



EFiled: Aug 30 2024 10:50AM EDT
Transaction ID 74199034
Case No. K24A-02-002 JJC



**KATHLEEN
JENNINGS
ATTORNEY
GENERAL**

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

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

August 30, 2024

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

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

Dear Judge Clark:

DSP¹ respectfully submits the following supplemental argument in the above matter, as allowed by the Court during oral argument on Monday, August 26, 2024. For the following reasons, and those previously argued Monday and in DSP's Answering Brief, DSP respectfully requests that the Court uphold the January 11, 2024 ruling of the Chief Deputy Attorney General. As the Court is aware, that decision concluded DSP did not violate FOIA in its November 15, 2023 response to Vanella's October 3, 2023 FOIA request. The request sought highly confidential personnel information of over 700 sworn DSP troopers that would put their personal safety at risk.

First, DSP responds to the authority cited by Vanella during argument that was not contained in Vanella's briefs on appeal. *Invisible Institute v. District of Columbia* appears to be² a Summary Judgment Order from the Superior Court of the

¹ For the undefined capitalized terms and acronyms herein, DSP refers to the definitions previously ascribed in the completed briefing in this appeal.

² A Westlaw version of this decision could not be located.

The Honorable Jeffery J. Clark

August 30, 2024

2 | Page

District of Columbia that addressed, relevant here, only whether the privacy interests of just a few (approximately 13) lateral hires of the D.C. Metropolitan Police Department (“MPD”) outweighed a public interest in knowing the identity of the prior employers so that Invisible Institute could assess the quality of MPD’s hiring practices. The decision did not seek the demographic information sought by Vanella in this matter, nor did it seek such information and previous employment, *carte blanche*, for over 700 officers. Moreover, *Invisible Institute* apparently did not include any consideration of a safety exception to FOIA, analogous to 29 *Del. C.* § 10002(o)(17)(a)(5). Thus, the court there was not asked to respond to the concern that DSP has raised, namely that providing detailed demographic information of all officers (including those in intelligent and undercover roles) puts officers at risk of harm. *Invisible Institute* is not, therefore, on point, as asserted during argument; to the contrary, it is neither controlling nor persuasive authority supporting Vanella’s wholesale and invasive FOIA request to DSP.

Invisible Institute is distinguishable for another, significant reason. Driving the court’s decision there was the Institute’s (and the public’s) asserted interest in ensuring accountability with lateral transfers of police officers, coined in recent years as “wandering officers.” Here, there are no facts in the record demonstrating any concern about officers seeking lateral transfers in Delaware. Quite the contrary, as Delaware’s process for authorizing lateral transfers is completely open and transparent. Through statute and regulations, the Police Officer Standards and Training Commission (f/k/a the Council on Police Training) is required to review and approve of the lateral transfers of all Delaware officers. *See* 11 *Del. C.* § 8404(a) (requiring that POST establish recertification requirements for officer-applicants who have not been employed within the past 12 months); § 8404(a)(18) (requiring POST to establish criteria for reciprocity of officers from other states); 1 *Del. Admin. C.* § 801:4.0 (requiring all law enforcement agencies to immediately notify POST of any resignation, retirement or separation of any police officer; requiring that POST be notified of any hiring of an existing, Delaware certified officer; *and* providing that Delaware certification expires upon the permanent separation from any police officer position). Thus, according, as exemplified from POST’s last public meeting agenda, POST regularly reviews and votes upon each lateral transfer within Delaware and each application for out-of-state reciprocity. *See* Section IV of POST’s August 6, 2024 Meeting Agenda, dated August 6, 2024 (**Exhibit A**). POST meetings are open to the public, noticed to the public on the State’s Public Meeting Calendar and the agenda is available online. *See* <https://publicmeetings.delaware.gov/#/?week=2024-08-06> (last visited 8/30/24).

