



MATTHEW P. DENN
ATTORNEY GENERAL

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

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

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 17-IB06

March 21, 2017

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

Re: May 6, 2016 FOIA Petition Concerning Delaware State Police and Delaware Department of Safety and Homeland Security

We write in response to your petition, dated May 6, 2016 (“Petition”). In the Petition, you allege that the Delaware Department of Safety and Homeland Security (“DSHS”) and the DSHS’s Division of State Police (“DSP”) violated Delaware’s Freedom of Information Act (“FOIA”) in connection with your February 18, 2016 request for records. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited DSHS and DSP to submit a written response to your Petition. We received their joint response on May 18, 2016 (“Response Letter”). For the reasons set forth below, we conclude that neither DSHS nor DSP violated FOIA as alleged in the Petition. As discussed more fully below, we nonetheless request that DSHS review its redactions as to shipping information and contacts and promptly provide you with either a copy of the documents without those redactions or, alternatively, the basis for such redactions.

On or about February 1, 2016, you submitted a request to DSHS for copies of all records that had been provided to Mr. Jonathan Rudenberg regarding the State’s acquisition of cell site simulators.¹ On February 2, 2016, DSP forwarded copies of the requested documents – specifically, the nondisclosure agreement between the Federal Bureau of Investigation and redacted purchase orders – to DSHS who, in turn, forwarded the documents to you.² That same

¹ Response Letter at 1. Pursuant to 29 *Del. C.* § 10005(b), “a person denied access to public records by an administrative office or officer, a department head, commission, or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of [Title 29] *must* within 60 days of denial, present a petition and all supporting documentation to the Chief Deputy.” Here, we note that you have not provided a copy of your February 1, 2016 request. As such, except as otherwise noted, we rely on the uncontested factual representations of DSHS and DSP as set forth in the Response Letter.

² Response Letter at 1. We note that DSP is a division of DSHS.

day, you requested copies of all emails, letters, faxes, texts and other correspondence between DSP/DSHS and Harris Corporation, its agents, and its representatives, as well as DSP policies and guidelines regarding cell site simulators.³ You also stated that you challenged the redactions in the purchase orders as unwarranted, improper and overly broad.⁴ DSP responded that its February 2, 2016 production satisfied its burden.⁵ On February 22, 2016, you sent a request for “[c]opies of all correspondence between the Delaware State Police and/or the Department of Safety and Homeland Security and Harris Corporation from Jan. 1, 2010 to the present.”⁶ You noted that your request included, but was not limited to, certain subcategories of information.⁷ That same day, DSHS acknowledged receipt of your request.⁸ You supplemented your request on February 23, 2016.⁹

On March 9, 2016, DSHS responded that it required additional time to search for and review records responsive to your requests.¹⁰ DSHS provided a response to your requests on May 2, 2016.¹¹ The response included certain records responsive to your requests a three-page letter from DSP Colonel Nathan McQueen Jr.¹² DSHS’s May 2, 2016 correspondence also noted that DSHS had previously provided a copy of the nondisclosure agreement and redacted purchase orders.¹³ In response to your February 22, 2016 request for “[c]opies of all correspondence between the Delaware State Police and/or the Department of Safety and Homeland Security and Harris Corporation from Jan. 1, 2010 to the present,” Colonel McQueen’s May 2, 2016 letter stated:

³ *Id.* at 1-2.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ Email from Randall Chase to Kimberly Chandler dated February 22, 2016.

⁷ *Id.*

⁸ Email from Kimberly Chandler to Randall Chase dated February 22, 2016.

⁹ Email from Randall Chase to Kimberly Chandler dated February 23, 2016. Because you have not challenged the response to this supplemental request, the specifics of that request are not relevant to this determination.

¹⁰ Email from Kimberly Chandler to Randall Chase dated March 9, 2016.

¹¹ Email from Wendy Hudson to Randall Chase dated May 5, 2016.

¹² *See* Letter from Colonel Nathaniel McQueen, Jr. to Randall Chase dated May 2, 2016.

