



**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
FOR KENT COUNTY**

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. K24A-02-002 JJC

Appeal from Attorney General

Opinion No. 24-IB01

**APPELLANTS' OPENING BRIEF IN SUPPORT OF THEIR  
APPEAL FROM ATTORNEY GENERAL OPINION 24-IB01**

Dated: May 7, 2024

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## **PRELIMINARY STATEMENT**

The Delaware Freedom of Information Act (“FOIA”) is a critical tool to facilitate public awareness and government accountability. Overbroad applications of FOIA’s statutory exemptions, that whittle down the reach of the statute to shield data from the public, obscure the statute’s core objective of making public records easily accessible so “that society remain free and democratic.” *29 Del. C.* § 10001. The need for transparency is heightened in the context of police accountability, for these public officials are empowered with great responsibility, including the authority to detain members of the public.

Appellant Robert E. Vanella, on behalf of the Delaware Call (“Appellant”), challenges the Attorney General’s (“AG”) January 11, 2024 Opinion No. 24-IB01 (the “Opinion”) upholding the Delaware Department of Safety and Homeland Security Division of State Police’s (“DSP”) denial of Appellant-Petitioner’s October 3, 2023, Request (“Request”) for public documents under FOIA. *29 Del. C.* §§ 10001-10007; Certified Record at 90-94, [Transaction I.D. 72779947].

For the reasons stated herein, Appellant respectfully requests that this Court reverse legal errors contained in the Opinion and underlying denial, and order DSP to disclose all responsive public records.



## **NATURE AND STAGE OF PROCEEDINGS**

On February 29, 2024, Appellant filed the Notice of Appeal in this action, seeking reversal of the AG Opinion and DSP's underlying denial of records pursuant to 29 *Del. C.* § 10005(e), along with a praecipe and citation. Super. Ct. Civ. R. 3; Super. Ct. Civ. R. 72. Appellant filed amended pleadings with the cooperation of opposing counsel on March 29, 2024. This is Appellant's Opening Brief in Support of his Appeal from Attorney General Opinion 24-IB01. Super. Ct. Civ. R. 72(g); Certified Record at 90-94.

## **QUESTIONS PRESENTED**

1. Was 29 *Del. C.* § 10002(o)(17) wrongly invoked to deny Appellant's FOIA request?
2. Was 29 *Del. C.* § 10002(o)(1) wrongly invoked to withhold responsive records containing officer resumes, certification statuses, and demographic information?
3. Were 29 *Del. C.* § 10002(o)(6) and the Law Enforcement Officer Bill of Rights ("LEOBOR") wrongly invoked to deny access to records containing officer certification statuses and demographic information?

## **STATEMENT OF FACTS**

### **The DE Call FOIA Request**

The Delaware Call (“DE Call”), an independent investigative journalism news publication committed to increasing government transparency, has a keen interest in providing information to readers about DE police officers sworn to protect the citizenry. Efforts to conceal public knowledge about basic characteristics of police forces thwart the public’s ability to hold officers accountable as public officials and to build greater institutional trust.

Appellant Robert E. Vanella, DE Call Coordinating Editor, sent a FOIA request (the “Request”) on behalf of DE Call to DSP on October 3, 2023, seeking data to identify, track, and report on officers who may have engaged in misconduct.

Certified Record at 03-06. The items requested were as follows:

- 1) names of all certified law enforcement officers,
- 2) the current annual salary of each certified officer,
- 3) the current employing state agency and rank of each certified officer,
- 4) the past employers and job titles of each certified officer,
- 5) resumes of each certified officer,
- 6) a list of all formerly certified officers and their current status, and
- 7) the age, sex, and race of each certified officer.

(“Requests 1-7”). *Id.* Appellant also expressly welcomed redaction where minor pieces of information might otherwise cause an entire record to be withheld. *Id.*

On October 27, 2023, Joseph Handlon, Deputy AG (“DAG”) for the Delaware Department of Justice, requested an extension from Appellant, provided a third-party

website link containing unverified salary information (“Open the Books”), and asked Appellant to withdraw that the rest of the Request because it was exempted under the personal privacy exception to FOIA. *Id.* at 09. Appellant agreed to the week-long extension but did not otherwise withdraw the Request. *Id.*

On November 3, 2023, DSP formally denied Appellant’s entire request (“the Denial”). *Id.* at 08-09. DSP again provided the “Open the Books” link, presumably in response to Request 2, without independently validating the site’s information.<sup>1</sup> *Id.* For each item in the Request, DSP claimed that they do not keep the requested records,<sup>2</sup> and in the alternative, stated that four exceptions to FOIA justified nondisclosure. *Id.* First, DSP stated that it does not maintain a “readily generated”

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<sup>1</sup> In response to Appellant’s request for salary information (Request 2), DSP repeatedly provided a link to “Open the Books,” instead of providing the information requested or any justification to deny the Request. The “Open the Books” link does not satisfy DSP’s obligation to respond to Request 2 under FOIA. Instead, it is a non-government third-party website with outdated and incomplete data. Also, Appellant sought data as of October, 2023, but relevant “Open the Books” data ends in 2022. DSP should provide Appellant this information directly, just as the Delaware Secretary of State presumably provided it to “Open the Books.”

