



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ROBERT E. VALENLLA, on behalf of)	
THE DELAWARE CALL,)	C.A. No. K24A-02-002 JJC
)	
Petitioner Below,)	
Appellant,)	
)	
v.)	Appeal from Attorney General
)	Opinion No. 24-IB01
CHRISTINA DURAN, in her official)	
capacity as FOIA Coordinator for)	
the DELAWARE DEPARTMENT OF)	
SAFETY AND HOMELAND SECURITY,)	
DELAWARE STATE POLICE,)	
)	
Respondent Below,)	
Appellee.)	

**APPELLEE’S ANSWERING BRIEF IN OPPOSITION
TO APPELLANT’S OPENING BRIEF ON APPEAL**

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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NATURE AND STAGE OF THE PROCEEDINGS

On February 29, 2024, Appellant Robert Vanella (“Vanella”) filed a Notice of Appeal asking this Court to reverse the determination by the Delaware Department of Justice (“DOJ”) that the Delaware State Police (“DSP”)¹ did not violate the Freedom of Information Act, 29 *Del. C.* Chapter 100 (“FOIA”) when it denied Vanella’s FOIA request seeking confidential law enforcement officer information. Within two weeks of filing the Notice of Appeal, Vanella filed an opening brief before the matter was served upon DSP and before the DOJ could certify the record to this Court, as required by Superior Court Civil Rule 72. Serendipitously, the DOJ and DSP learned of the appeal and brought this irregularity to Vanella’s attention. Thereafter, the Notice of Appeal and the Citation of the Record were served, and the DOJ then certified the record to the Court. *See* Trans. 72779947 (the “Record,” cited herein as, “R. at ___”). The Court issued a briefing schedule, and Vanella re-filed its Opening Brief on May 7, 2024. Trans. 72906264 (“OB”). This is DSP’s Answering Brief.

¹ In addition to DSP, this appeal names the DSP FOIA Coordinator as a respondent “in her official capacity.” To the extent this appeal could be construed as including a claim against the Coordinator, the claim would be treated as against DSP. *See Eskridge v. Hutchins*, 2017 WL 1076726, at * 1, note 3 (Del. Super. Mar. 22, 2017) (claims against state officials in their official capacity are construed as claims against the state).

FACTUAL BACKGROUND

On October 3, 2023, Vanella submitted a FOIA request to DSP seeking the identity of all current and former Delaware law enforcement officers. OB at 3. The request also sought their salaries, employment status, rank, past employers, job titles, resumes, a list of formerly certified officers, their “current status,” and the officers’ age, sex, and race. *Id.* Vanella states in this appeal that he sought this information to “to identify, *track*, and report on officers who may have engaged in misconduct.” *Id.* (emphasis added).

On October 27, 2023, DSP sought additional time to respond to the request, but made it clear that the request would likely be denied based on FOIA exceptions that were in fact subsequently asserted. *See* Trans. 72197734, Ex. 5 (10/27/23 email). DSP provided Vanella with a website that contained information responsive to at least a portion of the FOIA request. DSP also clarified that it would only have information regarding DSP troopers, not all Delaware police officers. *Id.*

On November 3, 2023, DSP responded to the FOIA request. R at 8-9. The response denied the request, pointed out that DSP does not have information as to all officers, provided that DSP did not have an existing record that had all the requested information, and asserted that if it did, such records would be exempt under 29 *Del. C.* § 10002(o)(17). The response also directed Vanella to the Open the Books website that contains salaries of state employees, including troopers, and

noted that resumes would be exempt under § 10002(o)(1), which exempts personnel files from FOIA requests. *Id.*

On October 3, 2023, Vanella filed a Petition with the DOJ pursuant to 29 Del. C. § 10005(e). Thereafter, DSP attempted to provide certain responsive information in a deidentified form to resolve the Petition. Vanella responded that it wanted to be able to match any unique identifiers to “other records” and to pursue the remaining requests in the petition proceeding. *See id.* (11/13/23 email (stating that DSP could provide unique identifiers “but would allow us to match the records to other records” and stating that the “rest of the request and related appeals would still stand.”)). Thus, because it appeared that Vanella was still interested in identifying the officers, apparently to *track them*, DSP’s attempt to reach a compromise failed. R. at 50.

