EFiled: Oct 01 2024 08:32AM EDT
Transaction ID 74637319
Case No. K24A-02-002 JJC

October 1, 2024

The Honorable Jeffery J. Clark
Kent County Courthouse
38 the Green
Dover, DE 19901

ACLU Delaware

RE: ***Vanella v. Duran, et al.*,**
Case No. K24A-02-002 JJC

Judge Clark:

Appellant respectfully submits the following letter brief in response to DSP's[1] August 30, 2024, Supplemental Argument. For the following reasons, and those previously argued in Appellant's Opening Brief and Reply Brief, and at the August 26, 2024, hearing, Appellant respectfully requests that the Court order disclosure of all records responsive to Appellant's October 3, 2023, FOIA Request, find that DSP's November 3, 2023,[2] response was not adequate under Delaware's FOIA statute, and reverse the Chief Deputy Attorney General's January 11, 2024, FOIA Opinion Letter.

Invisible Institute is persuasive authority in this case, confirming the proposition that FOIA's personal privacy exception (29 *Del. C.* § 10002(o)(1)) ought not apply to Appellant's Request.[3] That court held that police officers have relatively low expectations of privacy in their employment history and that the privacy at stake is minimal when a FOIA request seeks only names and previous employment information of officers. *Invisible Institute v. D.C.*, 2023-CAB-006295, slip. op. at 16-17 (D.C. Super. Ct. amended order granting summary judgment Aug. 21, 2024). Accordingly, the names and employment information sought here should be produced.

DSP fails to meaningfully distinguish *Invisible Institute.* For one, there is no relationship between the number of individuals for whom information is sought, the population of the jurisdiction, and the privacy interest at stake. DSP's argument to the contrary is not only unsupported by any case law, but is also undermined by *Invisible Institute*, wherein the request at issue identified *fewer* people than the Request here, and in a jurisdiction substantially *less populated* than Delaware.

Second, DSP's argument that the information requested is also made available through POST not only grossly overstates the quantity and quality of POST's public disclosures,[4] but

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[1] For the undefined capitalized terms and acronyms herein, Appellant refers to the definitions previously ascribed in the completed briefing in this appeal.
[2] DSP's Supplemental Argument incorrectly states the response date as November 15, 2023.
[3] Though WestLaw has not yet assigned the opinion in *Invisible Institute* a number, the opinion is available online here: https://dcogc.org/wp-content/uploads/2024/07/Opinion-Granting-P-Motion-for-Summary-Judgment.pdf.
[4] POST's minutes for its most recent meeting, which, if anything, could contain only *some* of the information sought in Appellant's requests, are not available online. *See Quarterly POST Commission Meeting*, Delaware.gov https://publicmeetings.delaware.gov/#/meeting/79176 (last visited Sept. 24, 2024) (as of the last visited date, clicking the link to the minutes on this page directs the reader to download minutes from a different meeting). Nor is there evidence that

also undermines any credibility in DSP's argument that disclosure of such records would violate privacy interests. *Invisible Institute* held that if a separate state law requires disclosure, then public policy does not justify denying FOIA requests for similar information. *Id.* at 17. Delaware law holds the same. *See Del. Op. Att'y Gen.*18-IB34, 2018 WL 3947262 at *2 (July 20, 2018) (finding that when some of the requested information is already publicly available, privacy interests in disclosure of the remaining information are further diminished). Notably, the names, police departments, and badge numbers for all recent police academy graduates have already been released by POST. *See* POST Quarterly Meeting Minutes, Apr. 12, 2024, https://publicmeetings.delaware.gov/#/meeting/78502. Therefore, no public safety concern pertaining to officer names justifies denying Appellant's Request.

Furthermore, POST's statutorily required disclosure duties are separate and apart from what constitutes a public record under FOIA. The existence of disclosure requirements in POST's organic statute does not displace the public record transparency required by FOIA. The General Assembly recognized that fact by repeatedly and explicitly subjecting POST to FOIA. *See* 11 *Del. C.* §§ 8403(d) (requiring POST to comply with provisions of FOIA), 8404(a)(20) (subjecting all police accountability committees and boards to FOIA), 8404A(5) (requiring POST to write summaries of all its decisions and make them available via FOIA). As stated previously, the overall goal of FOIA is to promote disclosure of public records. 29 *Del. C.* § 10001. As POST and DSP are both government agencies that create public records, they are subject to FOIA's disclosure requirements.