<sup>2</sup> DSP stated that it does not maintain information on all police officers in Delaware, instead only those employed by DSP. *See* Certified Record at 23. The Appellant seeks only records maintained by DSP. Bizarrely, DSP further stated in its Petition Response that it did not have a list of DSP troopers, but Capt. Doherty states otherwise. *Id.* at 40; 45, ¶ 3.

list of the items sought.<sup>3</sup> *Id.* Second, DSP claimed that even if such lists were available, trooper names (Request 1), employing state agency and officer rank (Request 3), and past employment and officer job titles (Request 4) would be exempt under the public safety exception. *Id.*; §10002(o)(17). Third, DSP stated that resumes (Request 5), if available, would be exempt under the personal privacy exception. Certified Record at 08-09; §10002(o)(1). Finally, DSP claimed that officer certification status (Request 6) and demographic information (Request 7) would be exempt under both the personal privacy exception and the statutory exemption applying LEOBOR. Certified Record at 08-09; §10002(o)(1); §10002(o)(6); 11 *Del. C.* § 9200.

### **The Petition**

Appellant petitioned the AG on November 7, 2023, (the “Petition”) to overturn DSP’s overbroad and erroneous application of FOIA exceptions that resulted in the complete nondisclosure of responsive records. Certified Record at 13-

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<sup>3</sup> This Appeal does not address DSP’s allegation that it lacks readily generated lists of the requested information because it is indisputable and admitted that DSP maintains certain records pertaining to state trooper information, including the information sought in the Requests. *See* Certified Record at 45, ¶ 3. DSP’s alleged lack of perfectly responsive records does not eliminate DSP’s obligation to provide partial responsive records that it does possess. *See* 29 *Del. C.* § 10003(d)(1); Op. Att’y Gen., 05-IB02 (Jan. 12, 2005). Because DSP has not satisfied its burden to show that it lacks any responsive records typically kept in the regular course of business by any employer, at issue in this Appeal is the production of such available records.

17; 35-37. The Petition challenged DSP's assertion that they do not have any records in a producible format and argued that the exemptions cited by DSP should not bar the disclosure of officer information. *Id.* On November 13, 2023, DAG Handlon again offered partial information, inquiring whether Appellant would accept, instead, general demographic statistics without trooper names. *Id.* at 50-51. Appellant responded that masked trooper names through a "unique ID or position number" would be acceptable, so long as complete data profiles were otherwise produced. *Id.*

On November 16, 2023, DAG Handlon submitted a Petition Response ("Response") reiterating the same objections from the Denial and reshared the "Open the Books" resource. *Id.* at 54-66. Specifically, DSP contended that FOIA does not require the creation of new documents, that disclosure of officer information would threaten the personal privacy and safety of officers, and further noted that a list of all officers would "necessarily include officers who are or will serve in an undercover or intelligence capacity." *Id.* Finally, DSP included affidavits from India Sturgis, Public Information Officer, (Sturgis. Aff.) and from Captain James P. Doherty (Doherty Aff.) to allege that disclosure of biographical information of DSP officers creates a risk to officer safety. *Id.* at 62-66.

## The AG Opinion

In the January 11, 2024, AG Opinion (“Opinion”), Chief DAG Alexander S. Mackler determined that DSP did not violate FOIA by failing to provide any responsive records to Appellant’s Request.<sup>4</sup> *Id.* at 90-94. The Opinion, relying upon the public safety exception, reiterated DSP’s concern that because DSP performs some undercover and intelligence operations, the disclosure of identities of officers would pose a security threat. *Id.* Finally, the Opinion noted that DSP included links to non-DSP sources and offered generic statistical information to support its view that DSP satisfied its obligation under FOIA. *Id.*

Appellant now timely appeals the AG’s Opinion and DSP’s Denial on the record pursuant to 29 *Del. C.* § 10005(e), which is subject to *de novo* review. *Flowers v. Off. of the Governor*, 167 A.3d 530, 103 (Del. Super. Ct. 2017).

## ARGUMENT

Appellees erroneously invoke narrow exceptions to Delaware’s FOIA statute to deny Appellant’s proper requests for public information. “The ‘most important

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<sup>4</sup> Tammy LeCates, FOIA Coordinator for the Delaware Department of Justice, sent Appellant the AG Opinion on January 11, 2024. Certified Record at 89. Despite §10005(e) requiring that the AG determine FOIA petitions within 20 days, Ms. LeCates notified Appellant on December 8, 2023, that “circumstances require us to take more time.” *Id.* at 84. Appellant requested a status update on January 3, 2024, after not receiving an Opinion or any further communication.

consideration for a court in interpreting a statute is the [language] the General Assembly used in writing [the statute].” *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1004 (Del. 2021). “If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls.” *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999). “The fact that the parties disagree about the meaning of the statute does not create ambiguity.” *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010). Further, statutory language should be “interpreted ‘in a way that will promote its apparent purpose and harmonize it with the statutory scheme.’” *Jud. Watch*, 267 A.3d at 1004. The unambiguous language and purpose of the FOIA statute mandates production of responsive records here. None of the three exemptions cited by Appellees are applicable to the information sought by Appellant. As such, DSP should be ordered to produce responsive information.

