

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

BOARD OF MANAGERS OF THE	:	
DELAWARE CRIMINAL JUSTICE	:	
INFORMATION SYSTEM, an agency of	:	C.A. No. 01C-01-039 WLW
the State of Delaware, RONALD J.	:	
TORGERSON, Executive Director of the	:	
Board, STATE BUREAU OF IDENTIFI-	:	
CATION, an agency of the State of	:	
Delaware, and CAPTAIN DAVID F.	:	
DEPUTY, Director of the State Bureau	:	
of Identification,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
GANNETT CO. t/a The News Journal,	:	
	:	
Defendant.	:	

Submitted: November 22, 2002  
Decided: January 17, 2003

**ORDER**

Upon Defendant's Motion for Reargument. Denied.  
Upon Defendant's Motion for Attorneys' Fees and Costs.  
Granted in Part.

Michael J. Rich, Esquire, and W. Michael Tupman, Esquire, Deputy Attorneys General, Dover, Delaware, for the State of Delaware.

Richard G. Elliott, Jr., Esquire, and Jennifer C. Bebko, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for the Gannett Co., t/a The News Journal.

WITHAM, J.

***I. Introduction***

Before this Court is Defendant's Motion for Reargument and Defendant's Motion for Attorneys' Fees and Costs. Upon consideration of the motions and responses, Defendant's motion for reargument is ***denied*** and Defendant's motion for attorneys' fees and costs is ***granted in part***.

## ***II. Background***

These motions arise out of this Court's September 30, 2002 Memorandum Opinion denying in part Delaware Criminal Justice Information System's (DELJIS) request for declaratory relief. This litigation began in 1997 when the Gannett Co. t/a The News Journal (Gannett) sought from DELJIS a snapshot of a ten-year database containing over 300 fields of information under FOIA. Since 1997, this request has been hotly litigated before two different superior court judges.<sup>1</sup> The history and facts of this case leading up to these motions have been set forth in prior decisions of this Court and will not be repeated here.<sup>2</sup> In short, this Court's Memorandum Opinion held that Gannett can receive the requested data from DELJIS; however, "it will not be permitted to receive arrest zip codes, grids or any other geographic information; non-conviction data, data relating to minors if

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<sup>1</sup> Judge Alford ruled on the initial request. *Gannett Co. v. Del. Criminal Justice Sys.*, 768 A.2d 508, 515 (Del. Super. Ct. 1999). After the initial request was denied, there was an agreement between Gannett and DELJIS to disclose a significantly reduced number of data fields. However, DELJIS rethought the wisdom of the agreement and asked this Court for declaratory judgment as to which data fields should be disclosed.

<sup>2</sup> See *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. Ct. 2002) (memorandum opinion); *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 2001 Del. Super. LEXIS 538 (order denying cross-motions for summary judgment).

requested, nor can The News Journal receive information which would allow for the identification of police officers.”<sup>3</sup> In its Motion for Reargument, Gannett is requesting reconsideration of this Court’s ruling concerning geographic information and non-conviction data. In addition, Gannett is requesting attorneys' fees and costs based on Delaware’s Freedom of Information Act.

### ***III. Discussion of Gannett’s Motion for Reargument***

Defendant filed its motion for reargument pursuant to Superior Court Civil Rule 59(e).<sup>4</sup> “A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment. . . . The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal. . . .”<sup>5</sup> A motion for

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<sup>3</sup> *Bd. of Managers of the Del. Justice Info. Sys.*, 808 A.2d at 464. It is important to note that at the time of this litigation Gannett had significantly reduced its original request from over 300 data fields to approximately 185 fields.

<sup>4</sup> Super. Ct. Civ. R. 59 (e) which states:  
Rearguments. -- A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within 5 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether reargument will be granted. A copy of the motion and answer shall be furnished forthwith by the respective parties serving them to the Judge involved.

<sup>5</sup> *Cummings v. Jimmy’s Grille, Inc.*, 2000 Del. Super. LEXIS 253, \*5 (quoting *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969)); see also *Gillenard v. Connor Broad., et. al.*, 2000 Del. Super. LEXIS 165, \*2 n.1 (granting the motion for reargument), *State v. Moffit*, 2000 Del. Super. LEXIS 201, \*1-\*2 (denying the motion for reargument).

reargument is not a device for raising new arguments or stringing out the length of time for making an argument.<sup>6</sup> It will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.<sup>7</sup> “A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change in the law or manifest injustice.”<sup>8</sup>

Gannett requests reconsideration of two aspects of this Court’s September 30, 2002 Memorandum Opinion and Order. Specifically, Gannett challenges this Court's ruling that Gannett could not receive information in two separate areas: (1) non-conviction data, and (2) geographic information.

