

**FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION
NO. 17-CI-03489**

ENTERED
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JUN 19 2018
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LEXINGTON FAYETTE URBAN COUNTY

RESPONDANT

GOVERNMENT

V.

**ORDER GRANTING APPELLEE'S MOTION
FOR SUMMARY JUDGMENT**

MICHAEL MAHARREY

MOVANT

Relevant Facts

This matter has been brought before the Circuit Court on appeal from the Decision of the Attorney General, who initially reviewed the case and resulted in 17-ORD-179. In July of 2017, Defendant Michael Maharrey ("Maharrey"), a freelance journalist, filed an open records request to the Lexington Police Department pursuant to the Kentucky Open Records Act ("ORA"). The request pertained to the production of all documents regarding surveillance technologies used by the Lexington Police Department ("LFUCG"). LFUCG promptly filed a response to Maharrey's request denying the use of the majority of the technologies named in the request, and denying access to documents about certain covert cameras used by the department. The Lexington Police Department denied the defendant's request pursuant to KRS 17.150 (2)(b)(c) and KRS 61.878(1)(m) which allegedly exempted the information from public scrutiny. The Lexington Police Department produced 12 pages regarding body worn cameras for Maharrey to review. Upon the denial of the requested documents, Defendant Maharrey appealed the agency denial to the Attorney General. The appeal resulted in an Order which determined that the requested information was not exempt pursuant to the KRS statutes cited by LFUCG and directed the department to release all documents

regarding the surveillance technologies. 17-ORD-170. Following this order, Lexington Police Department produced 467 documents pertaining to the requested surveillance cameras with the models of the cameras and excerpts of training manuals redacted. Complaint/Appeal of LFUCG. LFUCG then brought this action against Maharrey to overrule the Attorney General's Order 17-ORD-179. As indicated in the record, both parties have filed Motions for Summary Judgment. Pursuant to KRS 61.848(3), the Circuit Court adopts a *de novo* standard of review in evaluating matters regarding ORA. The language of ORA creates a strong presumption in favor of disclosure. The agency bears the burden of proof to show that a denial of information is proper under ORA. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 848 (Ky. 2013).

Analysis

I. LFUCG improperly relied on KRS 17.150(2)(b)(c) exemption in claiming that the release of the models of the cameras and the relevant training manuals would threaten the safety of officers and police informants

KRS 17.150 creates an exemption from disclosure of intelligence and investigative reports created by law enforcement officers and criminal justice agencies. The section specifically quoted by LFUCG states that records generally may be exempt from disclosure if the record would reveal information that would endanger the "life or physical safety of law enforcement personnel; or information in the records to be used in a prospective law enforcement action." See KRS 17.150(2)(b)(c). This statute is inapplicable primarily because the information requested by Maharrey does not constitute an intelligence or an investigative report. This statutory exemption also fails due to LFUCG's omission, in the response to Maharrey, to state exactly how the disclosure of the information would result in the threat to officer and informant safety.

Maharrey's request pertained to tax expenditure, grant applications, purchase orders, etc. (Maharrey request for information). This type of information is general information about the Lexington Police Department's possession and acquisition of the technology rather than particular deployment strategies and placement of the cameras. LFUCG relies upon *Gaither v. Justice and Pub. Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014) as corrected (Sept. 15, 2017) to illustrate the danger posed to confidential informants should their appearance identify them as an informant working for the police. In *Gaither*, a confidential informant was murdered after his identity was discovered as a result of the informant being used multiple times in the same community and the defendant thus recognizing the informant's appearance. 447 S.W.3d 628 (Ky. 2017). However, that facts of this case are distinguishable from those of *Gaither*. According to the Affidavit of Lieutenant Jesse Harris, the appearance of the cameras cannot be obtained by the public by searching the make or model of the camera, but rather requires valid law enforcement log in credentials to view the appearance of the cameras. Affidavit Jesse Harris. This suggests that the disclosure of the makes and models of the cameras would not provide the public with access to the appearance of the cameras and thus negates the argument that officers and informants could be identified solely through the use of the cameras. Therefore, LFUCG incorrectly relied on KRS 17.150(2)(b)(c) in determining that the models of the cameras and the relevant training manual parts should be exempted from disclosure, as required by ORA, due to a safety threat to officers and police informants.

