the requested information and thus found that the information was protected by both the investigative techniques privilege and the national security privilege. The court also found that the finding of a cell phone in defendant's house confirmed the accuracy of the government's geographic surveillance. Finally, the court found that the government did not assert privilege as to the technology that purportedly showed that the phone found in defendant's house was the instrument that actually made the calls. Defendant therefore had the opportunity to discover how that technology worked and to contest its reliability at trial.

Outcome
Defendant's motion was denied.

Counsel: **[*1]** For Eddie Milton Garey, Jr.(1) aka Miles Garey aka Milton Garey aka Eddie Garey, Defendant: Pro se, Cordele, GA; Scott C. Huggins, Macon, GA.

For USA, Plaintiff: Harry J. Fox, Jr., Macon, GA; Tracia M. King, Macon, GA.

Judges: CLAY D. LAND, UNITED STATES DISTRICT JUDGE.

Opinion by: CLAY D. LAND

Opinion

ORDER [REDACTED]

The Court presently has pending before it Defendant's Motion for Specific Discovery. Defendant seeks information regarding the nature and details pertaining to the use of surveillance equipment and technology employed by the Government during the investigation leading to his indictment. The Government has refused to provide this information, arguing that it is protected by a privilege not to disclose sensitive investigative techniques and a national security privilege. [1] For the reasons set forth below, the Court denies Defendant's motion.

[*2] BACKGROUND [2]

The Defendant, Eddie Milton Garey, Jr., is charged with, inter alia, interference with commerce by threats and threatening to use weapons of mass destruction. The charges arise from a series of threatening and harassing cellular telephone calls to the Bibb County Emergency 911 Center during September 2003. Most of the 911 calls threatened the use of bombs and explosives against public facilities in the Macon-Bibb County Area. The Government learned that the telephone calls originated from a number of different cellular phones, **[*3]** and it traced the calls to Defendant's house. Part of the Government's proof in this case is the electronic surveillance that allowed the Government to trace certain cellular telephone calls to the Defendant's house. In his Motion for Specific Discovery, Defendant requested information regarding the nature and details pertaining to the use of the pen register and trap and trace devices employed during the investigation leading to the indictment, including the technical analysis referred to in the affidavits proffered in support of the search warrants, as well as orders of the court regarding installation of the devices. Def.'s Mot. for Specific Disc., at P 5 (d). Defendant argues that he needs to obtain the technical analysis and the information underlying the technical analysis because it is the "only evidence adduced thus far that connects the location of the place to be searched with the alleged criminal activity." Def.'s Reply in Supp. of Mot. for Specific Disc., at 4. The officer's affidavit regarding the technical analysis, Defendant argues, did not describe how the technicians determined that the particular telephone calls were placed from Defendant's residence. *Id.*

The **[*4]** Government has refused to provide the technical analysis or other information regarding the surveillance equipment and techniques, citing the privilege not to disclose sensitive investigative techniques recognized by the Eleventh Circuit in *United States v. Van Horn, 789 F.2d 1492, 1508 (11th Cir. 1986)*. Gov't's Resp. to Def.'s Mot. for Specific Disc., at 2. The Government further argues that the information sought by Defendant is privileged because revealing it would threaten national security.

In support of its objection to disclosure of the surveillance information, the Government tendered Agent [Redacted], a Special Agent with the Federal Bureau of Investigation. Agent [Redacted], who is headquartered in Quantico, Virginia, is a supervisor

[1] The electronic surveillance referred to in this Order is the surveillance conducted to identify the *geographic* location of the cellular telephone that was allegedly used to make the telephone calls that form part of the basis for the indictment. It is important to distinguish between surveillance and tracing used to determine the *geographic location* of a cellular telephone and the surveillance and tracing used to *identify a particular* cellular telephone as the instrument from which a call originated. The Government does not assert any privilege regarding the tracing of the telephone calls to a particular cellular phone. Therefore, the Defendant has the opportunity to obtain discovery as to how that tracing occurred and to thoroughly cross-examine witnesses and present testimony at trial to attack the accuracy of that tracing.