Finally, DSP's claim that *Invisible Institute* is distinguishable because of that petitioner's concern about officers' lateral transfers not only improperly considers the motive of an individual seeking public records via FOIA, *see ACLU of Del. v. Danberg*, 2007 WL 901592 at *3 (Del. Super. Mar. 15, 2007) ("[g]enerally, the motives of the party requesting information from a public body are not relevant to the determination of whether that party is entitled to access public records under FOIA"), but also is belied by the fact that lateral transfers *were* a clear motivating concern of the Appellant's Request. *See* Sam Stecklow, *Delaware Opened Up Access to Some Police Misconduct Records – But Still Denies Requests for Basic Police Data*, Del. Call (Mar. 14, 2024) https://delawarecall.com/2024/03/14/delaware-opened-up-access-to-some-police-misconduct-records-but-still-denies-requests-for-basic-police-data/. As such, DSP cannot distinguish *Invisible Institute* based on that case's concern over lateral transfers.

Invisible Institute is persuasive authority for this case. This Court should follow *Invisible Institute's* holding that the public's interest in officer names and employment history is greater than public police officers' privacy interest. *Invisible Institute*, slip. op. at 21.

Next, DSP's restated argument that the link to Open the Books ("OTB") satisfies their FOIA obligation fares no better. OTB is not an adequate response to Appellant's request. *See* Appellant's Reply Br. at 17-18; Oral Arg. Tr. 25:18-26:6, 79:23-80:21, Aug. 26, 2024. A link to a *public* webpage where the requested information is available may be an adequate FOIA

POST has been fulfilling their other reporting duties. For example, POST has only sent two reports of police misconduct to the CJC in the last year even though there have been many other publicly known incidents. *See* Misty Seemans, *The Stagnation of Police Reform in Delaware*, Del. Call (Aug. 5, 2024) https://delawarecall.com/2024/08/05/the-stagnation-of-police-reform-in-delaware/.

response in some scenarios. *See Del. Op. Att'y Gen.* 16-IB22, 2016 WL 6684919, at *2 (Oct. 24, 2016) ("[T]he [agency] directed you to a specific *public* webpage containing all records responsive to your request") (emphasis added). But OTB is not a Delaware public webpage,[5] much less a verifiably accurate, up-to-date, responsive link to Appellant's request, as previously conceded by DSP. *See* Appellee's Answering Br. at 19. An agency cannot satisfy its FOIA burden by simply pointing to data held by a private party.

Finally, for the first time, DSP argues that FOIA does not require them to "create a document" by synthesizing other documents from its records.[6] In support of this argument, DSP relies on Delaware Attorney General opinions, which in turn rely on a series of outdated cases from other jurisdictions holding that agencies need not produce documents that quite literally do not exist.[7]

Contemporary case law recognizes that modern technology evolved agencies' FOIA obligations to produce information an agency possesses, even if only in electronic formats that do not precisely align with the petitioner's original request. *See Nat'l Sec. Couns. v. C.I.A.*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020) ("[I]f the agency already stores records in an electronic database, searching that database does not involve the creation of a new record."); *ACLU Immigrants' Rts. Project v. U.S. I.C.E.* 58 F.4th 643, 659 (2d Cir. 2023) ("[W]e are satisfied that 'using a query to search for and extract a particular arrangement or subset of data already maintained in an agency's database does not amount to the creation of a new record.'"), quoting *Ctr. for Investigative Reporting v. U.S. D.O.J.*, 14 F.4th 916, 938 (9th Cir. 2021). Producing records in this way is essentially the modern-day equivalent of searching a filing cabinet to disclose records.[8] *Id.* Even older case law recognizes that a FOIA

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[5] Open the Books is a national government watchdog organization. *See Our Story*, Open the Books https://www.openthebooks.com/about-us/ (last visited Sept. 23, 2024).