On November 16, 2024, DSP responded to the Petition. R. at 39-49. The response reiterated much of what DSP had already conveyed to Vanella when it denied the request. In addition, the response provided two affidavits in support of its opposition to the Petition. Among other things, those affidavits detailed that DSP has received an increasing number of disturbing messages from the public, through voicemail, phone calls and its social media platforms. R. 48. In one case, an individual was determined to antagonize troopers and Division civilian employees created alarm by circling DSP headquarters with his canine. *Id.*

Though not acknowledged in the Opening Brief, DSP’s Petition response also guided Vanella to its annual reports² containing deidentified statistical and demographic information regarding its workforce. R. at 40. Again, not mentioned in his brief, DSP guided Vanella to the Delaware Criminal Justice Council (“CJC”) website containing a list of decertified officers for the last ten years. *Id.* Though not required by FOIA, DSP also provided Vanella with a copy of CJC’s report. *Id.*³ DSP further explained that recent statutory changes had resulted in additional required disclosures regarding certification and disciplinary proceedings. *Id.*⁴ For

² DSP’s annual reports may be found at <https://dsp.delaware.gov/reports/> (last visited 6/5/24).

³ *See also* <https://cjc.delaware.gov/reports/required-law-enforcement-disclosures/> (last visited 6/5/24).

⁴ On August 7, 2023, HS 1 for HB 205 and House Bill No. 206, as amended by House Amendment No. 3, were signed into law. These bills resulted in significant changes to Delaware’s Law Enforcement Officer Bill of Rights (“LEOBOR”) and the organic statute for the Council on Police Training (“COPT”). COPT was reconfigured and renamed the Police Officer Standards and Training (“POST”) Commission. All police departments must now establish accountability committees and submit to the CJC for public posting “detailed narratives” of investigations in five categories of internal investigations, some of which do not require that the investigation result in substantiated police misconduct. POST must also now publicly post summaries of all officer disciplinary decisions. These statutory changes amount to a legislative acknowledgement of the sensitivity of personal information for law enforcement. For instance, the changes allow for the redaction in public narratives relating to domestic violence cases of officer names. 11 *Del. C.* § 9210(a)(2). When the DOJ provides *Brady* and *Giglio* material, it must redact personally identifying information of officers, and their family members. 11 *Del. C.* § 9210(c)(2). More recently, HB 412 currently proposes to require that, upon request, police departments remove personally identifying information of their officers from public websites. *See* <https://legis.delaware.gov/BillDetail?LegislationID=141422> (last visited 6/5/24).

the remaining issues, DSP noted its concern about disclosure of officers serving in undercover and intelligence roles. The response concluded that right to privacy exception and § 10002(o)(17) combined to exempt the remaining information sought by Vanella.⁵

On January 11, 2024, the DOJ agreed that DSP did not violate FOIA in denying Vanella's FOIA request. The decision explained that subsection (o)(17) consists of "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." R. at 92; *see also* 11 *Del. C.* § 8302 (describing DSP's powers and duties). Those records are exempt if they fall into one of two subcategories, including "Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments or to the response or deployment plans." *Id.* (cleaned up). The decision reasoned:

DSP's primary objectives include assessing vulnerable areas and deploying response plans to prevent, mitigate, or respond to criminal activity, and the identities of the officers, including those officers that are undercover or working in intelligence operations, are essential to these response and deployment plans. Disclosure of these assessments and response and deployment plans pose a safety risk to the involved officers and the public safety of

⁵ The request seeking certification status of currently-employed troopers should not be controversial, as Delaware law enforcement agencies cannot employ an individual as a law enforcement officer who is not Delaware certified.

the communities in which the officers operate, especially officers working in undercover or intelligence operations.

Id. at 93. The DOJ’s interpretation of subsection (o)(17) is correct and should be affirmed.