[2] The Court finds it necessary to discuss in this Order sensitive and privileged information. To avoid the unnecessary disclosure of that information, the Court has redacted that information from the Court's order that will be filed publicly and served upon the parties. The redacted portions of the order will be so indicated on the publicly filed order. The complete unredacted order will be filed under seal for review only by the Eleventh Circuit Court of Appeals on appeal.

in the surveillance area and familiar with the FBI's surveillance program. On November 9, 2004, the Court conducted an in camera examination of Agent [Redacted] to explore the basis for the Government's assertion of privilege in this case. The transcript of that examination, along with the Court's complete unredacted order, is filed under seal and shall remain under seal until further order of the Court. [Redacted]

DISCUSSION

[*5] *1. Sensitive Investigative Techniques Privilege*

The Eleventh Circuit in *Van Horn* held that the governmental privilege not to disclose sensitive investigative techniques applies to the nature and location of electronic surveillance equipment. *Van Horn, 789 F.2d at 1508*. The court reasoned that disclosing the precise specifications of surveillance equipment "will educate criminals regarding how to protect themselves against police surveillance." *Id.* The privilege is not, however, absolute: it "will give way if the defendant can show need for the information." *Id.* A defendant meets this burden by showing that the information sought "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro v. United States, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957)* (defining parameters of informer's privilege, upon which the surveillance privilege is based).

The Eleventh Circuit declared that "the necessity determination requires a case by case balancing process." *Van Horn, 789 F.2d at 1508*. In general, the Eleventh Circuit and other courts applying the investigative techniques privilege have held **[*6]** that where the defendant has access to evidence-such as the product of the surveillance-from which a jury can determine the accuracy and validity of the surveillance equipment and techniques, the defendant has no need for the information that outweighs the government's interest in keeping it secret. *See, e.g., Van Horn, 789 F.2d at 1508*; *United States v. Harley, 221 U.S. App. D.C. 69, 682 F.2d 1018, 1020 (D.C. Cir. 1982)*. In contrast, where the defendant has no opportunity to conduct an examination regarding the validity and accuracy of the surveillance, courts have held that the defendant does have a need that outweighs the government's privilege. *See, e.g., United States v. Foster, 300 U.S. App. D.C. 78, 986 F.2d 541, 543 (D.C. Cir. 1993)*; cf. *Roviaro v. United States, 353 U.S. at 60-61*.

The Eleventh Circuit found that the defendants in *Van Horn* did not demonstrate a need for the details of the surveillance information that outweighed the government's interest in keeping it secret. In *Van Horn*, the defendants were tried on charges stemming from a marijuana importation and distribution ring. The defendants sought information regarding the location of **[*7]** microphones used to tape conversations that were later used against them. Defendants argued that the information was necessary to demonstrate that the voices on the tapes could have been distorted by the way the microphones were hidden, and that the distortion could have led to improper voice identification. *Van Horn, 789 F.2d at 1508*. The court did not require the government to disclose how and where the microphones were hidden because the defendants had an alternative way to challenge the voice identification: the tapes themselves. The court submitted the ultimate question of whether the voice identifications were correct to the jury, and defendants were allowed to raise the issue of possible misidentification in front of the jury. *Id. See also Harley, 682 F.2d at 1020* (holding that defendant did not need to know exact location of apartment from which surveillance was conducted because he had access to surveillance videotape of the alleged transaction, which "indisputably showed the view the officers in the surveillance post had, the distance, the angle, and the existence or nonexistence of obstructions in the line of sight").

In contrast, the D. **[*8]** C. Circuit in *Foster* found that defendant *did* demonstrate a need for the details of the surveillance information that

outweighed the government's interest in keeping it secret. *Foster, 986 F.2d at 543*. In *Foster*, the defendant was charged with possessing crack cocaine with intent to distribute. He sought disclosure of the observation spot from which the police officer -- the government's key witness -- observed the drug transaction so that he could challenge the officer's perceptions and ability to identify the defendant accurately. Unlike *Van Horn* and *Harley*, the surveillance in Foster was not taped; the police officer's description of the transaction was the key evidence implicating the defendant in the drug transaction. *Id.* There was no tape or photograph a jury could examine to determine whether the surveillance post provided a clear view from which the officer could make an accurate identification of the defendant. Therefore, the D.C. Circuit found that the district court had "erred in upholding an observation post privilege in derogation of [defendant's] right of cross-examination." *Id. at 544*. *See also Roviaro, 353 U.S. at 61, 65* **[*9]** (holding, in the informer privilege context, that defendant was entitled to disclosure of informer's identity, where the informer was the sole participant, other than the defendant, in the drug transaction charged, and the informer was thus the only person who could controvert, explain or amplify the government witnesses' reports of the conversation between the defendant and the informer).