**I. 29 DEL. C. § 10002(o)(17) DOES NOT APPLY TO OFFICER NAMES OR EMPLOYMENT INFORMATION.**

Appellees assert that the names of all certified law enforcement officers (Request 1), the current employing state agency and rank of each certified officer (Request 3), and the past employers and job titles of each certified officer (Request 4), are exempted from disclosure under 29 *Del. C.* § 10002(o)(17). Certified Record at 08. The language and legislative history of 29 *Del. C.* § 10002(o)(17) and its

subsections, however, are unambiguously inapplicable, and thus, disclosure of information responsive to Requests 1, 3, and 4 is required under FOIA.

**A. 29 Del. C. § 10002(o)(17)'s Narrow Exception for Preventing Acts of Terror is Inapplicable to the Requests.**

Section 10002(o)(17) was enacted on July 3, 2002, in the wake of the 9/11 attacks. The provision was introduced and enacted because “Delaware’s Freedom of Information Act as [then] written [did] not permit the State to withhold specific information about anti-terrorism planning and facility security that could be used by persons who seek to cause harm to Delawareans.” 2001 Bill Text DE S.B. 371. This provision enables Delaware to prevent *terrorists* from utilizing state records to exploit state procedures and vulnerabilities. Within this governing anti-terror framework, the legislature permitted the withholding of specific categories of documents, including “[t]hose 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.” 29 Del. C. § 10002(o)(17)(a)(5). The statute identifies these documents as those which, if disclosed, “[c]ould jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual.” 29 Del. C. § 10002(o)(17)(a).



The language “or could endanger the life or physical safety of an individual,” however, is not a broad safety provision or catchall precluding disclosure, as asserted by Appellees. 29 Del. C. § 10002(o)(17)(a). The “well-established” rule of construction, *ejusdem generis*, provides that “where general language follows an enumeration of persons or things, by words of particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.” *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004). Applying that rule here, and given that FOIA “exemptions are to be narrowly construed,” the general phrase “could endanger the life or physical safety of an individual,” should be construed to refer to danger related to potential terrorist attacks, not any generalized and unsubstantiated safety threat unrelated to an articulable concern with terrorists. *Flowers*, 167 A.3d at 545; 29 Del. C. § 10002(o)(17)(a).

Here, DSP’s overbroad public safety argument is entirely unrelated to the statute’s anti-terrorism focus. DSP does not attempt to argue that withholding officer names, employing agency, ranks, and employment history is necessary to thwart any specific terrorist concern. Instead, DSP only alludes to generalized threats to undercover troopers, without showing that the release of the data requested would increase these threats. *See, e.g.*, Certified Record at 48, ¶ 3 (“concerning

messages from the public, both through... phone calls[] and social media;” and “an in-person threatening incident at DSP headquarters” involving a dog); *Id.* at 90-94. An errant social media post, a threatening call, or a person outside of a building with a dog are not the sorts of concerns that led the Delaware legislature to pass this 9/11 era legislation. These observations fall beyond the scope of § 10002(o)(17), particularly because they have nothing to do with the Requests. As such, DSP should produce responsive information, notwithstanding § 10002(o)(17).

**B. The Requests Are Not Exempt From Disclosure Given the Plain Language of 29 Del. C. § 10002(o)(17)(a)(5).**

Not only is § 10002(o)(17) broadly inapplicable to Appellant’s Requests, but the specific subsection Appellees rely upon, § 10002(o)(17)(a)(5), also has no bearing on the records sought here. For a record to be exempt from disclosure under § 10002(o)(17)(a)(5), it must (1) be “*assembled, prepared or maintained* to prevent, mitigate or respond to criminal acts,” and (2) the disclosure of the specific documents “*would have a substantial likelihood* of threatening public safety.” *Id.* (emphasis added). With respect to Requests 1, 3, and 4, the State cannot satisfy either of these requirements.

**1. The requested records were not “assembled, prepared or maintained to prevent, mitigate or respond to criminal acts.”**

The statute’s use of the phrase “assembled, prepared or maintained to” requires consideration of the purpose of the record’s creation. § 10002(o)(17)(a)(5).

The purpose of assembling a master list of certified officers (or troopers), their salaries and ranks within the DSP, and their past employment serves purely a human resources function. Any employer, including DSP, must maintain a list of employees and their salaries for payroll, taxation, budgetary, and other basic personnel purposes. The same is true for rank (i.e., job title), employing agency, and former employment. In describing the trooper selection process, the DSP website explains that DSP may interview co-workers and verify the candidate's former education and employment. *Selection Process*, DELAWARE STATE POLICE, <https://dsp.delaware.gov/selection-process/>. Therefore, these records are assembled for human resources hiring and promotion purposes, not to “prevent, mitigate, or respond to” criminal acts. Because DSP has assembled such lists of responsive information for reasons *other than* to prevent, mitigate, or respond to criminal acts, such records are beyond the purview of § 10002(o)(17)(a)(5)'s narrow exception and should be produced.

**2. Disclosure of the requested records would not have a substantial likelihood of threatening public safety.**

The second clause of § 10002(o)(17)(a)(5), permitting exemption from disclosure where that disclosure “*would* have a *substantial likelihood* of threatening public safety,” is similarly inapplicable to the Requests at issue here. (emphasis added). Where a public body denies access to public records, the Delaware Supreme

Court has explained that the agency’s burden of proof must be satisfied in a way that “tracks the seriousness of the statute’s purpose and policy.” *Jud. Watch*, 267 A.3d at 1011. Where a public body denies a request, it must “establish facts on the record that justify its denial of a FOIA request.” *Jud. Watch*, 267 A.3d at 1010. Because DSP has failed to demonstrate a concrete and foreseeable threat to safety related to the Requests, the information should be produced.