ARGUMENT

DSP’s burden to prove applicability of FOIA’s exceptions to the request is not beyond a reasonable doubt. FOIA requires that the agency justify its FOIA denial. *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1007, 1010–11 (Del. 2021). This is accomplished, where, as here, the agency provides competent evidence based upon personal knowledge, as by, for example, submitting affidavits. *Id.* “A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.” *Id.* DSP’s FOIA objection meets this standard.

Initially, it should be stressed that DSP does not disagree that FOIA is an important tool that facilitates public awareness and government accountability. Indeed, over the last several years, DSP has worked tirelessly with its partners and interested stakeholders to significantly overhaul LEOBOR and the COPT statutes to increase transparency and accountability. But transparency and accountability, laudable interests in their own right, for all areas of federal and local government, should not come at the price of risking the safety of state workers and its police force. These state workers should not lose their right to privacy and security unnecessarily

on the basis of the further pursuit of transparency and accountability. As our Supreme Court observed, “While FOIA aims to ensure that society remain free and democratic through easy access to public records, the statute’s assurance of openness and accountability is limited.” *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1004 (Del. 2021).

DSP’s response to Vanella’s FOIA request attempted to strike a reasonable balance between transparency and accountability and its legitimate concerns for the safety of its workers and their families. Recruiting law enforcement officers in recent years has been challenging enough,⁶ without unnecessarily further deepening a feeling of lack of privacy and safety among officer ranks. The DOJ, this state’s office tasked with fighting Delaware crime and protecting *all* Delawareans, agreed that DSP complied with FOIA by appropriately striking that balance. The Opening Brief fails to demonstrate the DOJ’s informed decision somehow constitutes legal error and that these legitimate concerns should be cast aside.

I. 29 Del. C. § 10002(o)(17) IS NOT LIMITED TO TERRORISTS

Vanella makes three main arguments on appeal. The first argument is his focus, that 29 Del. C. § 10002(o)(17) does not exempt officer names, employing agency, past agencies and job titles. Vanella argues that the language and legislative

⁶ See, e.g., <https://www.foxnews.com/media/police-shortages-reported-nationwide-amid-record-low-morale-recruitment> (last visited 5/31/24).

history of the subsection do not support application of the FOIA exception. *See* OB at pp. 8-15.

DSP agrees that the appropriate review of whether the DOJ committed legal error is an analysis of the plain language of subsection (o)(17). The plain language supports application of the exception on this record. Indeed, the DOJ relied upon the plain language of (o)(17), and the Opening Brief does not undermine that analysis.

Apparently recognizing that the plain language may apply to exempt the records, Vanella initially makes an appeal to legislative history, arguing that the subsection's enactment enables Delaware to prevent *terrorists* from seeking state records. OB at 8. Vanella makes short shrift of DSP and the DOJ's security concerns. It claims that the statute was passed only to prevent acts of terror. OB at 8. The provision, it surmises, prevents terrorists from using state records to exploit vulnerabilities. The problem with Vanella's legislative history argument is that the plain language of the statute does not apply only to terrorists. This is for good reason. How would an agency know whether someone had terroristic motives in seeking records? Vanella's argument would require an agency to explore a FOIA requester's motives, and such inquiries are generally prohibited. *See American Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at *3 (Del. Super. Mar. 15, 2007)

(noting that the motives of the requester are generally not relevant). Vanella's argument, therefore, does not comport with the law and common sense.

Again, the plain language of subsection (o)(17) supports the DOJ's conclusion. As observed there, and a fact of which the Court could readily notice, the primary purpose of DSP is to "prevent, mitigate [and] respond to criminal acts." 29 *Del. C.* § 10002(o)(17)a.5. For this exception to apply, the sought records must fall into one of two categories, including specific and unique vulnerability assessments or specific and unique response or deployment plans, *including underlying data collected* in preparation of or essential to the assessments or to the response or deployment plans." *Id.* at § 10002(o)(17)a.5.A (emphasis added). Implicit in the DOJ's ruling is the informed decision that providing a list of all active troopers amounts to a collection of data in preparation of or essential to DSP's primary purpose of preventing, mitigating and responding to criminal acts. The plain language of the statute therefore supports application of subsection (o)(17). This conclusion is particularly apt considering the unrebutted evidence below that troopers routinely act in an undercover capacity or in various intelligence roles. They do so at a time when officer assaults are on the rise and where DSP has been receiving specific threats. R. at 66.⁷