DSP also seeks to provide further clarity on a couple of issues raised during argument. One issue is whether a FOIA response may appropriately cite existing, publicly available information in response to a FOIA request. Recall DSP referred Vanella to OpenTheBooks.com for the bulk of its request, DSP trooper names and salaries. R. at 23. DSP's response to the Petition explained that the reference to OpenTheBooks.com is supported by the DOJ's application of FOIA. *See* R. at 40 (citing *Del. Op. Att'y Gen.* 16-IB22, 2016 WL 6684919, at *2 (Oct. 24, 2016)) (determining that a response directing a requesting party to a webpage containing responsive records complies with FOIA). DSP's referral to OpenTheBooks.com, the portal used by the State to publish salaries of all Delaware state employees, fully complied with FOIA; there is no authority in Delaware—and Vanella has cited none—requiring an agency to reproduce what the state has already made available to the public. Moreover, and as noted during argument, this website contains data that is up to date. *See* <https://www.openthebooks.com/delaware-state-employees/> (last visited 8/28/24).³

Another issue that arose during argument was whether FOIA requires the creation of documents that do not currently exist. Again, DSP demonstrated to Vanella that FOIA does not require this. *See* R. at 40; *see also Del. Op. Att'y Gen.* 16-IB08, 2016 WL 2619614, at *2 (Mar. 18, 2016) (FOIA does not require the creation of records that do not exist); *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at *4 (Aug. 21, 2006) (“There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records in a particular medium in order to provide greater public access to the records.”) (quoting *State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 559 (Ohio 1992)). As DSP informed Vanella in its FOIA response (R. at 23), DSP does not have an existing record or spreadsheet compiling the former employers of all troopers. To the extent that DSP has information regarding former employers of its

³ Again, DSP appropriately referred Vanella to various other sources of public information providing data and records either responsive or related to Vanella's FOIA request. Among the information provided was the Criminal Justice Council's website, which is not DSP controlled, and the CJC's tracking of officers that have been decertified in Delaware. R. at 40-41. DSP also referred Vanella to reports that have been or will imminently be published on POST and CJC websites. *See* <https://cjc.delaware.gov/required-law-enforcement-disclosures/>. The Chief Deputy noted DSP's referrals with approval when he upheld DSP's FOIA response. R. at 93.

Troopers, such information would be contained in various documents within the individual Trooper's personnel file.

DSP wishes to emphasize the uniqueness of the privacy interest applicable to Delaware law enforcement given the state's size and population. It is common sense to conclude that the ability to determine the identity and, potentially, the residence of an individual in Delaware is significantly greater than it would be in larger, more population dense states and jurisdictions, like those repeatedly referenced by Vanella in this appeal. Delaware's interest combined with the Department of Justice's general observation that law enforcement "have substantial personal privacy interests in protecting their identities" weighs significantly in favor of application of 29 *Del. C.* § 10002(o)(1) and (17) to Vanella's wholesale FOIA request for *all* Trooper's names, demographics, resumes, past employers, etc. *Del. Op. Att'y Gen.* 13-IB03, 2013 WL 4239232, at *3 (2013) (upholding the denial of a release the identities of Wilmington Police Department officers performing security detail for the mayor). As the Attorney General observed, Delaware's privacy interest is in line with the Federal Act and its generally accepted rule that law enforcement personnel have substantial personal privacy interests in protecting their identities. *Id.* Again, due to its unique size and the proliferation of virtual data available at the click of a mouse, Delaware's interest in protecting the privacy and safety of its officers and their families should be paramount and accorded significant weight.

For the above reasons, and those previously asserted, DSP met its burden in responding to Vanella's FOIA request. It justified its denial (for the portions of the request that were denied) and did so by citing the reasons why the information sought is non-public⁴ and by providing two affidavits establishing a legitimate privacy and safety concern on behalf of its troopers. *See Judicial Watch v. Univ. of Delaware*, 267 A.3d 996, 1007-10 (Del. 2021) (citing 29 *Del. C.* § 10005(c) and holding that the agency meets its burden by showing application of a FOIA exception through facts on the record). The Chief Deputy's application of 29 *Del. C.* § 10002(o)(1)

⁴ When "a request is clear on its face that the records sought are not subject to FOIA, a public body need not state under oath its efforts to determine whether there are responsive records to meet its burden." *Del. Op. Att'y Gen.* 24-IB27, 2024 WL 383447, at *1 (July 12, 2024); *see also Del. Op. Att'y Gen.* 24-IB20, 2024 WL 2982359, at *1 (May 22, 2024) (upholding FOIA denial by providing sworn affidavit and explaining application of FOIA exception).