First, Gannett claims that Chapter 85 does not specifically exempt from public disclosure information relating to non-conviction data. Furthermore, Gannett claims that DELJIS agreed to the release of non-conviction data, and that this issue was never before this Court. DELJIS filed an action for declaratory judgment requesting this Court to determine whether disclosure of the information that Gannett requested is required under FOIA. In order to determine what information should be disclosed under FOIA, this Court must reconcile FOIA with Chapter 85

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<sup>6</sup> *Cummings*, 2000 Del. Super. LEXIS 253 at \*5 (citing *Murphy v. State Farm Ins. Co.*, 1997 Del. Super. LEXIS 298).

<sup>7</sup> *Id.* at \*5-\*6 (citing *Interim Health Care v. Fournier*, 1994 Del. Ch. LEXIS 43); *see also Brenner v. Vill. Green, Inc.*, 2000 Del. Super LEXIS 198, \*3.

<sup>8</sup> *Brenner* , 2000 Del. Super LEXIS 198 at \*3.

of Title 11 of the Delaware Code, which in great detail restricts access to criminal histories. FOIA contemplates looking at other statutes for possible exemptions stating that “any records specifically exempted from public disclosure by statute or common law” are not considered public records under FOIA.<sup>9</sup> According to a plain reading of Chapter 85, it is apparent that § 8513 draws a distinction between news media and other researchers. Specifically, § 8513 states that the news media is only to be given conviction data, not all criminal history data.

Gannett also argued that this Court's ruling is inconsistent with Judge Alford's ruling in *Gannett I*. Judge Alford determined that § 8513 does not expressly exempt all CJIS data.<sup>10</sup> Furthermore, Judge Alford stated “If the General Assembly desired for § 8513 to exempt FOIA with regard to every piece of information contained in CJIS databases, it could easily have done so.”<sup>11</sup> Both of these statements are consistent with this Court's ruling in its September 30th Opinion. Judge Alford further states; “At most, § 8513 works to prevent the disclosure of ‘criminal history record information’ which is limited to ‘information . . . on individuals consisting of identifiable descriptions and notations of arrests.’”<sup>12</sup> Judge Alford was making these statements to show that “§ 8513 does not completely preempt FOIA.” Later

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<sup>9</sup> DEL. CODE ANN. tit. 29, §10002(d)(6) (2002).

<sup>10</sup> *Gannett Co. v. Del. Criminal Justice Sys.*, 768 A.2d 508, 515 (Del. Super. Ct. 1999).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

in the opinion, Judge Alford specifically draws the distinction between the news media and other researchers explaining why Gannett is prohibited from receiving non-conviction data.<sup>13</sup>

As noted, § 8513 draws a clear distinction between criminal history (which includes sensitive arrest information) and mere conviction data. While subsection (c)(2) gives members of the news media a limited right of access to identifiable conviction data, that is not at issue here. Rather, The News Journal submits that it is entitled to arrest and conviction data for the purpose of research, evaluative and statistical activities under subsection (b)(3). The Court disagrees for two reasons. To begin with, subsection (c)(2) expressly relegates the news media to conviction data. If the General Assembly intended for members of the news media to also have access to sensitive arrest information under the guise of being a research agency within the meaning of subsection (b)(2), it would have provided as much.<sup>14</sup>

Judge Alford ruled completely based on the privacy concerns raised in FOIA stating “While Defendants have done little to actually prove the existence of privacy concerns, the Court is satisfied, based solely on the immense scope of the 1997 request, that legitimate privacy concerns exist here.”<sup>15</sup> It was this prohibition against disclosure that the Supreme Court summarily affirmed.<sup>16</sup> Once Gannett

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<sup>13</sup> *Id.* at 516.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 515.

<sup>16</sup> *Gannett Co. v. Del. Criminal Justice Sys.*, 765 A.2d 951 (Del. 2000).

changed its request decreasing the number of fields that it was requesting, this Court had to look at the new request and determine if disclosure was prohibited. Neither Judge Alford's opinion nor the Supreme Court's summary affirmation ruled on the specific issue of whether Chapter 85 specifically prohibits certain disclosures.