⁷ There has also been a disturbing uptick in assaults on law enforcement officers nationwide. *See, e.g.*, <https://www.police1.com/officer-safety/fbi-reports-assaults-on-leos-in-the-us-reached-a-10-year-high-in-2023> (last visited 5/28/24) (discussing

The Chief Deputy’s determination in this matter is consistent with the DOJ’s application of (o)(17) to other FOIA requests. For instance, the DOJ recently applied subsection (o)(17) to uphold a journalist’s request for various Department of Correction records, including policies and procedures and reports, agreeing that disclosure of such records “would create an officer safety issue and provide the offenders with the ability to possibly escape or disrupt plans and that knowing these operational procedures of this nature would allow offenders to know the outcomes of certain actions and plan accordingly.” AG Op. No. 24-IB09, 2024 WL 1132322, at *4 (Feb. 19, 2024). Unsurprisingly, there was no indication in this decision that the request was denied because it was made by a terrorist.

While not specifically relying upon subsection (o)(17), the DOJ has applied other FOIA exceptions to requests similar to Vanella’s, recognizing the unique circumstances attributable to officer information. In *Del. Op. Att’y Gen.* 13-IB03, at *3 (2013), the DOJ upheld the denial of a release the identities of Wilmington Police Department officers performing security detail for the mayor. In upholding the denial, the DOJ broadly held that “it is appropriate in this case to adhere to the

FBI report indicating there were 79,000 assaults on law enforcement officers in 2023 nationwide, representing a ten-year high and that there were 466 officers were assaulted with firearms, compared to 200 in 2014). A brief review of the DOJ’s use of force reports demonstrates further the dangers faced by Delaware officers on a regular basis. See <https://attorneygeneral.delaware.gov/executive/use-of-force-investigations> (last visited 5/30/24).

generally accepted rule under the Federal Act that law enforcement personnel have substantial personal privacy interests in protecting their identities.” Nothing in that decision appeared driven by the detail performed by those officers. Moreover, wholesale release of all trooper names would include those serving in an undercover and intelligence capacity.

Vanella evokes the construction rule of *ejusdem generis* in support of its construction analysis. OB 9-10. Vanella argues that the phrase “could endanger the life or physical safety of an individual,” should be construed to refer to “potential terrorists acts.” OB 9-10. The problem with this argument is that Vanella is asking the Court to insert language into the statute that does not exist. This the Court cannot and should not do so. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232 (Del. 1982) (courts may not engraft upon a statute language that has been excluded). The statute does not limit the General Assembly’s concern for the safety of individuals to terror attacks.⁸

If anything, the conclusion that DSP did not violate FOIA is *supported* by the argument that FOIA should be interpreted wholistically. As argued *infra*, the statute’s other exceptions, pertaining to personnel files, intelligence files, and subsection (o)(6) (personal privacy exception), further informs that application of

⁸ DSP’s concern that wholesale release of all trooper identities, together with their demographic information, jeopardizes officer safety could aptly and correctly be characterized as a concern about future terrorist activity.

subsection (o)(17), in combination with these other exceptions, was appropriate under the circumstances of DSP's FOIA denial and the record on this appeal. The exceptions relied upon by DSP must be read *in pari materia*.

The object of statutory construction is to give a sensible and practical meaning to the statute as a whole in order that it may be applied in future cases without difficulty, and if a literal interpretation leaves a result inconsistent with the general statutory intention, such interpretation must give way to the general intent. This is particularly true where such a literal interpretation would lead to unjust and mischievous consequences.

Nationwide Mut. Ins. Co. v. Krongold, 318 A.2d 606, 609 (Del. 1974). When read with the other FOIA exceptions for personnel files, personal privacy, and intelligence files, it is apparent that subsection (o)(17) and its concern for the safety of individuals provides a sensible exception to FOIA without limiting interests of transparency and accountability.