2. National Security Privilege

The courts have also recognized a national security privilege. The Eleventh Circuit has not addressed the national security privilege asserted by the Government in this case. [3] The Fourth Circuit has addressed the issue, and it recognized a qualified national security privilege in *United States v. Moussaoui, 382 F.3d 453, 466, 475-76 (4th Cir. 2004)*. [4] This privilege protects information that, if disclosed, would tend to compromise national security. Like the investigative techniques privilege, however, the national security privilege is not absolute: the government's interest in protecting national security does not categorically override a defendant's right to a fair trial. *Moussaoui, 382 F.3d at 466* ("There is no question **[*10]** that the Government cannot invoke national security concerns as a means of depriving Moussaoui of a fair trial."). The Fourth Circuit, relying in part on *Roviaro*, applied a balancing test to determine whether the information sought by the defendant must be disclosed: where the information the government seeks to withhold is "material to the defense," the privilege gives way. *Id. at 475-76*.

[*11] At issue in *Moussaoui* was a series of rulings granting the defendant, who was charged with conspiracy related to the September 11, 2001 terrorist attacks on the United States, access to depose "enemy combatant witnesses" who had knowledge of the 9/11 plot and whose testimony would support defendant's claim that he was not involved in the plot. These "enemy combatant witnesses" were members of al Qaeda who had been captured by the government, and the government asserted that these witnesses were national security assets. In determining whether to uphold the rulings granting access to the witnesses, the Fourth Circuit balanced the government's national security interests against the defendant's need for access to the enemy combatant witnesses. The court found that the burdens that would arise

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[3] In *United States v. Fernandez, 797 F.2d 943, 952 (11th Cir. 1986)*, the government asserted a national security privilege to prevent disclosure of certain surveillance techniques, but the court did not reach the issue of whether the information was protected under the privilege because it found that the information was not relevant to defendants' defense.

[4] The Fourth Circuit had previously recognized a qualified national security privilege in the context of classified information protected by the ***Classified Information Procedures Act*** (CIPA). The court equated disclosure of classified information regarding national security issues with the type of information sought about informers in *Roviaro* and its progeny. *United States v. Smith, 780 F.2d 1102, 1107, 1110 (4th Cir. 1985)*. This Court is not concerned with the balancing approach employed by the Fourth Circuit in the CIPA context, but the Court finds that the analogy drawn in *Smith* between national security information and confidential informer information is helpful in determining the contours of the national security privilege.

from producing enemy combatant witnesses were substantial but that each witness could provide material testimony in the defendant's favor, so the defendant's interests outweighed the government's interest in denying access to the witnesses. *Id. at 471, 476*.

3. Balancing the Government's Interest Against the Defendant's Need

In this case, Defendant requested information regarding **[*12]** the nature and details pertaining to the use of the pen register devices and trap and trace devices employed during the investigation leading to his indictment. The Government has asserted both an investigative techniques privilege and a national security privilege. The Court does not doubt the legitimacy of the Government's concerns regarding the sensitivity of the requested information and thus finds that the information is protected by both the investigative techniques privilege and the national security privilege.

The inquiry does not end there, however. The Court must also evaluate the Defendant's need for the information to determine whether either privilege must give way. In this case, the Defendant is charged with making a series of threatening cellular telephone calls. Although there are tapes of the 911 telephone calls, there is no way to review the tapes and identify the caller because the caller electronically altered his voice. Defendant maintains that the only basis for connecting Defendant's residence with the cell phone calls is the surveillance that traced the telephone calls to Defendant's house.