DSP’s affidavits do not meet this high standard for denial of the Requests. While an affidavit detailing the public body’s reasons for the FOIA denial “*may*—not shall—be sufficient to satisfy the public body’s burden . . . such evidence also *may not* meet [FOIA]’s burden of proof requirement in certain circumstances.” *Jud. Watch*, 267 A.3d at 1010 (citing *Flowers* , 167 A.3d at 549). An affidavit must “show that the [public body] carefully applied well-recognized [exceptions] with a clear understanding of those [exceptions] when it applied them,” and demonstrate “*how*” an adverse effect would occur. *Flowers*, 167 A.3d at 549; *O’Neill v. Town of Middletown*, No. 2478-VCN, 2007 WL 2752981, \*9 (Del. Ch. Mar. 29, 2007) (emphasis in original).

Here, the Chief Sturgis affidavit states broadly that “DSP has received an increasing number of concerning messages from the public, both through voicemails and phone calls, as well as through its social media platforms”; that “an individual arrived at DSP Headquarters with a threatening canine and walked it around each

building on the property”; and that “DSP is concerned about publicly identifying all of its troopers” because “many DSP troopers serve in undercover and other intelligence roles.” Certified Record at 48, ¶ 2—3. However, the Affidavit establishes no causal nexus between the release of the records sought here and public safety, not to mention safety related to a terrorist threat. Therefore, the Government did not “justify” its withholding by showing “*how*” disclosure of trooper names, employing agency, rank and prior employer “*would*” increase the number and severity of such incidents or possibly endanger public safety, much less the safety of officers, while tracking the purpose of the statute. § 10002(o)(17)(a)(5) (emphasis added); § 10005(c); *Flowers*, 167 A.3d at 549; *O’Neill*, No. 2478-VCN, 2007 WL 2752981 at \*9 (emphasis added).

The same can be said about DSP’s concern involving undercover troopers. *Hearst Corp. v. New York State Division of Criminal Justice Services* is instructive. *Hearst Corp. v. New York State Div. of Crim. Just. Servs.*, No. 901527-23 at \*2-3 (N.Y.Sup.Ct. Jul. 31, 2023) (order granting petitioners’ motion to vacate).<sup>5</sup> There, the requester similarly sought officer names and employment histories and the agency cited a safety exception, arguing that disclosure of the documents would pose

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<sup>5</sup> *Hearst Corp. v. New York State Div. of Crim. Just. Servs.*, No. 901527-23 at \*2-3 (N.Y.Sup.Ct. Jul. 31, 2023) can be accessed as “No. 26 Order-Other (Motion #1)” at [https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=qVmu9021ufSxjwpjS\\_PLUS\\_dIQ==&display=all](https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=qVmu9021ufSxjwpjS_PLUS_dIQ==&display=all).

a safety risk to undercover officers. *Id.* at \*2-3. The Judge stated that the risk associated with disclosure “was speculative and neither particularized nor specific.” *Id.* at \*4. The Judge explained that, first, because undercover officers do not work under their real names, even the agency itself could not determine whether any of the officers listed in its records serve (or would serve) undercover. *Id.* at \*4. Second, because the agency offered no way in which a person could identify any officers currently serving in an undercover role from the requested records, the Judge found that revealing whether a trooper is currently employed does not reveal whether the trooper might now, previously, or in the future operate undercover. *Id.* For these same reasons, the records sought here are similarly devoid of information that would endanger officer safety.

Ultimately, § 10002(o)(17) is a narrow exception intended to prevent acts of terror. The records sought were not “assembled, prepared or maintained to prevent, mitigate or respond to criminal acts,” and the Government has not satisfied its burden to show that disclosure of Requests 1, 3, and 4 “would have a substantial likelihood of threatening public safety.” § 10002(o)(17)(a)(5). Therefore, the records ought to be produced.

**II. 29 DEL. C. § 10002(o)(1) DOES NOT BAR DISCLOSURE OF OFFICER RESUMES, CERTIFICATION STATUSES, AND DEMOGRAPHIC INFORMATION.**

Appellees improperly applied the exception under § 10002(o)(1) to deny Appellant’s Requests for resumes (Request 5), the current status of formerly certified officers (Request 6), and demographic information (Request 7). Under the personal privacy exception, a public record subject to disclosure under FOIA does not include “[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.” § 10002(o)(1). To invoke this exception, the agency must prove both that the records in question are personnel files and that their disclosure “would constitute an invasion of personal privacy.” *See* Op. Att’y Gen., 17-IB19 (July 12, 2017). Here, DSP can do neither.

**A. Records Regarding Officers’ Demographic Information Are Not Personnel Files Under FOIA.**

A personnel file is “a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions.” Op. Att’y Gen., 02-IB24 (Oct. 1, 2002). Here, Request 7 is not properly characterized as a personnel file. First, the demographic background of each certified officer (Request 7) is not, and must not be, “information

gathered by an employer for the purposes of making traditional personnel decisions” and it bears no weight on whether an individual should be “subject to [] traditional personnel actions.”<sup>6</sup> *Id.* Records responsive to Request 7 are outside the scope of “personnel files” under § 10002(o)(1).

