



February 17, 2016

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

**By E-mail and First Class Mail**

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

Dear Chief Deputy Gibbs:

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

**Background**

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

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

---

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

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

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

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

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

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

### **The nature of the violation**

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

#### **A. Unreasonable search**

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

---

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

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

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

Although the other methods the State Police used to search for responsive records are not apparent from the Response Letter, it seems likely based on the results that these searches were similarly unreasonable. For example, the State Police failed to produce any records other than purchase orders responsive to the request for "Records regarding the State Police's acquisition of cell site simulators, including invoices, purchase orders, contracts, loan agreements, solicitation letters, correspondence with companies providing the devices, and similar documents." *See* Attachment A. It is not plausible that the State Police spent hundreds of thousands of dollars on these devices but entered into no contracts and had no written correspondence concerning the transactions.

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

### **B. No justification for omitted records or redactions**

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

---

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

Response Letter is not a satisfactory explanation for multiple reasons. First, it is unclear as to several requests whether there were no responsive records or the records were exempt from FOIA disclosure. Second, it was not updated between July and January to reflect any further search for responsive documents or to reflect the determination of the first § 10005(e) petition that the FBI nondisclosure agreement was not a valid basis to withhold documents. And third, it was not attached to records disclosure or even provided to Mr. Rudenberg until after the January 15, 2015 production. It has never been offered as the official explanation for the content of the January 15, 2016 production—and if it is the official explanation, it is wholly inadequate. The State Police are obligated to explain to Mr. Rudenberg as to each request whether responsive records were found and, if found and not provided, what provision of FOIA justifies the failure to provide them. *See* § 10003(h)(2) (“If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial.”).

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

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

### **C. Improper redactions**

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

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

---

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

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

### **Conclusion**

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

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

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

Sincerely yours,



Ryan R. Tack-Hooper

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