Vanella argues that the subsection does not apply because DSP's personnel records were not "assembled, prepared or maintained to" respond to criminal acts. OB at 11. It compares DSP to "any employer," who must maintain such records. *Id.* It oddly relies on website information about DSP's (confidential) recruitment process in seeking to divorce these confidential records from the language of the statute. However, Vanella's reasoning ignores the fact that DSP is not just "any employer," it is an employer, as the Chief Deputy observed, whose "primary objectives include assessing vulnerable areas and deploying response plans to

prevent, mitigate, or respond to criminal activity.” R. at 93; *see also* 11 Del. C. § 8302 (describing DSP’s powers and duties). Most employers do not have statutes that not only specifically address officer privacy, but also require transparency and accountability. *See* 11 Del. C. Chapters 84 and 92. DSP, and law enforcement in general, is not just “any employer.” The primary function of most employers is not to respond to attacks that could be considered terrorist attacks, as DSP undoubtedly would be required to do.⁹ *See also Long v. Off. of Pers. Mgmt.*, 692 F.3d 185, 192 (2d Cir. 2012) (No disclosure of names and duty-station records of federal employees because they worked in sensitive agencies/occupations such as national security and law enforcement and “the mission and nature of the work performed by those agencies rendered them ... vulnerable to harassment or attack”).¹⁰

Vanella asserts that the affidavits in the record do not say enough about how release of personal information – pedigree information, past employers, etc. – can jeopardize officer safety. OB at 14. It claims there is no causal connection

⁹ Vanella’s reliance on *Flowers v. Office of the Governor*, 167 A.3d 530 (Del. Super. 2017) is unavailing. OB at 13. The cited portion of that decision, which upheld the denial of a FOIA request, held that a FOIA denial does not have to include “Vaughn index.” 167 A.3d at 549. It grappled with whether one could be required for an agency to meet its burden of proof. *Flowers* does not support Vanella’s claim that subsection (o)(17) is irrelevant to DSP’s denial.

¹⁰ *Long* also held that even if names were redacted, the records were personal and could reveal current and career information such as job classification, pay, veteran status, and work schedule. *Id.*

established in the affidavits between this confidential information and a concern for safety. *Id.* It should go without saying that releasing the identity of officers and their personal information, in particular those who are serving, or may serve, in an undercover or intelligence role, puts them at risk. *See also Rataj v. City of Romulus*, 306 Mich. App. 735, 858 N.W.2d 116 (2014) (holding personal information such as home addresses, dates of birth, and telephone numbers typically constitutes information of a personal nature that are exempt from FOIA and noting that this information does little to further public policy goal by revealing little or nothing about the government agency's conduct). The General Assembly appears to agree. *See 11 Del. C. § 9210(c)(2)* (requiring redaction of personally identifying information of officers and their family members in criminal discovery).

Vanella cites an unreported New York Supreme Court Order in support of its argument. OB at 14. The administrative record in that matter did not appear to include affidavits or other evidence articulating the specific concerns and threats set forth in the DSP affidavits. Moreover, the portion of the New York order addressing the request for officer addresses supports the Chief Deputy's decision in this appeal. The court there observed that a police officer's name, taken together with other personal information, may enable a "person disgruntled by the actions of any police officer," undercover or not, or with police officers in general, may well be able to determine the precise location of a police officer's residence based upon such

information, resulting in a risk to the safety of the police officer or such person's family and attendant hardship.” *Hearst Corp. v. New York State Div. of Crim. Just. Servs.*, No. 901527, at *3 (N.Y. Sup. Ct. Jul. 31, 2023). Considering New York's population is twenty times larger than Delaware's,¹¹ the recognition of a disgruntled person's ability to track down an officer in New York should be exponentially more concerning to a Delaware court in applying FOIA to protect Delaware officers.

The plain language of subsection (o)(17), combined with the exceptions for personnel records and the right to privacy, support the DOJ's decision upholding the DSP's FOIA denial.