In conclusion, after reviewing the applicable statutes and the parties' submissions, this Court is convinced that Gannett has not shown that the Court has overlooked a controlling precedent or legal principles, or has misapprehended the law or facts such as would have changed the outcome. Thus, the motion for reargument based on this argument is denied.

Secondly, Gannett requests that this Court delete the phrase “other geographic information” from its opinion because there was no trial testimony that geographic information, other than arrest zip codes and grids, could be used as identifiers. Gannett explained that use of “other geographic information” in this Court’s September 30<sup>th</sup> Memorandum Opinion excludes information such as “county of residence” and “location of crime.” This is a correct reading of that Opinion. Moreover, after a careful reading of the transcript, this Court has determined that according to the testimony presented, the geographic limitation must be in place to eliminate any privacy concerns. Dr. Sweeney, Plaintiff’s privacy expert, testified that the potential to re-identify an individual increases as the geographic area is pinpointed; i.e., it is easier to re-identify someone if you know the person lives in a specific county rather than merely knowing that a person lives in the state of Delaware. Dr. Sweeney explained that the disclosure of fields such as original

crime location, arrest zip codes, and county of residence pose concerns for individual privacy because of the potential for re-identification.<sup>17</sup> Dr. Sweeney explains that there is a high correlation between the place of arrest and the residence of the offender, so that one can be inferred from the other.<sup>18</sup> Once this information is known, there is a greater chance of re-identification because there are less people in smaller geographic areas that have the other characteristic that would be listed in the database. In addition, if the original crime location was disclosed this would easily link to prior newspaper coverage, and could be used to re-identify an individual even if “the newspaper article didn’t provide all the necessary names or identifiers.”<sup>19</sup> If Gannett has access to geographic data and the other identifiers that this Court allowed in its September 30<sup>th</sup> Opinion, the risk of re identification greatly increases. Therefore, Gannett’s motion for reargument is denied.

***IV. Discussion of Gannett’s Motion for Attorneys’ Fees and Costs***

Gannett also moves for an award of attorneys’ fees and costs pursuant to Delaware’s Freedom of Information Act. Title 29 § 10005(d) of the Delaware Code provides: “The court may award attorney fees and costs to a successful plaintiff of

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<sup>17</sup> Evidentiary Tr. Vol. A at 191. Furthermore, Dr. Sweeney draws the analogy between releasing criminal offense data and medical data pursuant to the Health Insurance Portability and Accountability Act (HIPPA). Dr. Sweeney explains that under HIPPA all geographic data must be stripped from the data before it can be released because of the chance that it can be used to re-identify individuals. *Id.* at 181-183.

<sup>18</sup> *Id.* at 197.

<sup>19</sup> *Id.* at 196.



any action brought under this section. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.”<sup>20</sup> The State does not contest the fact that Gannett can be considered a “plaintiff” for purposes of the FOIA statute because Gannett asserted a counterclaim. Therefore, Gannett is eligible for attorneys' fees and costs under § 10005(d) without having to show frivolity or harassment on the part of DELJIS. Another prerequisite to an award of attorneys' fees and costs under this statute is that the plaintiff must have been “successful” in the litigation. In this case, Gannett was successful on the ultimate issue of being able to receive fictional numbers to link the fields of data together.<sup>21</sup> Although, Gannett was precluded from receiving some data,<sup>22</sup> it should still be considered a successful plaintiff for purposes of awarding attorneys' fees and costs under FOIA.

An award of attorneys' fees and costs under FOIA is completely within the discretion of the court.<sup>23</sup> FOIA authorizes but does not require an award of

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<sup>20</sup> DEL. CODE ANN. tit. 29, §10005(d) (2002).

<sup>21</sup> *Bd. of Managers of the Del. Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. Ct. 2002).

<sup>22</sup> *Id.* (denying Gannett access to non-conviction data, all geographic data, and officer identification data).