The Honorable Jeffery J. Clark

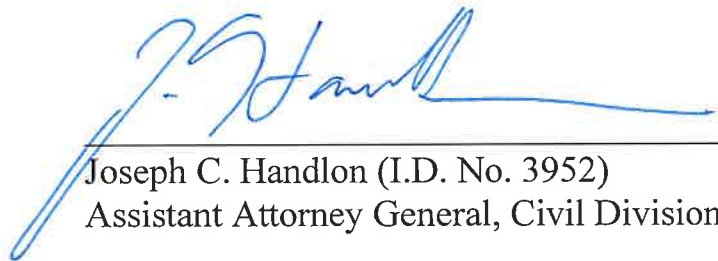
August 30, 2024

5 | Page

and (17) to the specific facts of this proceeding did not constitute legal error and should, respectfully, be affirmed.

We hope this supplement provides further clarity on DSP's positions and demonstrates the necessity of upholding the Chief Deputy's determination below. We are, of course, available at the Court's convenience to answer any further questions or concerns.

Respectfully submitted,



Joseph C. Handlon (I.D. No. 3952)
Assistant Attorney General, Civil Division

Attachment

cc: Dwayne Bensing, Esquire (*via File&Serve Express*)



STATE OF DELAWARE
Police Officer Standards and Training Commission
Delaware Police Accreditation Commission
Delaware Department of Safety and Homeland Security
Thomas Collins Building, 3rd Floor, Suite 1-A
540 S Dupont Hwy, Dover, DE 19901

Honorable Nathaniel McQueen Jr
Secretary Safety & Homeland Security
Chairman

Sean E. Moriarty, Ed.D.
Executive Director

MEETING AGENDA

August 6th, 2024

2:00 p.m.

Farmington/Felton Room

Delaware Department of Safety & Homeland Security

800 S. Bay Road, Dover DE 19901

I. Meeting Called to Order

Welcome and introduction by Secretary Nathaniel McQueen Jr. (Chairman)

II. Review and Approval of Meeting Minutes

April 12, 2024, POST regularly scheduled meeting minutes

III. Old Business

- Police Accountability Committee (PAC) updates

IV. New Business

A) Domestic Violence Strangulation Training

B) New POST/DPAC Positions:

- On May 22, 2024, Reverend, Dr. Carol E. Boggerty was appointed to Police Officer Standards and Training Commission as a Commission Board Member by Governor Carney.

C) Reactivation/Re-Employments of Officers

- 1) Name: Emily Truitt
Department From: Laurel PD, *April 18, 2024*
Department To: Fenwick Island PD, *April 22, 2024*
- 2) Name: Kevin Guy Bottomley
Department From: Dover PD, *March 2024*
Department To: Smyrna PD, *March 07, 2024*
- 3) Name: John Rose
Department From: NCCPD, *March 19, 2024*
Department To: Smyrna PD, *March 26, 2024*
- 4) Name: Ossie Cano
Department From: NCC PD, *March 2024*
Department To: Smyrna PD, *March 28, 2024*
- 5) Name: Brendin Peters
Department From: Cheswold PD, *April 26, 2024*
Department To: Townsend PD, *May 5, 2024*
- 6) Name: Cecilia E. Ashe
Department From: Wilmington PD, *Jan 6, 2023*
Department To: Milford PD, *Feb 13, 2023*
- 7) Name: Ashton Holden
Department From: Wilmington PD, *Jan 4, 2021*
Department To: Wilmington PD, *April 22, 2024*
- 8) Name: John L. Mitchell
Department From: Cheswold PD, *July 8, 2024*
Department To: Elsmere PD, *July 15, 2024*
- 9) Name: Joshua G. Carter
Department From: Newark PD, *July 7, 2024*
Department To: NCCPD, *July 8, 2024*