II. The Personnel Records Exception Applies.

Vanella's second argument on appeal is that resumes, certification statuses, and demographic information are not subject to the exception in *29 Del. C. § 10002(o)(1)*. For the reasons discussed above regarding application of subsection (o)(17), the personnel records exception FOIA also protects the records and information sought by Vanella.

DSP's primary focus in this matter is officer safety and not disclosing a list of all DSP certified troopers. Concomitant with this objective is resisting the disclosure of additional information – for example, demographic information – that further

¹¹ See <https://worldpopulationreview.com/states> (roughly 19.5 million for New York compared to approximately 1 million for Delaware) (last visited 6/4/24).

enables anyone receiving (and apparently *tracking*) that information to identify and locate individual officers, particularly ones who have served or may serve in undercover or intelligence roles. Thus, releasing names *along with* other information jeopardizes their safety and infringes on their personal privacy. The unrebutted evidence cited in the DOJ's decision established that the information sought by Vanella is from the personnel files of DSP troopers. R. at 62.

Vanella cites Attorney General Opinion 02-IB24 (Oct. 1, 2002), but that decision fails to rebut DSP's evidence on this issue. The decision held that a settlement agreement cannot be withheld based on § 10002(o)(1). The unrebutted evidence is that this additional demographic information is part of Human Resources personnel records and disclosure further risks officer privacy and safety. Vanella is wrong in claiming that DSP is arguing that the location of the information is determinative. DSP's Human Resources Department maintains the personnel records sought by the FOIA request. DSP has not argued, and is not contending on appeal, that a document's mere placement in a personnel file is determinative. *See* OB at 17 (relying on *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278 (Ca. 2007)). Subsection (o)(1), read together with 11 *Del. C.* § 9200(d)(1) (prohibiting disclosure of police officer "personnel files"), supports application of subsection (o)(1) to the resumes and demographic data of DSP troopers.

Vanella quibbles with the Doherty Affidavit's wording, since it does not expressly state that demographic information is "included within a physical personnel file." OB at 17. But the uncontroverted evidence below from the Human Resources Director is that this personally identifiable information is treated by DSP as personnel records. Vanella's contention asks this Court to raise form over substance.

The fact that personnel decisions could not be made based upon demographic information does not equate to the information not being part of a personnel file. OB at 17. The only authority cited by Vanella, again, cites to a DOJ decision holding that settlement agreements are not non-public simply because they are placed in a personnel file.

Vanella next contends that resumes are not personnel records. First, it should be noted, as was pointed out to Vanella at the time of the denial, DSP does not have resumes of all troopers. R. at 8. And it would be unusual for DSP to have resumes, as they are not requested as part of the recruitment process. R. at 45. To the extent it has any, the record conclusively shows that they are part of DSP's personnel file. *See* OB at 17 (acknowledging DSP's unrebutted evidence that resumes are part of an individual's personnel record). Common sense also dictates that resumes, unlike settlement agreements, are personnel records routinely maintained in an HR personnel file.

Vanella relies upon *Grimaldi v. New Castle Cty.*, 2016 WL 4411329 (Del. Super. Ct. Aug. 18, 2019), but *Grimaldi*, if anything, supports application of the privacy exception to DSP resumes. There, a former high ranking county official sought the resume of a county risk manager who he alleged, in a lawsuit involving several claims against then County Executive Thomas Gordan, was given the position based upon a personal relationship and not on merit. The Court denied in part and granted in part a motion to dismiss filed under Rule 12(b)(6) and held, as to the FOIA claim, that disclosure of the risk manager's resume would not constitute an invasion of personal privacy. A fair reading of *Grimaldi* does not support the conclusion that resumes are always subject to production under FOIA, particularly the resumes of police officers who have completely different privacy and safety concerns as the single risk manager involved in the *Grimaldi* lawsuit. Moreover, a FOIA request, unlike civil litigation, is not subject to the broad scope of civil discovery.