¹³ *Id.*

As DSP has stated to you in your earlier request, the only correspondence with the Harris Corporation that is within [DSP's] possession are the purchase orders for the equipment and updates. These were provided to you at that time. The documents are redacted pursuant to FBI direction due to the confidential nature of the information. Cell site simulator technology falls within proprietary information as it belongs to the FBI and the Harris Corporation is the manufacturer designated by the FBI. See *29 Del. C. § 10002(1)(2)*. . . .

...

Any documents concerning cell site simulator equipment would be housed with the Criminal Intelligence Section. The [Officer in Charge] serves as the leader and contact point for the unit. The OIC checked through all their files at their location and contacted an analyst in DSP's Fiscal Unit for any documents responsive to this request. The purchase orders were the only documents the fiscal analysts obtained. . . .

Any other documents that may have existed when DSP first began using this technology over three years ago no longer exist. Many of those officers that were assigned to the unit at the time have retired or moved on to other assignments and purged all their files. The Harris Corporation serves as the manufacturer of the FBI technology. Other than the purchase orders, there is no on-going correspondence with the manufacturer as there is no need.

The FBI redacted the names of the software on the purchase orders and is vehement that it is proprietary and the release of which may allow individuals to develop technologies to impede or negate the operation of particular cell site simulator systems. As the FBI also uses this technology, such disclosure would have negative repercussions across the country and would put the public and the national security at risk as criminals and terrorists could actively work to thwart law enforcement efforts by developing defensive technologies to combat the effectiveness of this surveillance equipment, or render it non-functional all together (sic).¹⁴

We received your Petition on May 5, 2016. In your Petition, you challenge the purchase order redactions, as well as the scope of DSP's/DSHS's search for correspondence with Harris

¹⁴ Letter from Colonel Nathaniel McQueen, Jr. to Randall Chase dated May 2, 2016 at 1-2. Because your Petition challenges only the redaction of purchase order information and the search for correspondence with Harris Corporation, any responses to your additional requests are not relevant to this determination and, as such, have not been identified with specificity herein.

Corporation from January 1, 2010 onward.¹⁵ In their Response Letter, DSHS and DSP maintain that the redacted information is not a “public record” pursuant to 29 *Del. C.* § 10002(1)(2), which exempts “[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature,” and 29 *Del. C.* § 10002(1)(5), which exempts “[i]ntelligence files compiled for law-enforcement purposes, the disclosure of which could constitute an endangerment to the local, state or national welfare and security.”¹⁶ Consistent with Colonel McQueen’s May 2, 2016 letter, DSHS and DSP also maintain that “there are no other documents or communications between the manufacturer of the cell site simulators and DSP for the past five years besides the purchase orders already produced.”¹⁷

As an initial matter, you allege that DSP violated FOIA by “improperly and unnecessarily redact[ing] purchase order information regarding products and services obtained from Harris Corp. regarding cell phone simulators.”¹⁸ By way of background, we note that on June 17, 2015, Mr. Jonathan Rudenberg filed a petition with this Office alleging that the Delaware State Police (“DSP”) violated FOIA by failing to provide him access to records. Among other things, at issue in that matter was whether and to what extent information regarding Harris Corporation’s “Stingray” technology is subject to Delaware’s Freedom of Information Act (“FOIA”). Mr. Rudenberg had requested several categories of information.¹⁹ The first category of information that Mr. Rudenberg had requested – category number one – was:

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 requested, please include records of all contracts, agreements, and communications with Harris Corporation.²⁰

On December 29, 2015, then-Chief Deputy Attorney General Danielle Gibbs issued *Del. Op. Att’y Gen.* 15-IB14. In that Opinion, she opined that “[t]he request for several categories of records have become moot because of subsequent events.”²¹ She noted that, since the petition had been

¹⁵ We note that the May 2, 2016 letter also referenced and responded to your requests for other categories of information. However, those facts are not relevant to this determination due to the limited scope of your Petition.

¹⁶ Response Letter at 4-5.

¹⁷ *Id.* at 5.

¹⁸ Petition at ¶ 1.

¹⁹ *Del. Op. Att’y Gen.* 15-IB14, 2015 WL 9701645, at *1-2 (Dec. 29, 2015).

²⁰ *Id.* at *1 (emphasis added).