Nor does the fact that the information may be included as part of a personnel file transform the data into a non-disclosable record. The determination of whether a record is properly considered part of a personnel file is determined by its content, rather than its location. *See id.*; *see also Comm’n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 291 (2007) (finding it unlikely “that the Legislature intended that a public agency be able to shield information from public disclosure simply by placing it in a file that contains the type of information specified”). Thus, although some information sought may be referenced within a personnel file, the data’s location does not automatically trigger § 10002(o)(1)’s narrow exception. *See, e.g., Op. Att’y Gen.*, 02-IB24 (Oct. 1, 2002) (finding that legal settlement documents stored in a personnel file were not within FOIA’s definition of a personnel file because they did not contain “information gathered by an employer for the purposes of making traditional personnel decisions”). DSP has

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<sup>6</sup> Employers are prohibited from discriminating on the basis of age, sex, and race under federal law. *See Prohibited Employment Policies/Practices*, EEOC, accessed Mar. 6, 2024, <https://www.eeoc.gov/prohibited-employment-policiespractices>.



not even alleged that Request 7 is included within a physical personnel file. *Compare* Certified Record at 45, ¶ 6, (“DSP considers the age, sex and of its officers... to be personally identifiable information”) with *id.* at 45, ¶ 4 (stating that resumes are part of an individual’s personnel file).<sup>7</sup> Even if it had, the government has failed to demonstrate how demographic information could be relevant (or legal) in making traditional personnel decisions. Thus, records responsive to Request 7 are not properly considered part of a “personnel file” exempted from disclosure under FOIA.

**B. Disclosure of Resumes and Certification Statuses Would Not  
Constitute an Invasion of Personal Privacy Interests.**

Resumes (Request 5) and officer certification statuses (Request 6) may be *part* of a personnel file, but their disclosure would not constitute an invasion of personal privacy under § 10002(o)(1). Determining whether disclosure of resumes and statuses of officers “would constitute an invasion of personal privacy” requires balancing the public’s legitimate interest in the disclosure of responsive records against the privacy interests in any such records. *See Grimaldi v. New Castle Cty.*, No. CV 15C-12-096, 2016 WL 4411329 at \*9 (Del. Super. Ct. Aug. 18, 2016) (weighing the public interest in obtaining a government employee’s resume against

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<sup>7</sup> DSP’s assertion that Request 5 (resumes) are *part* of a personnel file does not end the inquiry of whether such records ought to be produced. *See infra* Part II. B.

the individual’s privacy interest and finding it would not be an invasion of personal privacy to disclose a resume); Op. Att’y. Gen., 13-IB06 (Nov. 20, 2013) (“When legitimate privacy rights are implicated under FOIA, we must balance those rights against the competing need for access to information to further FOIA’s primary goals—government transparency and accountability.”); Op. Att’y. Gen., 13-IB03 at 4 (July 12, 2013) (noting that Delaware’s balancing test mirrors the federal FOIA balancing test, despite the difference in language, because of “the qualified nature of privacy rights under Delaware common law”).<sup>8</sup>

Even where legitimate privacy interests are implicated under FOIA, the right to privacy is not absolute for public officials. In the FOIA context, Delaware recognizes that “the right to privacy” justifies withholding records only in “those instances in which ‘the public has ‘no legitimate concern’ in [the] matters’ at issue.”

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<sup>8</sup> Exemption 6 under the federal FOIA precludes disclosure of personnel files where that disclosure “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). 29 *Del. C.* § 10002(o)(1), while substantially similar to this federal FOIA exemption, omits the phrase “clearly unwarranted.” Despite this difference, Delaware authorities appear to employ the same balancing test from the federal FOIA; however, other states with FOIA laws omitting the “clearly unwarranted” language have rejected the federal FOIA’s balancing test in favor of disclosure unless the higher common law tort standard for invasion of privacy is satisfied. See *Perkins v. Freedom of Info. Comm’n*, 228 Conn. 158, 175 (1993) (finding that “[i]nformed by the tort standard, the invasion of personal privacy exception of [Connecticut’s FOIA] precludes disclosure [] only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person”).

Op. Att’y. Gen., 17-IB19 (July 12, 2017). Because the public’s interests in the records of its taxpayer-funded police force are significantly outweighed by any implicated privacy interests, disclosure is required.

### **1. Privacy Interests in Resumes are Minimal for Public Officials.**

As a threshold matter, public employees have a lower expectation of privacy than do other citizens due to their accountability to the public. *See* Op. Att’y. Gen., 01-IB17 (Nov. 19, 2001) (noting that current public employees have a lower expectation of privacy than retired employees because they are “accountable to the public for his or her performance on the job”); *Reeder v. Del. Dep’t of Ins.*, No. 1553-N, 2006 Del. Ch. LEXIS 46, at \*43 (Feb. 24, 2006) (finding that under Delaware’s FOIA, “public officials will know that the public can scrutinize their actions and hold them accountable through the various means afforded in our republican form of democracy.”)

