



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ROBERT E. VANELLA, on behalf of THE
DELAWARE CALL

*Petitioner Below –
Appellant,*

v.

CHRISTINA DURAN, In her official capacity as
FOIA Coordinator for DELAWARE
DEPARTMENT OF SAFETY AND
HOMELAND SECURITY, DELAWARE STATE
POLICE

*Respondent Below –
Appellee.*

C.A. No.

NOTICE OF APPEAL

NATURE OF THE ACTION

This action seeks to compel compliance with the Delaware Freedom of Information Act (“FOIA” or “the Act”). 29 Del. C. §§ 10001 *et seq.* Pursuant to the Act, Robert E. Vanella (“Appellant”) requested, on behalf of the Delaware Call, that the Defendant Division of Delaware State Police of the Delaware Department of Safety and Homeland Security (“DSP”) disclose certain public records about DSP. In its Response (“Response”), DSP refused to disclose any responsive records, relying upon the statutorily inapplicable “invasion of personal privacy” and “public safety” exceptions to FOIA. *See Id.* § 10002(o)(1); *Id.* § 10002(o)(17).

DSP also erroneously relied upon the Law Enforcement Officers' Bill of Rights ("LEOBOR") to deprive the public of information that is plainly not shielded by statute or common law. *See Id.* § 10002(o)(6); 11 *Del. C.* § 9200.

Appellant hereby appeals on the record the Chief Deputy Attorney General's Opinion No. 24-IB01 ("Opinion") rejecting Appellant's petition ("Petition") pursuant to 29 *Del. C.* § 10005(e). Appellant respectfully asks this Court to reverse legal errors contained in both the Opinion and in DSP's Response, and to order DSP to disclose all public records responsive to Appellant's Request.

JURISDICTION AND VENUE

1. This complaint is timely filed within 60 days of the issuance of the Opinion, pursuant to 29 *Del. C.* § 10005(b); Super. Ct. Civ. R. 3(c).
2. This Court has jurisdiction over this action pursuant to 10 *Del. C.* § 541 and venue is proper under 29 *Del. C.* § 10005(b).

PARTIES

3. Delaware Call is an independent media group that engages in investigative journalism, political analysis, and Delaware-focused commentary. Delaware Call is dedicated to advocating for increased government transparency to support their journalistic efforts and the creation of an engaged and knowledgeable citizenry. Delaware Call is especially

interested in using data transparency to facilitate police accountability in Delaware.¹

4. Appellant, Robert E. Vanella, is the Coordinating Editor of the Delaware Call. Appellant is a citizen of Delaware. *See* Op. Att’y Gen., 16-IB20 (Sep. 30, 2016) (stating that public bodies are *required* to respond to FOIA requests when the requesting party is a Delaware citizen). Appellant brings this action pursuant to his official capacity as Coordinating Editor.
5. The Delaware State Police (“DSP”) is Delaware’s state-run law enforcement agency. DSP holds its headquarters in Dover, Delaware. DSP strives to use technology to “improve communication with the public and the media.”² On its FOIA landing page, DSP states that it is “committed to transparency and openness,” and shares links to submit digital or paper-copy FOIA requests to the agency.³
6. Defendant Christina Duran is the FOIA Coordinator for DSP. Defendant Duran is sued in her official capacity.

¹ *See* Misty Seemans, *The Problem: Why we need access to police misconduct records in Delaware*, Delaware Call (Jan. 11, 2023), <https://delawarecall.com/2023/01/11/why-we-need-access-to-police-misconduct-records-in-delaware/> (This article is Part 1 of Delaware Call’s 5-part series on data transparency and police accountability.)

² *See* *Colonel’s Message*, Delaware State Police, accessed Feb. 19, 2024. (“As a progressive agency we try to use technology not only to fight crime and enhance traffic safety, but also as a method to improve our communication with the public and the media.”)

³ *See* <https://dsp.delaware.gov/foia/>.

