



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

JONATHAN RUDENBERG,

Petitioner Below,  
Appellant

v.

C.A. No. N16A-02-006 RRC

THE CHIEF DEPUTY ATTORNEY  
GENERAL OF THE  
DEPARTMENT OF JUSTICE AND  
THE DELAWARE DEPARTMENT  
OF SAFETY AND HOMELAND  
SECURITY, DIVISION OF STATE  
POLICE,

Respondents Below,  
Appellees

**AGREEMENT AND ORDER**

WHEREAS, on May 15, 2015, Jonathan Rudenberg (“Appellant”) submitted a Freedom of Information Act request, pursuant to 29 Del. C. § 10003, to the Delaware Department of Safety and Homeland Security, Division of State Police (“State Police” or “Appellee”);

WHEREAS, on June 5, 2015, the State Police denied the FOIA request in its entirety, citing a nondisclosure agreement they had entered with the Federal Bureau of Investigation;

WHEREAS, on June 17, 2015, Appellant filed a petition challenging the denial with the Chief Deputy Attorney General (“CDAG” or “Appellee”) pursuant to 29 Del. C. § 10005(e) as described in 29 Del. C. § 10005(b);

WHEREAS, on December 29, 2015, the CDAG ordered the State Police to produce the Federal Bureau of Investigation nondisclosure agreement and acknowledged the State Police’s agreement to produce certain redacted purchase orders, but did not compel the production of any other responsive records;

WHEREAS, on February 26, 2016, Appellant filed a Notice of Appeal from the decision of the CDAG, alleging, among other things, that Appellant was entitled to an explanation of the nature of the search conducted as to each category of the request, additional production of responsive records, and a declaration concerning the procedure that must be followed in proceeding before the CDAG;

WHEREAS, since filing the Notice of Appeal, the State Police have provided additional explanations of the nature of the search conducted as to each category of the request, as well as additional responsive documents including an additional non-disclosure agreement and three applications for court orders and resulting court orders. The State Police have not provided the model names of the cell site simulators purchased as Appellant requested; the number of investigations in which cell site simulators were used, the number of those investigations that resulted in prosecution as Appellant requested; a list of all cases in which cell site

simulators were used as part of the underlying investigation as Appellant requested; or all applications submitted to State or Federal Courts for search warrants or orders, denials of warrants or orders, or returns of warrants returned with all applications authorizing the use of cell site simulators as Appellant requested;

WHEREAS, these additional explanations and production have resolved many of the disputes between the parties;

WHEREAS, the principal remaining dispute concerns the process due to a petitioner who appeals to the CDAG;

WHEREAS, the parties recognize that the process due to a petitioner who appeals to the CDAG depends, in part, on the availability of *de novo* suit in the Superior Court that is separate from any appeal from the decision of the CDAG;

WHEREAS, the parties, without conceding any infirmity in the claims or defenses, have in good faith negotiated the terms of this Stipulation and Order in order to resolve this remaining issue to their mutual satisfaction;

NOW, THEREFORE, AND SUBJECT TO APPROVAL OF THE COURT, IT IS HEREBY STIPULATED AND AGREED by and between the parties, as follows:


- A. Agreement as to FOIA Procedure. The Parties agree: that the 2010 amendments to Delaware FOIA created a screening procedure that must be completed by a FOIA petitioner seeking records from an

agency represented by the Attorney General of Delaware; however, this procedure and the potential appeal from it do not displace a petitioner's right to file "suit" under 29 Del. C. § 10005(b); a petitioner seeking records from an agency represented by the Attorney General may file the same type of suit under § 10005(b) that they were able to file before the FOIA amendments and that they continue to be able to file with respect to agencies not represented by the Attorney General; as described in the relevant statutory sections, the petitioner or public agency "may" choose to appeal the CDAG's decision and rely on the record created before the CDAG, but "[t]he citizen shall have the absolute right" to file a separate lawsuit after complying with the statutory requirements of §§ 10005(b) & (e); in sum, there is an optional "appeal" of the CDAG's decision described in §§ 10005(b) & (e) that is limited to the record and is distinct from the "suit" described in §§ 10005(b) & (e) that remains available to all FOIA petitioners. The Court expresses no view as to the parties' "agreement" in this paragraph.

- B. Attorney Fees and Costs. Appellant shall file any motion for attorney's fees and costs within 45 days of the Effective Date. By entering into this Agreement and Order, Appellees do not concede that Appellant is a prevailing or successful party or is otherwise entitled to fees and costs in any amount and they therefore reserve the right to raise any and all defenses to a claim for fees and costs.
- C. Dismissal. Following this Court's decision on any motion for attorney's fees and costs, the above-captioned lawsuit shall then be dismissed.
- D. Release. Except as otherwise indicated in this Agreement and Order (including in particular Part B "Attorney Fees and Costs" *supra*), Appellant hereby unconditionally releases and forever discharges the Appellees and their officers, agents, employees, former employees, attorneys, and vendors from any and all claims, demands, actions, causes of action, and suits, at law, in equity or otherwise, attorneys' fees, costs, obligations, damages, and liabilities of every kind, nature and description whatsoever asserted in the above-captioned action, whether individual or derivative, state or federal, which Appellant, has, had or which it hereinafter can, shall or may have for, upon or by reason of facts, conditions and events described in the pleadings in

this action. Notwithstanding the foregoing, Appellant does not release his legal right to seek any and all public records in the future with new FOIA petitions.

- E. No admission of wrongdoing. Appellees' stipulation to this Agreement and Order does not constitute and shall not be construed or interpreted as an admission of any wrongdoing or liability by any party.

  
\_\_\_\_\_  
Ryan Tack-Hooper (Del. Bar. No. 6209)  
Richard H. Morse (Del. Bar No. 531)  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF DELAW  
100 West 10<sup>th</sup> Street, Suite 706  
Wilmington, DE 19801  
Telephone: (302) 654-5326, Ext. 105  
Facsimile: (302) 654-3689  
[rtackhooper@aclu-de.org](mailto:rtackhooper@aclu-de.org)  
[rmorse@aclu-de.org](mailto:rmorse@aclu-de.org)

*Counsel for Appellant Jonathan  
Rudenberg*

/s/ Joseph C. Handlon  
\_\_\_\_\_  
Joseph C. Handlon (Del. Bar. No. 3952)  
State of Delaware  
Department of Justice  
Carvel State Building, 6th Floor  
820 N. French Street  
Wilmington, DE 19801  
Telephone: (302) 577-8862  
Facsimile: (302) 421-8390  
[joseph.handlon@state.de.us](mailto:joseph.handlon@state.de.us)

*Counsel for Appellee Delaware  
Department of Justice, Chief Deputy  
Attorney General*

/s/ Patricia A. Davis  
\_\_\_\_\_  
Patricia A. Davis (Del. Bar No. 3857)  
Rae Meredith Mims (Del. Bar No. 5095)  
State of Delaware  
Department of Justice  
102 W. Water Street  
Dover, DE 19904  
Telephone: (302) 739-7641  
Facsimile: (302) 739-7652  
[patriciaa.davis@state.de.us](mailto:patriciaa.davis@state.de.us)  
[rae.mims@state.de.us](mailto:rae.mims@state.de.us)

*Counsel for Appellee Delaware  
Department of Safety and Homeland  
Security, Division of State Police*

Dated: May 4, 2017

SO ORDERED this 8<sup>th</sup> day of May, 2017

Michael R. Lord  
Superior Court Judge