AG Opinion 18-IB34 also demonstrates that subsection (o)(1) is applicable to DSP resumes. That decision required the production of the resume of the Deputy Commissioner for the Department of Insurance where the decision noted that the Deputy Commissioner's employment and education history was already posted

publicly online. There is no such record here.¹² DSP does not maintain officer resumes in the normal course of business or request a resume from candidates during recruitment. *See* R at 45. To the extent that an officer may have submitted a resume during recruitment, that document is maintained in a personnel file and is not a public document. 29 *Del. C.* § 10002 (o)(1).

Vanella cites *Gannett Co. v. Bd. of Managers of [DELJIS]*, 840 A.2d 1232 (Del. 2003) and argues that Delaware courts have held there is no invasion of personal privacy where the requester cannot reverse engineer the identity of the individual. However, this contention misses the fact that Vanella not only seeks both names and biographical and identifying data, but also seeks to *track* the officers. OB at 3. *Gannett* was concerned with deidentified information being produced to permit someone to determine the identity of the individual employees or officers. Here, Vanella seeks personally identifying information of all troopers, to track them, and has rejected attempts by DSP to offer deidentified information. *See also* Del. Op. Att’y Gen. 94-I019 (Mar. 7, 1994) (upholding FOIA denial seeking date of birth information in bulk); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, (Iowa 1999) (upholding denial of requests for firefighter gender, address and birth date

¹² DSP has not independently verified whether the Openthebooks.com website, containing names and salaries of certain state employees contain a list of all current DSP troopers. For those that are listed, DSP appropriately directed Petitioner to that site to hopefully provide the bulk of the information requested.

information, noting “public employees ‘deal with people who don’t necessarily have the same boundaries as the people sitting in this courtroom.’”). Recently, as was publicly reported, the DOJ had to go as far as pursuing a Chancery Court injunction to curtail threats being made to the head of the Division of Civil Rights and Public Trust and his children.¹³ The fact that individuals accept employment with the State does not eliminate their privacy and safety concerns. *See* Del. Op. Att’y Gen. 94-I019 (Mar. 7, 1994).

Production of every resume of Delaware police officers should give this Court significant pause. *See, e.g., Gonzalez v. United States Citizenship & Immigr. Servs.*, 475 F. Supp. 3d 334 (S.D.N.Y. 2020) (government properly withheld sensitive information of ICE employees, who qualified as law enforcement personnel, since the disclosure could reasonably be expected to endanger the life or physical safety of them and other individuals); *D.C. v. Fraternal Ord. of Police, Metro. Police Dep’t Lab. Comm.*, 75 A.3d 259 (D.C. 2013) (the names and identifying information of officers who had sent emails to their chief regarding various internal affairs were not subject to compelled disclosure because the officers had a cognizable privacy interest in the information and there was little public interest in forcing their names to be revealed); *cf.* Del. Op. Att’y Gen. 17-IB53 (2017) (DOC applicant did not have

¹³ *See* <https://why.org/articles/protests-at-delaware-prosecutors-house-went-beyond-free-speech-says-attorney-general/> (last visited 6/5/24).

the right under FOIA to view the pre-employment background check, interviews, and statements with previous employers or employees, or the report of the investigating officer who did not select them for employment because such information was classified as “investigatory files”). Wholesale production of officer resumes entails significant different considerations than the single resumes of public officials at issue in the decisions relied upon by Vanella. *See, e.g., Reyes v. Freeberry*, 2005 WL 3560724 (D. Del. Dec. 29, 2005) (upholding a protective order that restricted parties from making public any “personnel information” since there is a strong public policy favoring the confidentiality of police personnel records in LEOBOR). Subsection (o)(1) applies to officer resumes and demographic information.¹⁴

To justify its attempted wholesale invasion of privacy of all Delaware police officers, Vanella argues that it is attempting to promote transparency. OB at 26. Citing a 2019 study, it asserts that law enforcement administrators across the country support greater access to misconduct records. *Id.* But these policy arguments are misplaced as: (1) Delaware just passed two bills that seek to accomplish this goal; (2) Vanella seeks personal information of *all Delaware law enforcement officers*, not just those who have engaged in misconduct; and (3) Vanella’s assertions appear to

¹⁴ DSP does not dispute that certification status alone is non-public information. Again, as a matter of law, Delaware police departments cannot employ an individual as a police officer who is not Delaware certified to be a police officer.

be policy driven, matters best suited for the General Assembly, not through FOIA. If Vanella believes that Delaware still has work to do to increase accountability and transparency, despite the significant changes from last legislative session, he should be required to pursue those policy initiatives legislatively.