D) Part Time Officer Changes/Updates

- 1) Name: Albert J. Wysock
Department From: Cheswold PD, Feb 2019- Current
Department To: Delaware City PD, July 2024 PT
- 2) Name: Michael Helton
Department From: Cheswold PD, June 10, 202(Staying)
Department To: Delaware City PD, June 2024 (new)

E) Certification of New Post Certified Instructors

1) Dover Police Department, March 25-29, 2024

- | | |
|-----------------------|-------------------|
| a) Jacob Rankin | Dover PD |
| b) Tyler Loomis | Dover PD |
| c) Kody Frye | Dover PD |
| d) Bryce Jackson | Dover PD |
| e) Joshua Krumm | Dover PD |
| f) Sioban Burton | Dover PD |
| g) Logan Spicer | Dover PD |
| h) Jonathan Hummel | Dover PD |
| i) Matthew Barlow | Georgetown PD |
| j) Corey Shurba | DRBA |
| k) Stanley Kite IV | DRBA |
| l) Nathan D'Ettore | Middletown PD |
| m) Jordan Douglass | Middletown PD |
| n) Matthew Sarkissian | Smyrna PD |
| o) Susan Gladmon | Rehoboth Beach PD |

2) New Castle County Police Department, March 11, 2024

- | | |
|---------------------|-------------------------|
| a) Jacob T. Whatley | *January 3, 2024, NCCPD |
| b) Caszmere Bethea | NCCPD |
| c) Cole Blohm | NCCPD |
| d) Everett Brown | NCCPD |
| e) Raymond Di Fiori | NCCPD |
| f) Joanne Garcia | NCCPD |
| g) Drew Johnson | NCCPD |
| h) Eric Moro | NCCPD |
| i) Adam Park | NCCPD |
| j) Issac Park | NCCPD |
| k) Michael Riva | NCCPD |
| l) John Ryan | NCCPD |

- m) Carlos Sousa NCCPD
- n) Yousif Taki NCCPD
- o) Keith Taylor NCCPD

F) Certification of Firearms Instructors:

Delaware Certified Instructor Courses:

Delaware State Police Firearms Instructor Course January 15-19, 2024

- o Jeffrey Baldwin (Delaware State Police)

G) Police Officer Decertification:

1) Hearings

- a. Adam Ringle (Wilmington Police Department)

Lead Charge(s): Misconduct

Hearing held April 15, 2024.

Not Recommended for decertification by the following Board Members

Chief Jeffrey Horvath (chair)

Investigator Robert Irwin

Mayor Nick Smith

- b. Connor A. Schell (Dover Police Department)

Lead Charges: Conduct Unbecoming,

Hearing held May 15, 2024.

Recommended for decertification by the following Board Members

Robert Irwin (Chair)

Major Benjamin Feldmann

Major Christy Ballinger

- c. Christopher R. Sutton (Delaware State Police)

Lead Charge: DSP R & R 1 (Harassment)

Hearing held May 28, 2024.

Recommended for case dismissal by the following Board Members:

Chief Jeffrey Horvath (Chair)

Chief Thomas Johnson

Ms. Rosalie Morales

2) Administrative Decertification:

Dempsey Walters (Delaware State Police)

Lead Charge(s): Felony Convictions (Assault)

- Resignation: April 12, 2024
- Decertification letter sent: May 23, 2024
- Returned to sender (POST) June 8, 2024
- Letter emailed to John Malik, esq. June 10, 2024
- Returned letters from Mr. Malik and Cpl. Dempsey advising voluntary relinquishment. July 15, 2024

V. Public Comment

VI. Adjournment

Next regularly scheduled meeting:

- **Tuesday, November 12, 2024, at 2:00 P.M.**
- **Tuesday, February 11, 2025, at 2:00 P.M.**

Pursuant to 29 Delaware Code, Section 10004(e)(2), the Commission shall pre-announce all Executive Sessions; however, such agenda shall be subject to change to include additional items including Executive Sessions, which arise at the time of the body's meeting.