There is also a significantly lower expectation of privacy where the information sought has already been made public. *See Gannett Co. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1239 (Del. 2003) (noting that “which officer conducted an arrest is a matter of public record” and reversing the trial court’s order denying disclosure of the names of arresting officers under FOIA because of the officer’s privacy interests); Op. Att’y. Gen., 18-IB34 (July 20, 2018) (noting that, in the context of FOIA’s personal privacy exemption,

“the privacy interest is further diminished” where part of the information sought was publicly available online); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (“[T]he interests in privacy fade when the information involved already appears on the public record.”)

In *Grimaldi v. New Castle Cty.*, this Court considered a request to disclose the resume of a government employee, and held that “[u]nder Delaware law, it is not an invasion of the personal privacy of a successful applicant for a job for the government to disclose to the public information the successful applicant disclosed during the application process.” *Grimaldi*, 2016 WL 4411329, at \*9. Because the public has a legitimate interest in “knowing information about the candidate who got the job,” this legitimate interest in the qualifications of governmental employees “outweighs the privacy interest of the successful applicant.” *Id.* The AG has similarly required the disclosure of resumes under FOIA. *See Op. Att’y. Gen.*, 18-IB34 (July 20, 2018); *Op. Att’y. Gen.*, 22-IB20 (May 17, 2022) (finding the government should produce the resumes of government appointees because of the “public interest in their qualifications.”)

Here, the reasoning of *Grimaldi* controls the release of resumes (Request 5). *Grimaldi*, 2016 WL 4411329. DSP troopers have diminished privacy interests in their resumes which are disclosed in their successful efforts to obtain their important government positions. The very nature of their employment with a public body,

along with the expectation of public accountability that accompanies trooper responsibility, diminishes any reasonable expectation of privacy that a trooper could have in their qualifications for their public role.

## **2. Privacy Interests in Certification Statuses are Minimal for Public Officials**

DSP has also failed to meet its burden to prove how § 10002(o)(1) exempts certification status from disclosure. Neither the Petition Response nor the Opinion provide any support for the premise that disclosure of officer certification status would infringe on an officer's privacy. Appellees do, however, note that much of this information is publicly available through another governmental body, and that Delaware's legislature has recently passed statutory amendments requiring information related to decertification and disciplinary actions to be published. Certified Record at 40-41; 90-94. As conceded by DSP, Delaware passed statutory amendments in 2023 requiring that Delaware's Police Officer Standards and Training Commission publish summaries of certification decisions on its public website. *See Id.* at 41; 11 *Del. C.* § 8404A(5). Related statutory amendments now also require that Delaware's Criminal Justice Council publish detailed narratives of certain disciplinary decisions and data on its website. *See* 11 *Del. C.* §§ 9210(a)(3), 9211.

Given this context, formerly certified officers have a significantly diminished privacy interest in their names and decertification statuses being released because much of this information is already publicly available. As evidenced by these amendments cited by Appellees, Delaware’s legislature has determined that there is a strong public interest in decertification status and other disciplinary information, outweighing any privacy interest that the officers may have in this information.

Just as the legislature determined that disclosing this information serves the public interest, so too is the public interest benefitted in disclosing this information through FOIA.

**3. There is a Legitimate Public Interest in the Resumes and Certification Statuses.**

Delaware applies the federal FOIA standard to evaluate public and private interests under FOIA. Op. Att’y. Gen., 13-IB03 at 4 (July 12, 2013). Public interest is measured by the extent to which disclosure furthers the “core purpose” of FOIA—that is, how the information would “she[d] light on an agency’s performance of its statutory duties,” “contribute significantly to public understanding of the operations or activities of the government,” or otherwise inform citizens about “what their government is up to.” *Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989); Op. Att’y. Gen., 01-IB17 (Nov. 19, 2001).

Courts have consistently recognized the need for law enforcement transparency and accountability. The Third Circuit emphasized that police officers “are members of quasi-military organizations, called upon for duty at all times, armed at almost all times, and exercising the most awesome and dangerous power that a democratic state possesses with respect to its residents—the power to use lawful force to arrest and detain them.” *Kramer v. City of Jersey City*, 455 F. App’x 204, 207 (3d Cir. 2011). Thus, “the need in a democratic society for public confidence, respect and approbation of the public officials on whom the state confers that awesome power’ is compelling.” *Id.*; see also *Comm’n on Peace Officer Standards and Training*, 42 Cal.4th at 297 (“The public’s legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant.”); *Stilley v. McBride*, 332 Ark. 306, 313 (1998) (“The public’s interest [in] the right to know that its safety is protected by competent and the best-qualified police lieutenants[] is substantial.”).

Delaware recognizes a substantial public interest in matters of hiring and qualification standards for law enforcement personnel. See, e.g., Op. Att’y. Gen., 13-IB03 (July 12, 2013) (“the public certainly has legitimate and substantial interests in knowing whether [public employees] were selected for government jobs without due regard for their qualifications” and “ensuring the fairness and propriety of the selection process” for law enforcement personnel.) Similarly, Delaware courts have

recognized that, in the FOIA context, the public has a genuine interest in “knowing information about the candidate who got the job” for a public position. *Grimaldi*, 2016 WL 4411329 at \*9.

Here, the public has a substantial interest in officer resumes and certification statuses to shed light on their qualifications and fitness to serve. This information illustrates the “fairness and propriety of the selection process” that DSP uses to find candidates best fit for undertaking a state trooper’s public safety duties. *See Op. Att’y. Gen.*, 13-IB03 (July 12, 2013).