²¹ *Id.* at *3.

filed, the State Police had “conferred with the FBI and ha[d] obtained permission to produce the records responsive to category nos. 1 and 4, so long as certain information [wa]s redacted.”²² She noted that “[t]he State Police w[ould] redact from th[o]se records information concerning specific elements of the technology or components” and indicated that she “trust[ed] that this [would be] satisfactory for [Mr. Rudenberg’s] purposes, as it [wa]s consistent with the nature of the information requested.”²³

On February 17, 2016, Mr. Rudenberg – through his counsel – submitted a letter to this Office requesting this our determination of whether the Delaware State Police’s partial production of redacted documents on January 15, 2016 in response to *Del. Op. Att’y Gen. 15-IB14* violated FOIA.²⁴ In response to that petition, on March 4, 2016, then-Chief Deputy Attorney General Danielle Gibbs issued *Del. Op. Att’y Gen. 16-IB03*. In that opinion, she stated: “with one exception, we believe the February 17 Letter is an impermissible attempt to have this office reconsider Attorney General Opinion 15-IB14.”²⁵ She noted that the letter “raised one matter that was not contemplated in the December 29 Opinion – the alleged redaction of ‘shipping information and contacts.’”²⁶ She stated that FOIA does not require this Office to maintain continuing jurisdiction to police an agency’s response to a FOIA determination and, as such, she believed the redaction of shipping information to form the basis of a new petition.²⁷ She stated that inconsistent redaction of shipping information and contacts “raise[d] the possibility that the material was redacted in error” and requested that DSP review the redactions and promptly provide either a copy of the documents without the redacted shipping information or, alternatively, the basis for those redactions.²⁸ She noted that, “[i]n describing the matters the State Police intended to redact [in *Del. Op. Att’y Gen. 15-IB14*], this office effectively allowed the redactions.”

Notably, your February 1, 2016 request was for copies of all records provided to Mr. Rudenberg and, on February 2, 2016, DSHS did indeed provide you copies of all records that had previously been provided to Mr. Rudenberg. In fact, we note that the purchase orders contain the very same redactions that were at issue in *Del. Op. Att’y Gen. 16-IB03*, inclusive of the “inconsistent redaction of shipping information and contacts” that were identified in that matter. As such, and consistent with *Del. Op. Att’y Gen. 16-IB03*, we request that DSHS review its redactions as to shipping information and contacts and promptly provide you with either a copy of

²² *Id.* at *2.

²³ *Id.* at *3.

²⁴ See Letter from Ryan Tack-Hooper to Danielle Gibbs dated February 17, 2016 (“February 17, 2016 Petition”) (attached hereto as Exhibit 1).

²⁵ *Del. Op. Att’y Gen. 16-IB03*, 2016 WL 1072889, at *1 (Mar. 4, 2016).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

the documents without those redactions or, alternatively, the basis for such redactions. As to the remaining redactions, and consistent with our determination in *Del. Op. Att’y Gen.* 15-IB14 as noted in *Del. Op. Att’y Gen.* 16-IB03, we conclude that the redactions were permissible under FOIA.²⁹ We nonetheless note that, on February 26, 2016, while his February 17, 2016 Petition was pending, Mr. Jonathan Rudenberg filed an appeal to the Superior Court from *Del. Op. Att’y Gen.* 15-IB14.³⁰ Among the issues that may be decided by the Superior Court is whether the redactions at issue were proper.³¹ As such, this determination may be affected by Superior Court’s conclusion (or that of a higher court in the event of an appeal).³²

With respect to your second allegation, we note that Mr. Rudenberg’s February 17, 2016 Petition also challenged the scope of the DSP’s search for correspondence regarding the State’s acquisition of cell site simulator technology.³³ By way of example, the February 17, 2016 Petition noted that “the State Police failed to produce any records other than purchase orders responsive to