[6] In their initial November 3, 2023, FOIA response, DSP claimed the requested information was not contained in any file, list, database, or document that they possessed. They now argue that for information they do possess, *synthesizing* such records would require the creation of a "new record." DSP's failure to raise this argument until supplemental briefing deprives Appellant the opportunity to fully litigate this issue. Additional or significantly modified arguments should be complete in initial briefing to avoid placing the burden on opposing counsel to address new arguments in supplemental briefing. *Data Mgmt. Internationale, Inc. v. Saraga*, 2007 WL 2142848 at *3 n. 19 (Del. Super. July 25, 2007). DSP has waived this line of argument at this stage of the dispute due to their failure to raise it in their Answering Brief.

[7] *See, e.g., Hartzell v. Maysville Cmty. Sch. Dist.*, 455 N.W.2d 411, 412 (1990) (stating that FOIA cannot compel disclosure of a fake school rule that did not exist); *State, ex rel. Margolius v. Cleveland*, 584 N.E.2d 665, 670 (1992) (holding that an agency does not need to create new tangible records when they are already stored in a tangible medium); *Gabriels v. Curiale*, 216 A.D.2d 850, 850 (1995) (determining that a new record must be created if a computer database does not have the capability to generate the desired information); *Yeager v. Drug Enf't Admin.*, 678 F.2d 315 (D.C. Cir. 1982) (finding that prior to the e-FOIA amendments, Congress did not contemplate an agency searching through millions of computer files to aggregate data).

[8] DSP argued that a "filing cabinet" is not an answer to a FOIA request. Oral Arg. Tr. 73:20-74:4, Aug. 26, 2024. However, since the original FOIA statute in 1966, searching through a

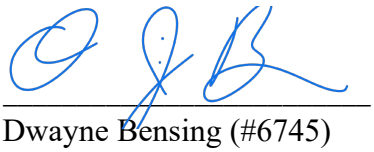
request "is not flawed simply because the agency has not anticipated [the FOIA request] and preassembled the desired information." *Ferri v. Bell*, 645 F.2d 1213, 1220 n.9 (3d Cir. 1981). While a request may require an agency to examine a lot of files to discover responsive records, that is the burden that FOIA creates. It is not unusual for FOIA to require an agency to search numerous files and assemble them into a final document that the agency did not previously possess. *Disabled Offs. Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456 (D.D.C. 1977), *aff'd*, 574 F.2d 636 (D.C. Cir. 1978). As the Ninth Circuit has recognized, if FOIA did not require agencies to search and assemble documents across a database, FOIA would essentially be a nullity in the digital age. *Ctr. For Investigative Reporting*, 14 F.4th at 939.

Nothing in Delaware's FOIA statute divorces it from these FOIA principles. On the contrary, Delaware's FOIA statute specifically addresses circumstances when an agency may be required to generate a computer record that did not exist before the FOIA request in question. *See* 29 *Del. C.* § 10003(m)(2) ("Charges for administrative fees may include staff time associated with processing FOIA requests, including . . . *generating computer records* . . . .") (emphasis added).

Here, DSP claims that, in response to the Request, it would have to create a "new record" by compiling existing information regarding troopers' former employers. Modern case law demands just that. *Ctr. For Investigative Reporting*, 14 F.4th at 938 ("[S]orting, extracting, and compiling pre-existing information from a database does not amount to the creation of a new record."). Delaware's FOIA statute further requires the generation of electronic records, even if there are fees associated with generating such records. As such, if DSP's database contains the requested information scattered in different locations, FOIA requires DSP to assemble that information to respond to a FOIA request. Delaware must stop evading FOIA requirements based on inapplicable case law from the 1980's and 90's that did not contemplate modern computer technology. DSP must sort the electronic information it already possesses and disclose all responsive information to Appellant's FOIA request.

For the above reasons and those previously stated, DSP did not meet its burden in responding to Appellant's FOIA request. The Chief Deputy's application of 29 *Del. C.* 10002(0)(1) and (17) to the specific facts of this proceeding constituted legal error and should be reversed.

Respectfully submitted,



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cc: Joseph Handlon, Esquire (*via File&Serve Express*)

filing cabinet has been the quintessential response to a FOIA request. While a party need not produce the entire filing cabinet, they must search through it and disclose responsive records.