The Court would be persuaded by Defendant's argument if the Government **[*13]** had never found the cellular telephone it was tracking in Defendant's house pursuant to a valid search warrant. Since the Government found the cellular phone, it will be able to introduce it into evidence at trial. Unlike *Foster* where the Government's only evidence of its surveillance was the eyewitness testimony of the witness conducting the surveillance, the Government here, like in *Van Horn*, has the product of the surveillance: the cell phone itself. The finding of the cell phone in Defendant's house confirms the accuracy of the Government's geographic surveillance. The Defendant does not need to know how that location was accurately determined. [5]

[*14] The Court emphasizes that the surveillance technology that the Government asserts is privileged relates only to how it determined the geographic location of the phone. The Government does not assert privilege as to the technology that purportedly shows that the phone found in Defendant's house is the instrument that actually made the calls. Defendant therefore has the opportunity to discover how that technology works and to contest its reliability at trial.

CONCLUSION

Based on the foregoing, the Court finds that Defendant has access to the product of the surveillance (the cellular telephone found in his house). The location of the phone in his house appears to be undisputed and confirms the accuracy of the geographic surveillance technology. Moreover, Defendant has the opportunity to discover and attack the technology that identified the telephone that was found in Defendant's house as the instrument that made some of the calls that form the basis of the indictment. The Government asserts no privilege as to that technology. Therefore, the Defendant has no need to discover

[5] *Foster* and similar cases are distinguishable in that in those cases the product of the surveillance was visual observation that could only be relayed to the jury through the eyewitness testimony of the officer doing the surveillance. Therefore, to ensure defendant a fair trial in those cases, he should be permitted to discover how the surveillance was conducted and to cross-examine the person doing the surveillance as to what he actually witnessed. The case at bar would be analogous to *Foster* if the Government had traced the phone to Defendant's house but never found the actual phone. Under those circumstances, if the Government sought to introduce evidence that its surveillance located the phone in Defendant's house, notwithstanding its inability to find the phone, then the Defendant should be entitled to discover how the surveillance identified his house as the location of the phone.

how the technology traced the geographic location of the phone to his house that outweighs the Government's **[*15]** legitimate interest in keeping it secret. [6] Accordingly, Defendant's Motion for Specific Discovery is denied. [7]

[*16] IT IS SO ORDERED, this 15th day of November, 2004.

CLAY D. LAND

UNITED STATES DISTRICT JUDGE

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[6] Defendant also sought discovery of the court orders authorizing the surveillance. The Court understands that those orders have now been unsealed and provided to the Defendant. Therefore, this request by Defendant is moot.

[7] As a final footnote, the Court finds it appropriate to address Defendant's continued suggestion that the Government's partial reliance upon the privileged surveillance information in obtaining the search warrant that ultimately led to the discovery of the cellular phone in question deprived Defendant of his constitutional rights under the ***Fourth Amendment***. The Court addressed this contention directly in a previous ruling denying Defendant's Motion to Suppress. In that ruling, the Court found that the government agent's affidavits regarding the link between the suspected threatening telephone calls and the Defendant was sufficient to establish probable cause even though they did not contain the details of how the surveillance worked. Ord. Den. Def.'s Mot. to Suppress, at 7-8. As an alternative to the holding that the affidavits provided sufficient information to establish probable cause that the calls were coming from inside Defendant's residence and holding that the agents were justified in relying upon the warrant pursuant to the good faith exception, this Court found that the Government was entitled to invoke the *Van Horn* privilege not to disclose sensitive investigative techniques. *Id.* at 9. The Court also observes that the reasons for requiring disclosure of privileged information at the search warrant stage are less compelling than those for disclosure in preparation for trial. *See* *McCray v. Illinois, 386 U.S. 300, 311, 18 L. Ed. 2d 62, 87 S. Ct. 1056 (1967)* (when the issue is the preliminary one of probable cause, and "guilt or innocence is not at stake," the privileged information (informer's identity; nature and details regarding surveillance equipment) need not be disclosed in applying for a search warrant; whereas, at an actual trial, where the issue is "the fundamental one of innocence or guilt," the privilege may give way if disclosure of the information "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id. at 310* (quoting *Roviaro v. United States, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957))*. In this case, the privileged information did not need to be disclosed to support the search warrant nor is disclosure necessary at the trial stage for the reasons stated previously in this Order.