<sup>23</sup> *Hoster v. Poppiti*, 1994 Del. Super. LEXIS 502, \*3-\*4 (stating that an award of attorneys' fees and costs is not automatically given since the court is granted discretion under FOIA), *aff'd*, 1994 Del. LEXIS 404; *see also Turner v. City of Newark*, 1998 Del. Ch. LEXIS 89, \*3-\*4.

attorneys' fees and costs to the successful plaintiff.<sup>24</sup> Since the award is discretionary, the court can utilize the circumstances of the case in fashioning an appropriate award.<sup>25</sup>

In order to determine the appropriate amount of attorneys' fees and costs, this Court must weigh two competing policy implications. FOIA contemplates granting attorneys' fees and costs so that potential plaintiffs would not be deterred from filing suit in order to gain access to information under FOIA.<sup>26</sup> Furthermore, granting attorneys' fees and costs also encourages an agency to provide information under FOIA when the agency has no valid reason for denying the request. On the other hand, an agency not only has the duty to disclose information under FOIA but also has the duty to withhold information the disclosure of which would violate individual privacy.<sup>27</sup> Thus, an excessively large award may provide an incentive to the agency to disclose possibly sensitive information to avoid being forced to pay fees and costs. In the case at bar, the issue as to whether or not DELJIS should

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<sup>24</sup> *Chem. Indus. Council of Del., Inc., v. State Coastal Zone Indus. Control Bd.*, 1994 Del. Ch. LEXIS 70, \*49 (utilizing the Court's discretion to decline attorneys' fees and costs).

<sup>25</sup> *Turner*, 1998 Del. Ch. LEXIS 89 at \*4-\*5.

<sup>26</sup> *Layfield v. Hastings*, 1995 Del. Ch. LEXIS 82, \*8. In *Layfield* the court determined that a Plaintiff should be allowed attorney's fees and costs even though the agency complied with the FOIA request after the suit was filed. Specifically the *Layfield* court reasoned that "some citizens with legitimate claims under FOIA would be deterred from pursuing them if they were required to pay the costs of meritorious action, with no hope of recovering such costs in the event the case is dismissed because of late compliance." *Id.*

<sup>27</sup> DEL. CODE ANN. tit. 29, §10001 et. seq.

disclose the information requested by Gannett was difficult and protracted. This Court only made its decision to disclose information after hearing the testimony of privacy experts.<sup>28</sup> Moreover, this Court in fact did determine that certain areas of information should not be disclosed.<sup>29</sup> Therefore, this is not a case where it is readily apparent that DELJIS should have disclosed the requested information. In addition, Gannett routinely files suits in order to gain information under FOIA, and Gannett desires this type of information to prepare investigative reports. The incentive structure for Gannett is not the same as that of an individual plaintiff, so Gannett does not need to recover attorneys' fees and costs as an incentive to bring suit.<sup>30</sup> On the other hand, Gannett was forced to engage in protracted litigation because DELJIS made agreements to disclose certain information without thoroughly evaluating the potential privacy concerns, which in turn forced DELJIS to file the declaratory action in order to avoid disclosure as per that agreement.

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<sup>28</sup> *Bd. of Managers of the Del. Justice Info. Sys.*, 808 A.2d 453 at 455-456.

<sup>29</sup> *Id.* at 464-465. Specifically, this Court determined that the following information was not subject to disclosure under FOIA: officer names and identification numbers; geographic information; and non-conviction data. *Id.*

<sup>30</sup> *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 Del. Ch. LEXIS 70. In *Chemical Industry*, the Chancery Court denied the plaintiff's application for attorney's fees and cost because "plaintiffs have not established that the Board acted in bad faith by withholding the public records. . . . Its decision to do that had a colorable—albeit—erroneous legal basis." Moreover, "because the plaintiffs have a significant private economic interest in invalidating the Regulations, no fee shifting was (or would be) needed to afford them an incentive to bring suit." *Id.* at \*49. Gannett, like the plaintiff in *Chemical Industry*, also has a significant private economic incentive to gain this type of information to conduct investigative reports with the hopes that the stories produced will increase newspaper sales.

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Thus, DELJIS forced Gannett into litigation that Gannett otherwise may not have undertaken. Due to the unusual circumstances of this case, this Court will award Gannett some of its attorneys' fees and costs but not the full amount requested.<sup>31</sup> Therefore, this Court in an exercise of its discretion concludes that Gannett is entitled to \$68,783.50 in attorneys' fees and \$5,192.46 in costs which represents that portion of the fees and costs properly expended to establish what information Gannett was otherwise entitled to receive.

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<sup>31</sup> Gannett is requesting \$177,567.00 in legal fees and \$5,192.46 in costs.

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***V. Conclusion***

In conclusion, because Gannett has not proven that this Court has overlooked a controlling precedent, or has misapprehended the law or facts such as would have changed the outcome, Gannett's motion for reargument is *denied*. Furthermore, Gannett's motion for attorneys' fees and costs is granted but only in the amount of \$73,975.96.

IT IS SO ORDERED.

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Honorable William L. Witham, Jr.

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution  
File