Moreover, disclosure of this information would address growing concerns about the extraordinary power given to law enforcement personnel.<sup>9</sup> In states where

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<sup>9</sup> *See, e.g.*, Arno Pedram & Luca Powell, *New York Regulations Allow Cops Stripped of Training Credentials To Be Rehired*, *The Intercept* (July 8, 2021), <https://theintercept.com/2021/07/08/new-york-policedecertification/>; Mike Reicher, *Fired, but still a cop: How Washington state’s decertification process leaves troubled officers with their guns*, *The Seattle Times* (Oct. 6, 2020), available at: <https://www.seattletimes.com/seattle-news/times-watchdog/fired-but-still-a-cop-how-the-statedecertification-process-leaves-troubled-officers-with-their-guns/>; Jennifer Bjorhus & MaryJo Webster, *Convicted, but still policing*, *Star Tribune* (Oct. 1, 2017), <https://www.startribune.com/convicted-of-serious-crimes-but-still-on-the-beat/437687453/>; William H. Freivogel & Paul Wagman, *Problem police officers don’t just go away, studies find. They get hired somewhere else.*, *Naples Daily News* (Apr. 29, 2021), <https://www.naplesnews.com/story/news/crime/2021/04/28/florida-disciplined-police-decertification-use-of-force-rehired/4876622001/>; Casey Tone & Jared Rutecki, *The Revolving Door: Troubled Officers Get Frequent Career Chances*, *WBEZ* (Jan. 8, 2018), <https://interactive.whez.org/taking-cover/revolving-door/>; Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *Yale L.J.* 1676 (2020).



similar information has been disclosed, public access to the data has empowered journalistic and public advocacy efforts to hold their governments accountable.<sup>10</sup> Here, Appellant seeks to promote the same government transparency and accountability in Delaware by obtaining information that could reveal whether and what portion of DSP employees have backgrounds of misconduct that may shed light on their fitness to serve and protect the public.

In addition to promoting a more engaged citizenry, increased transparency often benefits law enforcement efforts, further supporting the public interest in disclosure. A 2019 study that surveyed 344 law enforcement administrators in 12 states that permit public access to some or all law enforcement misconduct records determined that a majority of administrators support greater access to misconduct records, and that harm caused by the release of such records is minimal when compared to the benefit. Rachel Moran and Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 *Cardozo L. Rev.* 4, 1240 (2021). Just sixteen percent of survey respondents identified any harm that stemmed from disclosure, and in all but one of those identified cases, the harm was reputational, not physical. *Id.* at 1280. The sole incident of non-reputational harm reported was an instance of verbal harassment. *Id.* at 1281. Further, administrators expressed support for greater disclosure because “making records accessible to the

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<sup>10</sup> *Supra* n.9.

public quelled rumors and allowed the department to provide a fuller picture of events than had previously been reported.” *Id.* at 1282. Because increased transparency regarding officer qualification both fosters a more informed citizenry, and, on balance, benefits police departments themselves, there is a great public interest in disclosure.

Thus, resumes (Request 5) and certification statuses (Request 6) should be disclosed as they would “she[d] light on an agency’s performance of its statutory duties,” “contribute significantly to public understanding of the operations or activities of the government,” and inform citizens about “what their government is up to.” *Reporters Comm. for Freedom of Press*, 489 U.S. at 773.

#### **4. The Balance of Public Interests Against Privacy Interests Weighs in Favor of Disclosure.**

Balancing the public’s legitimate interest in the disclosure of resumes and certification statuses against the officers’ diminished privacy interests in those resumes and statuses demonstrates that disclosure would not constitute an invasion of personal privacy. *Grimaldi*, 2016 WL 4411329 at \*9. Therefore, because disclosure of the resumes and certification statuses would not constitute an invasion of personal privacy under Delaware’s FOIA, they should be produced.

### **III. LEOBOR, AS INVOKED THROUGH 29 DEL. C. § 10002(o)(6), DOES NOT BAR DISCLOSURE OF OFFICER CERTIFICATION STATUS AND OFFICER DEMOGRAPHIC INFORMATION.**

While neither DSP's Reply Petition nor the AG Opinion mention DSP's initial reliance on LEOBOR in their Denial, this Court reviews the entire record. Appellant asks this Court to hold that LEOBOR is inapplicable to Requests 6 and 7. Certified Record at 08-09.

#### **A. The LEOBOR Statute Does Not Apply to the FOIA Context.**

LEOBOR's procedural protections for law enforcement officers undergoing internal investigation are inapplicable to FOIA requests for information from a law enforcement agency because LEOBOR's scope is limited to the conduct of internal investigations; that is, LEOBOR applies to the relationship between the law enforcement agency and the police officer, not the law enforcement agency and the public, which is at issue in a FOIA request. 11 *Del. C.* § 9200. LEOBOR does not create a blanket shield against disclosure of all officer information in any circumstance. *See State v. MacColl*, No. 2103011110, 2022 WL 2388397, \*9 (Del. Super. Ct. July 1, 2022) ("LEOBOR created due process rights enforceable against police agencies *only*")(emphasis added); Op. Att'y Gen., 17-IB19 (Jul. 12, 2017) (LEOBOR is limited in its applicability to "law enforcement disciplinary proceedings throughout the state, conducted by the law enforcement agencies specified in 9200(b).") This Court explained that LEOBOR should not give law

enforcement officers a level of immunity from disclosure “afforded to no other class of citizens anywhere.” *MacColl*, 2022 WL 2388397 at \*9. Beyond the text of LEOBOR making no mention of FOIA, the AG has also explicitly stated that “LEOBOR gives no hint of any exemption from FOIA related disclosure.” Op. Att’y Gen., 12-IIB10 (Jul. 27, 2012). Therefore, DSP cannot invoke LEOBOR through § 10002(o)(6) to bar access to public information that Appellant sought in its Requests because LEOBOR protections do not implicate public information requests pursuant to FOIA.

