November 28, 2012

Jeffrey S. Goddess, Esquire
919 Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899-1070

RE: Freedom of Information Act Request for WPD Cell Phone Location Records

Dear Mr. Goddess:

This is the City’s formal revised reply to the ACLU’s request for records relating to the Wilmington Police Department’s acquisition of cell phone location records. The Freedom of Information Act ("FOIA") only requires the municipality to produce documents. Any explanations to FOIA inquiries are given as a courtesy and are not precedent.

1. Policies, procedures and practices to follow to obtain cell phone location records.

Response: See the attached redacted Wilmington Department of Police Criminal Investigation Division Standard Operating Procedures for Cellular Telephone.

2. Data retention policies.

Response: The Wilmington Police Department follows the Delaware Local Government general records retention schedule, which is prepared by Delaware Public Archives Government Services Section, 121 Duke of York Street, Dover, Delaware 19901.

3. The use of cell phone location records to identify “community of interest”.

Response: The WPD reviews phone records for investigatory purposes. Each investigation is different and may include one or multiple phones. Phone data is reviewed on a case-by-case basis with a valid subpoena or warrant. The WPD does not use cell phone data to identify “community of interest”. Since records are kept on a case-by-case basis they are part of the investigatory file, which is exempt from the definition of public records as set forth at 29 Del. C. §10002(g).

Any redactions in the policy were made are the result of a mutual understanding between the parties.
4. The use of cell phone location records to identify all of the cell phones at a particular location.

Response: There are no records.

5. The use of “digital fences.”

Response: There are no records pertaining to WPD’s use of digital fences.

6. The legal standard proffered to obtain cell phone location records.

Response: Refer to information attached to request No.1. Warrants and/or subpoenas are obtained through the Attorney General’s Office.

7. Judicial decisions and orders ruling on your application to obtain cell phone location records.

Response: This is exempt under Attorney Work Product; however, if you refer to the State of Delaware’s Answer to the ACLU’s FOIA request, it provides case law for obtaining cell phone records. The City obtains its warrants through the AG’s Office.

8. Statistics regarding your use of cell phone location records including the number of emergency requests for which no court order was obtained.

Response: The City has no statistics on this issue and no index is kept. Any information relating to specific prosecutions is exempt from the definition of public records as set forth at 29 Del. C. §10002(g).

9. The forms in which cell phone location records are provided.

Response: Cell phone data is kept on a case by case basis, in hard copy, and as part of the investigative file. Any information related to specific prosecutions is exempt under the definition of public records as set forth in 29 Del. C. §10002(g).

10. Records reflecting your communication with cell phone communication providers of location-based services regarding cell phone location records.

Response: The City of Wilmington has no index or list reflecting communications with cell phone companies or providers other than the contents of the specific criminal prosecutions or civil investigative files. Any information related to specific prosecution or investigations is exempt from the definition of public records as set forth in 29 Del. C. §10002(g). The City is also not in possession of any company manuals,
pricing, and data access policies from a cell phone service provider.

Please feel free to contact me if any further assistance is necessary.

Martin C. Meltzer

[Signature]

Assistant City Solicitor

MCM
I. PURPOSE:

The purpose of this Standard Operating Procedure is to establish written guidelines and procedures for officers of the Wilmington Department of Police regarding legally seizing, accessing, and conducting examinations of cellular telephones. This SOP also covers any other medium or device under the control of an individual(s) which the owner or possessor has some expectation of privacy for the purpose of advancing a criminal investigation.

This SOP also establishes written guidelines and procedures for officers to legally obtain cellular telephone subscriber information, global positioning system (GPS) data / cell tower locations, telephone call history, as well as data from any other medium or device which the owner or possessor has some expectation of privacy for the purpose of advancing a criminal investigation.

II. SCOPE:

These guidelines apply to all members of the Criminal Investigations Division as well as the Drug, Organized Crime and Vice Division.
III. PROCEDURE:
CELLULAR TELEPHONE DATA:

Delaware State Code, Title 11, Chapter 24: “Wiretapping, Electronic Surveillance and Interception of Communications” determine the authority of law enforcement to obtain subscriber information, GPS/cell tower locations and call history for cell phones.

When during the course of a criminal investigation, it becomes necessary for an officer to obtain cellular telephone subscriber information, Global Positioning System (GPS)/cell tower locations, and call history for cellular telephones, as well as data from any other electronic medium or device under their control which the owner/possessors has some expectation of privacy for the purpose of advancing a criminal investigation. This information will only be acquired in one of the below described manners.

1. That a search warrant is created and approved by an Honorable Judge of the Superior Court of the State of Delaware.

2. That a court order is issued by an Honorable Judge of the Superior Court of the State of Delaware.

3. An Attorney General’s subpoena issued by a Deputy Attorney General of the State of Delaware Attorney General’s Office.

4. If there are exigent/emergency circumstances as defined under Title 11, Del. C. Section 2407. For the exigent/emergency circumstances to exists, one of the below listed criteria must apply.

   A. Immediate danger of death or serious physical injury to any person;

   B. Activities related to escape or attempted escape from custody;
C. Conspiratorial activities threatening the national security interest; or

D. Conspiratorial activities characteristic of organized crime; that requires a wire, oral electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained.

If the chief investigating officer of a criminal investigation reasonably believes that the exigent/emergency circumstances criteria exist, he must receive prior approval from a supervisor of the Criminal Investigations Division or Drug, Organized Crime and Vice Division before requesting any of the above listed information.

If exigent/emergency circumstances are used as a justification to acquire any of the above information, it will be the responsibility of the chief investigation officer of the criminal investigation to ensure that a search warrant, court order, or Attorney General’s subpoena is applied for retroactively regarding the information that is obtained.