FACTS

7. The core purpose of FOIA is to make public records open to public view. *See 29 Del. C. § 10001* (“It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic.”)
8. The Delaware FOIA provides that “[a]ll public records shall be open to inspection and copying by any citizen of the state.” *Id.* § 10003(a).
9. The Delaware Department of Justice and the Chief Deputy Attorney General are vested in the first instance with the duty to determine whether a violation of FOIA has occurred or is about to occur. *See Id.* § 10005.
10. In any action brought under the FOIA statute, the burden of proof shall be on the custodian of records to justify the denial of access to records. *See Id.* § 10005(c).
11. On October 3, 2023, Appellant sent a FOIA request to DSP seeking basic demographic information about DSP officers (“the Request,” attached hereto as Exhibit 1). The Request sought:

- a. “Names of all law enforcement officers who are actively certified as of the date of this request (or when the request is processed) (“certified officers”). This document may take the form of a roster of certified officers.
 - b. The current annual salary of each certified officer.
 - c. The current employing state agency of each certified officer. The current rank of each certified officer.
 - d. The past employers of each certified officer and job title(s) associated with each such employment.
 - e. Resumes of each certified officer.
 - f. A list of all formerly certified officers and their current status (lapsed, suspended, etc.)
 - g. The age, sex, and race of each certified officer.”
12. DSP failed to provide timely records or an explanation for their delay by the 15-day statutory deadline set forth in *29 Del. C. § 10003*. (*See* "Query Regarding FOIA Delay," attached hereto as Exhibit 2.)
 13. On November 3, 2023, DSP, through Deputy Attorney General Joseph Handlon (“DAG Handlon”), responded to Appellant’s FOIA request with no responsive records. DSP only included the link to a third-party website (“Open the Books”) regarding Appellant’s request for salary information. (“DSP’s Response,” attached hereto as Exhibit 3).
 14. The third-party website is not a responsive record pursuant to FOIA because 1) it is not DSP’s record, and 2) there is no way to verify whether the third-party source is complete or accurate.
 15. In the November 3, 2023, Response, DSP claimed not to have a record containing a list of “all” certified DSP officers, a list of salaries of “all”

certified DSP officers, records containing the state agency employing each DSP officer and their rank, records containing the past employers of “each” certified DSP officer and their former job titles, resumes for “all” of its certified officers, records containing a list of “all” formerly certified DSP officers and their current status, and records containing the age, gender and race of “each” certified officer. *Id.* DSP’s reference to “all” and “each” indicate that *some* responsive records exist. The fact that DSP may not have complete records for each item sought does not negate DSP’s responsibility under FOIA to disclose the relevant portions of records they do possess. *See 29 Del. C. § 10003(d)(1); See also, Op. Att’y Gen., 05-IB02 (Jan. 12, 2005) (“...a public body must try to redact exempt information from its records to make non-exempt information available to the public.”)*

16. While DSP alleges that they only maintain records for DSP troopers, rather than Delaware’s entire police force, Appellant’s request seeks all responsive records in DSP’s possession. Ex. 3, at 4. DSP’s allegation that they do not maintain *any* such responsive records, however, is meritless because DSP has not satisfied their burden to demonstrate that they, unlike any typical employer, lack all basic employment information, such as the information requested, about their workforce.

17. DSP's Response further denied Appellant's request on the ground that the records sought were not public records because their disclosure would invade personal privacy, endanger public safety, or violate protections set forth in LEOBOR. *See* Ex. 3; § 10002(o)(1); § 10002(o)(6); § 10002(o)(17); 11 *Del. C.* § 9200.
18. Pursuant to 29 *Del. C.* §10005, Appellant sent a petition ("the Petition," attached hereto as Exhibit 4) to the Attorney General on November 7, 2023, questioning DSP's application of FOIA's personal privacy and public safety exceptions to deprive the public of access to public records. *See* § 10002(o)(1); § 10002(o)(17).
19. On November 13, 2023, DAG Handlon emailed Appellant to inquire whether Appellant would accept summary-level demographic and statistical information, without trooper names, and withdraw the Petition. (Attached hereto as Exhibit 5.)
20. Appellant responded that he would accept data that masked trooper names through a "unique ID or position number," but that would still provide complete data profiles for each individual officer. Appellant otherwise refused to withdraw or amend the Petition as to the outstanding items. *Id.*
21. On November 16, 2023, DAG Handlon submitted a petition response ("DSP's Reply Petition," attached hereto as Exhibit 6). It justified DSP's total denial of Appellant's FOIA request on the grounds listed in

Paragraphs 15 and 17 above. Ex. 6. It also included affidavits from Captain James Doherty (attached hereto as Exhibit 7) and Chief Information Officer Sturgis (attached hereto as Exhibit 8).