Finally, the rights created in LEOBOR may only be invoked by individual officers against the agency; not by the agency against the public. In AG Opinion No. 12-IIB10, the Wilmington Police Department invoked FOIA and LEOBOR to deny the News Journal, another Delaware news agency, access to police officer names and compensation information. Op. Att’y Gen., 12-IIB10 (Jul. 27, 2012). The AG opinion rendered LEOBOR inapplicable, explaining that the agency cannot assert the personal rights created in LEOBOR on behalf of the officers. *Id.* Here, LEOBOR does not apply because DSP is not granted individual rights. *Id.*

While DSP did not cite any specific provisions of LEOBOR that they believe block public access to the requested records, Appellant addresses § 9200(c)(12) and § 9200(d) below in turn, because those are the only two LEOBOR provisions related to disclosure of documents. 11 *Del. C.* § 9200.

**B. Section 9200(c)(12) Does Not Exempt Disclosure of Certification Status and Demographic Information Disclosure Through FOIA Because Such Information is Not Compiled Out of a Formal Investigation.**

Section 9200(c) regulates the conditions for investigation and questioning during formal investigations of law enforcement personnel and is entirely inapplicable to requests, proceedings, and confidentiality outside the context of formal investigations of law enforcement personnel, such as disclosure of documents pursuant to a FOIA request. § 9200(c). Information deemed confidential pursuant to LEOBOR must be compiled from an investigation which could lead to disciplinary action. § 9200(c). A public records request made by a Delaware citizen to a state agency is not an instance where a “law enforcement officer is under formal investigation and is subjected to questioning.” § 9200(c)(12).

Here, none of the requested information is covered by § 9200(c)(12). An officer’s demographic information (Request 7) is not relevant to a formal investigation. Similarly, while an officer’s certification status (Request 6) could, in some cases, result from a formal investigation, certification statuses based on retirement, voluntary leave, reassignment, or other reasons are wholly unrelated to any investigation. Failure to disclose the certification statuses of officers because the current status could be the *result* of an investigatory proceeding misapplies LEOBOR’s narrow protection of information that could *lead to* discipline.

Therefore, § 9200(c)(12) is inapplicable to Requests 6 and 7, and DSP's reliance upon § 9200(c)(12) as their basis for denial is erroneous. Certified Record at 08-09.

**C. Section 9200(d) Does Not Apply to FOIA Requests Because a Public Records Request is Not a “Civil Proceeding.”**

The plain text of § 9200(d) limits the reach of LEOBOR disclosure protections to civil proceedings. Section 9200(d) states that “no law-enforcement agency shall be required to disclose *in any civil proceeding...*” (emphasis added). LEOBOR, therefore, does not apply in the present case because a FOIA request is not a civil proceeding.

Black's Law Dictionary defines a “civil proceeding” as “a judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in a dispute between litigants in a matter relating to torts, contracts, property, or family law.” CIVIL PROCEEDING, Black's Law Dictionary (11th ed. 2019). Civil proceedings include “measures adopted in the prosecution or defense of an action, including pleadings and judgment.” *In re K.M.*, Del. Fam., Cr. A. No. 1503016773 (Jan. 31, 2017). A civil proceeding exists where one is “seeking redress,” not merely voicing a request in a non-adversarial forum that may just as likely be met with compliance. *Id.*

While the present matter has become a civil proceeding because the issue is now being litigated in court, the initial Request merely sought public records and

was not a civil proceeding. Instead, a FOIA request is just that: a request. No dispute yet exists where one party simply asks another party for information that they are presumably entitled to pursuant to FOIA. If the denial of information in a FOIA request transformed a non-adversarial, statutorily encouraged request into a civil proceeding, agencies like DSP would be incentivized to deny *all* disclosure requests, and thereby transform *all* requests into civil proceedings shielded by LEOBOR. Such obfuscation would thwart the pro-disclosure objectives of FOIA the General Assembly preserved by limiting the applicability of LEOBOR to civil proceedings. § 10001 (“it is vital that citizens have easy access to public records.”)

Ultimately, because there is no provision in LEOBOR that shields police departments from standard FOIA requests for public information about public employees, and because the LEOBOR statute is unrelated to FOIA disclosure, DSP erroneously invoked LEOBOR to deny Appellant’s Request for officer demographic information and certification status. § 10002(o)(6); § 9200.

### **CONCLUSION**

For the foregoing reasons, Appellees erroneously applied the public safety exception, the personal privacy exception, and LEOBOR to deprive the Appellant of public records they are legally entitled to pursuant to FOIA. Appellant respectfully requests that this Court reverse the legal errors below and order disclosure of all responsive records.