III. LEOBOR PROVIDES FURTHER, ADDITIONAL SUPPORT FOR THE DOJ'S DECISION

Finally, Vanella argues that LEOBOR does not bar officer certification status or demographic information. Again, DSP does not contest production officer certification status in isolation. DSP's concern is identification of all troopers along with demographic and other information sought by Vanella. As to those concerns, DSP will not repeat the above arguments. Rather, DSP responds to specific assertions made in relation to LEOBOR and to other contentions in the final section of the Opening Brief.

Vanella asserts that LEOBOR is inapplicable to FOIA requests, citing *State v. MacColl*, 2022 WL 238897 (Del. Super. July 1, 2022). *MacColl* does not stand for such a broad proposition. Section 10002(o)(6) undoubtedly requires non-production of records that are confidential under common law or statute. LEOBOR, now renamed, is such a statute. *MacColl* did not involve a FOIA request. MacColl, a former Wilmington officer, was charged with making false statements during an internal affairs interview. He sought to have the indictment dismissed, arguing among other things that LEOBOR precluded the State's use of the IA transcript,

possession of which the State already had. Vanella’s attempt to use *MacColl* for the proposition that LEOBOR has no application to FOIA requests made to government bodies in the first instance should be rejected.

LEOBOR, together read *pari materia* with the right to privacy, officer safety concerns and subsection (o)(17), demonstrates that FOIA requests for personal information of law enforcement should be given special consideration. Contrary to Vanella’s repeated assertions, police departments are not “any employer.” Like subsection (o)(1), LEOBOR provides further support for the application of the personnel file exception. 11 *Del. C.* § 9200(d)(1).

Vanella argues this section should be ignored for purposes of FOIA because its request and this appeal are not “civil proceedings.” OB at 35. Vanella cites no authority for this remarkable proposition other than a dictionary and an unreported Family Court decision that did not address the argument advanced by Vanella.

Section 9200(d)(1) clearly applies to this proceeding. The words “any civil proceeding” must be read *pari materia* with the remaining language of the statute, which excepts lawsuits against the officer. The broad language “any civil proceeding,” when excepting out the typical scenario where a personnel file might be sought and might be relevant – suit against the officer – makes clear that the statute applies to all remaining civil proceedings. Vanella even concedes that *this appeal* has at least “become a civil proceeding.” OB at 31. This civil proceeding,

now pursued in this Court, complete with a civil action number and civil docket, also provides for broad, *civil* remedies. *See 29 Del. C. § 10005(d)*.

Vanella's argument that this is not a civil proceeding also proves too much. Taken to its logical conclusion, Vanella's position would mean that pre-suit arbitrations, charges filed with the Equal Employment Opportunity Commission, and administrative proceedings in Delaware (*e.g.* licensing actions under Title 24 professionals) would not constitute "civil proceedings". LEOBOR's reference to civil proceedings undoubtedly applies to FOIA requests, this appeal, and therefore implicates § 10002(o)(6).

LEOBOR, subsection (o)(6), along with the personnel file exception and subsection (o)(17) justifies DSP's denial of Vanella's FOIA request and the DOJ's decision affirming the denial.

CONCLUSION

For all of the above reasons, the DOJ did not err as a matter of law in upholding DSP's denial of Vanella's FOIA request. While transparency and accountability are important goals for governance of police officers, and all facets of state government, there are equally important considerations for officer safety and privacy, particularly at time when assaults on officers are on the rise and officer recruitment and retention are on the decline. Reading FOIA's asserted exceptions together, wholesale production of all officer identities, personal biographical

information, and background information, so that requestors can “track” officers, is not justified under FOIA and its underlying purposes of transparency and accountability. DSP respectfully requests that the Court uphold the DOJ’s decision in this matter and grant DSP such further and other relief as this Court may deem just and appropriate.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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