²⁹ *Id.* (“In describing the matters the State Police intended to redact, this office effectively allowed the redactions.”). While we need not make such a determination here, we note based upon the record here, and the facts as set forth in the unsealed record of the *Rudenberg* matter, that the request information may also be exempted from FOIA’s definition of “public record” pursuant to the most recently-enacted amendment to the statute, which exempts “[i]nformation technology (IT) infrastructure details, source code, logical and physical design of IT systems and interfaces, detailed hardware and software inventories, network architecture and schematics, vulnerability reports, and any other information that, if disclosed, could jeopardize the security or integrity of an information and technology system owned, operated, or maintained by the State or any public body subject to the requirements of [FOIA].” See Del. S.B. 258, 148th Gen. Assem., 80 Del. Laws, ch. 296 (2016) (codified at 29 *Del. C.* § 10002(l)(17)(a)(7)); *Rudenberg v. The Chief Deputy Attorney General of the Del. Dep’t of Justice* Del. Super., C.A. No. N16A-02-006 (“*Rudenberg*”), Docket Item (“D.I.”) Nos. 14 (Statement of Interest of the United States), 15 (Declaration of Carol Federighi), and 16 (Declaration of Russell D. Hansen). Senate Bill 258 was originally introduced on May 10, 2016 and signed into law, as amended, on June 30, 2016.

³⁰ Notice of Appeal, *Rudenberg v. The Chief Deputy Attorney General of the Del. Dep’t of Justice* Del. Super., C.A. No. N16A-02-006 (“*Rudenberg*”), Docket Item (“D.I.”) 1.

³¹ See Letter from Patricia Davis to the Court, *Rudenberg*, D.I. 24 at 3 (identifying “[w]hether the DSP properly redacted the model names of the technology used by DSP in the purchase orders it provided [to Mr. Rudenberg] pursuant to the FOIA request” as one of “the only determinations that remain in dispute”). *But see* Letter from Ryan Tack-Hooper to the Court, *Rudenberg*, D.I. 25 at 1-2 (disputing DSP’s framing of the remaining issues and identifying the issue regarding DSP’s redaction of purchase order information as whether DSP had *met its evidentiary burden* with respect to the redactions).

³² We note that you declined this Office’s request that you consent to a stay this matter pending resolution of the *Rudenberg* litigation.

³³ February 17, 2017 Petition at 2 (alleging that “the search for records performed by the State police was unreasonable.”).

[its category number one request]” and stated that it was “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 regarding the transactions.”³⁴ In *Del. Op. Att’y Gen.* 16-IB03, then-Chief Deputy Attorney General Danielle Gibbs stated:

It was apparent from the December 29 Opinion that the State Police had already conducted a search. In accepting representations that the State Police found no responsive documents, this office implicitly accepted the scope of the search.³⁵

Here, as in both *Del. Op. Att’y Gen.* 15-IB14 and *Del. Op. Att’y Gen.* 16-IB03, we conclude that neither DSHS nor DSP violated FOIA in connection with its search for records responsive to your request for “[c]opies of all correspondence between the Delaware State Police and/or the Department of Safety and Homeland Security and Harris Corporation from Jan. 1, 2010 to the present” was acceptable under FOIA. Indeed, the DSP’s search for “all contracts, agreements, and communications with Harris Corporation” would necessarily have included a search for a more limited subset of the same records. This conclusion is further supported by Colonel McQueen’s May 2, 2016 letter, which describes in detail the steps DSP took in locating and identifying responsive records.³⁶

Based upon the foregoing, it is our determination that neither DSHS nor DSP violated FOIA as alleged in your Petition.

Very truly yours,



LaKresha S. Roberts
Chief Deputy Attorney General

³⁴ *Id.* at 3.

³⁵ *Del. Op. Att’y Gen.* 16-IB03, 2016 WL 1072889, at *1.

³⁶ See Letter from Nathaniel McQueen, Jr. to Randall Chase dated May 2, 2016 at 2. On appeal, Mr. Rudenberg abandoned his claim regarding the adequacy of DSP’s search for documents responsive to category one, noting that, since the filing of his appeal, the DSP described the searches and he “[wa]s satisfied with the searches eventually performed for acquisition-related documents (Category 1).” Appellants Opening Brief, *Rudenberg*, D.I. 7 at 19. While he maintained that he believed the search was “not legally adequate,” he nonetheless indicated that he “elected not to pursue those records further . . . , since the described search [wa]s sufficient to conclude that the State Police did not engage in any written bid process or any other written negotiation in the purchase of this technology.” *Id.* at 19 n.13.

cc: Michelle E. Whalen, Deputy Attorney General (via email)
Rae M. Mims, Deputy Attorney General (via email)
Lisa M. Morris, Deputy Attorney General (via email)