105 DEGR 7

NO. 105, August 2005

OPINIONS

Reporter
105 DEGR 7 *

DE - Delaware Government Register > ***2005*** > ***August*** > ***August 2005*** > ***OPINIONS*** > ***ATTORNEY GENERAL***

Agency

ATTORNEY GENERAL

Text

OPINION 05-IB19

August 1, 2005

Civil Division-Kent County (739-7641)

Mr. David Ledford

Vice President/News & Executive Editor

The News Journal

P.O. Box 15505

New Castle, DE 19720

Re: Freedom of Information Act Complaint Against City of Wilmington

Dear Mr. Ledford:

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

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

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

According to the City, the Wilmington Police Department is divided into six squads (A through F). A Squads A through E are regular patrol platoons, with rotating shifts. Each platoon covers the entire city, broken down into geographic radio districts. The F squad is the Community Sector Specialist Squad, which has two shifts. The F squad's only distinction from squads A through E is the F squad is assigned to long-term problem solving, therefore F squad is not generally subject to basic calls for service, ...

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

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

According to the City, the police department has recently developed written guidelines (not published in the White Book) A prescribing how to conduct a checkpoint encounter. . . . The guidelines are not standard operating procedures of the F **[*8]** Squad, but are general guidelines for the Police Department as a whole. The City provided a copy of the checkpoint guidelines for our in camera review.

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

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

Relevant Statutes

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

FOIA exempts from disclosure A[t]hose portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety. Id. '10002(g)(16)a.5.

Legal Authority

1. Law Enforcement Manuals

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

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

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

Subparagraph 5. of the statute more broadly exempts A records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety including A vulnerability assessments or specific and unique response or deployment plans.

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

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

It would be anomalous indeed to attribute to Congress the intention to require agency revelation of internal law enforcement manuals. Such a step would increase the risk of physical harm to those engaged

in law enforcement and significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection. **[*9]**

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

Although a response to 9/11, Section 10002(g)(16) of Delaware's FOIA is not limited to information that might aid terrorists to destroy buildings or infrastructure, but also exempts information Aprepared or maintained to prevent, mitigate, or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety. 29 Del. C. '10002(g)(16)A.5. We believe that exemption covers law enforcement manuals to the extent they contain information that would disclose investigative techniques and procedures, or endanger the life and safety of citizens or law enforcement officers.

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

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

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

We now address the White Book. In Caplin, the federal appeals court held that only those portions of the BATF pamphlet ARaids and Seizures) which might disclose confidential law enforcement techniques and procedures were exempt from disclosure. Other portions pertaining to purely Aadministrative matters must be disclosed to the public. AAll administrative materials, even if included in staff manuals that otherwise concern law enforcement, must be disclosed unless they come under one of the other exemptions of the act. *Hardy, 631 F.2d at 657.*

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

We do not believe that the index to the White Book is exempt from disclosure under FOIA because the listings do not reveal any confidential law enforcement techniques or otherwise jeopardize officer safety and effective law enforcement. To the extent that the Index is within the purview of your FOIA requests,

the City must make a copy available to you. That will enable you to determine whether any portions of the White Book are what you are seeking in your FOIA requests.

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

B. E-Mails

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

Conclusion

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

We also determine that the City did not violate the public records requirements of FOIA by not providing you with access to any standard operating procedures or training manuals specific to the AF squad, and e-mails you requested, because those documents apparently do not exist, based on the representations of the Assistant City Solicitor. **[*10]**

To the extent you are seeking access to the police department's White Book, we determine that the index to the White Book is a public record under FOIA. We do not have to determine at this time whether any particular section of the White Book is exempt under FOIA because that issue is not yet ripe for decision.

Very truly yours,

W. Michael Tupman

Deputy Attorney General

APPROVED

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Malcolm S. Cobin

State Solicitor

cc: The Honorable M. Jane Brady

Lawrence W. Lewis, Esquire

Deputy Attorney General

Alex J. Mili, Jr., Esquire

Phillip G. Johnson

Opinion Coordinator

DELAWARE GOVERNMENT REGISTER
