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July 6, 2015

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

Dear Ms. Fortune:

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

#### Procedural History

On or about May 15, 2015, Jonathan Rudenberg of Muckrock.com in Boston, MA, sent to the DSHS an electronic request pursuant to the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 (“FOIA”) seeking the following:

- 1) Records regarding the State Police’s acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents. In

response to this request, please include records of all contracts, agreements and communications with Harris Corporation.

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

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

### ANALYSIS

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

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

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

First, the request falls within the exception 29 *Del. C.* § 10002(l)(6): “[A]ny records specifically exempted from public disclosure by statute or common law” due to the fully-executed non-disclosure agreement requiring information concerning cell site simulators be kept confidential. Any breach of confidentiality by DSP would leave the agency vulnerable to possible legal action or the FBI removing the technology. “A confidentiality agreement . . . is intended and structured to prevent a contracting party from using and disclosing the other party’s

confidential, nonpublic information except as permitted by the agreement.” *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208 (Del. 2012). Pursuant to the non-disclosure agreement, DSP notified the requestor of the existence of the non-disclosure agreement, directed him to the FBI, and notified the FBI about the request.

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

Under the Delaware Trade Secret Act, a trade secret:

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

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

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

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

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

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

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

**(2) Records regarding any arrangements or agreement between the State Police and other law enforcement agencies in Delaware to share the use of cell site simulators, or any offers by the State Police to share the use of cell site simulators with other law enforcement agencies in Delaware.**

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

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

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

**(4) Policies and guidelines of the State Police governing use of cell site simulators, including restrictions on when, where, how, and against whom they may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of cell site simulators may be revealed to the public, criminal defendants, or judges.**

There is currently no reference to cell site simulators within DSP's Divisional Manual. However, DSP will check if there is some separate document that includes policies and guidelines. Should such documents exist, the FBI has allowed DSP to provide them so long as any reference to specific elements of the technology or components would be redacted.

**(5) Any communications or agreement between the State Police and wireless service providers (including AT&T, T-Mobile, Verizon, Sprint Nextel, and U.S. Cellular) concerning use of site simulators.**

No records exist that are responsive to this request.

**(6) Any communications, licenses, or agreements between the State Police and the Federal Communications Commission or the Delaware Public Service Commission concerning use of cell site simulators.**

No records exist that are responsive to this request.

**(7) Records reflecting the number of investigations in which cell site simulators were used by the State Police or in which cell site simulators owned by the State Police were used and the number of those investigations that have resulted in prosecutions.**

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

**(8) Records reflecting a list of all cases, with docket numbers if available, in which cell site simulators were used as part of the underlying investigation by the State Police or in which cell site simulators owned by the State Police were used as part of the underlying investigation.**

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



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

**(9) All applications submitted to state or federal courts for search warrants or orders authorizing use of cell site simulators by the State Police in criminal investigations or authorizing use of cell site simulators owned by the State Police in criminal investigations, as well as any warrants or orders, denials of warrants or orders and returns of warrants associated with those applications. If any responsive records are sealed, please provide documents sufficient to identify the court, date and docket number for each sealed document.**

DSP does not keep a central database of all applications submitted to state and federal courts for search warrants or orders. Moreover, these records fall under the FOIA exemption 29 *Del. C.* § 10002(1)(3), investigatory files compiled for civil or criminal law enforcement purposes. These would certainly contain information that is held confidential under the non-disclosure agreement, as well as other confidential information such as confidential informant information, and the procedures by law enforcement as part of the search warrant process.

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

Respectfully,

*/s/ Rae M. Mims*

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