22. Following Appellant's submission of their Petition on November 7, 2023, the Attorney General ("AG") had 20 business days to determine whether DSP violated FOIA. *See* §10005(e) ("Within 20 days of receiving the petition, the Attorney General shall make a written determination of whether a violation has occurred or is about to occur."); *see also*, Sec IV.J. DOJ Rules of Procedure for FOIA Petitions and Determinations. Twenty business days from November 7, 2023 is December 8, 2023.
23. On December 6, 2023, Appellant asked for a status update on the decision.
24. On December 8, 2023, Tammy L. LeCates, FOIA Coordinator for the Department of Justice, responded that "circumstances require us to take more time," and that the Opinion could be expected in approximately two weeks; that is, by December 22, 2023.
25. On January 3, 2024, after still not receiving an AG Opinion or any further communication, Appellant again requested a status update.
26. Ms. LeCates sent Appellant the Attorney General Opinion via email one week later, on January 11, 2023 ("the Opinion," attached hereto as Exhibit 9), without any explanation for the delay.

27. In the Opinion, signed by Chief Deputy Attorney General Alexander S. Mackler, the AG determined that DSP did not violate FOIA by denying access to all requested records. Ex. 9.
28. The Opinion did not address DSP's assertion that it does not have each or all of the records requested and, thus, provided none of them. *Id.*
29. The Opinion accepted DSP's denials on the ground that DSP properly denied trooper names under the public safety exception. *Id.* The Opinion then stated that the rest of Appellant's request was properly denied because the remaining items "hinge on releasing the identities of DSP troopers." Ex. 9, at 4; § 10002(o)(17)(a)(5)(A). The Opinion explained that disclosure would jeopardize public safety by necessarily including the names of some officers who may, at some point, serve in an undercover or intelligence capacity. Ex. 9, at 4.
30. Appellant now appeals the AG's decision on the record, raising only questions of law subject to *de novo* review. *See Flowers v. Off. of the Governor*, 167 A.3d 530, 103 (Del. Super. Ct. 2017); § 10005(e).

CLAIMS FOR RELIEF

WHEREFORE, Appellant respectfully requests that this Court:

1. Declare that Appellee’s failure to disclose the requested records violates 29 *Del. C.* § 10003 and is unlawful. Specifically, Appellant asks that this Court make the following findings of law:
 - a. That the AG Opinion erroneously applied § 10002(o)(17), the public safety exception, to conclude that disclosure of DSP trooper names would jeopardize public safety;
 - b. That the AG Opinion erroneously concluded that DSP properly withheld trooper demographics, employment histories, and job titles because the data “hinges” on revealing officer identities;
 - c. That DSP violated FOIA because they refused to disclose any data requested on the grounds that DSP doesn’t maintain records of the kind and form sought, despite the statute’s pro-disclosure directive to provide partial responses where possible. § 10003(g)(2);
 - d. That DSP violated FOIA because they relied on § 10002(o)(1), the personal privacy exception, to determine that an officer’s employment history, certification status, and demographic information, respectively, are personnel records that unduly jeopardize personal privacy; and
 - e. That DSP violated FOIA because they erroneously relied upon LEOBOR and § 10002(o)(6) to block officer certification status and demographic data where LEOBOR is inapplicable.

2. Order Appellee to make the requested records available to Appellant;
3. Award Appellant attorneys' fees and costs pursuant to § 10005(d); and
4. Grant all other appropriate relief as the Court deems just and proper; and
5. Issue a citation to the custodian of records for the Attorney General's office directing such custodian to send the Superior Court a certified copy of the record of the proceedings below, including a typewritten copy of the evidence. The record of proceedings below are attached as exhibits hereto.

Dated: March 1, 2024

/s/ Dwayne J. Bensing
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