II. LFUCG improperly relied on KRS 61.872 exemption in claiming that the requested information would result in an undue burden.

Under KRS 61.872(6), denial of a request is appropriate when the information to be released would disrupt a "significant government interest" and result in the immediate need to revise the policy or practice used by the agency. Ky. Op. Atty. Gen. 08-Ord-101. (Ky. A.G.) 2008. WL 2520976. However, KRS 61.872(6) also states that such a denial must be supported by clear and convincing evidence. LFUCG asserts that the investigation of crime facilitated by the use of the cameras as well as the safety of officers and informants using the cameras is an important government interest warrants the denial of the information. While the Court does not dispute that these are important government interests, LFUCG has not met the standard of clear and convincing evidence required by the statute. In their response to Maharrey, the Police Department stated that officer and informant safety could be compromised if the information was released and that the information could be used by individuals to "circumvent the law." Government's Response to Cross Motion for Summary Judgement p. 5. However, LFUCG failed to offer concrete examples of how this result stems from the release of the models and training manuals for the cameras. The mere contention that the information could pose a safety risk is far too abstract to satisfy the standard of clear and convincing evidence required by the statute.

Second, LFUCG's claims that the release of the information would require the Lexington Police Department to immediately revise its policy and procedure on the use of the cameras and potentially purchase new equipment each time a request is made regarding covert camera usage. However, as previously discussed, images of the cameras cannot be obtained without valid law enforcement credentials. Affidavit of Jesse Harris. It is therefore unlikely that members of the public would be able to identify, and thus avoid surveillance by, the cameras currently in use based solely upon the information requested by Maharrey. Therefore, the release of the requested information would not create an undue burden on

the Lexington Police department by requiring an immediate revision of policy and procedure, nor is it likely that the Department would have to purchase new equipment should subsequent requests occur.

III. LFUCG incorrectly relied on KRS 61.878 exemption in claiming that the requested information should be exempt from disclosure because of the threat to public safety.

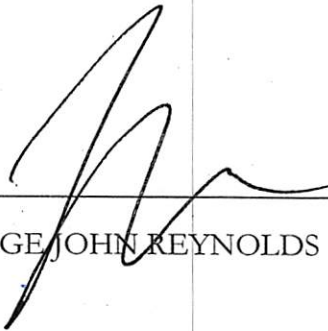
This provision fails due to LFUCG's failure to state, with particularity, how the disclosure of the requested information would result in a "reasonable likelihood" of a threat to the public safety in the form of a "terrorist act". KRS 61.878(1)(m). "terrorist act" is defined in subsection 2 of KRS 61.878 as a "criminal act intended to: intimidate or coerce a public agency or all or part of the civilian population;...or cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency." KRS 61.878(2)(a)(c). It is clear from Maharrey's request that the information does not rise to the level of creating a reasonable likelihood of facilitating a terrorist act. This provision lists several examples of records that do qualify under the exemption such as criticality lists, vulnerability assessments, antiterrorism protective measures, counterterrorism plans, and security assessments. KRS 61.878(1)(m). As seen in Attorney Generals Order 15-ORD-041, records which may create a "higher risk to officers and civilian employees is too broad to be justified by the limited terms of the homeland security exemption." Ky. Op. Atty. Gen. 15-ORD-041 (Ky. A.G.), 2015 WL 1599195 (internal quotation marks omitted). Similarly, LFUCG's assertion that disclosure of the models and training manuals for the cameras could present a security risk to officers and the public is also too broad to be covered by this exemption. It is facially clear that the models and training manuals related to the cameras used by the Lexington Police Department does

not equate to the same level of severity as records intended to be protected by this statutory provision.

Conclusion

In sum, this Court finds that the plaintiff, LFUCG, has failed to assert an applicable provision of the KRS or other binding precedent which would allow the denial of the information requested by Maharrey. Therefore, LFUCG has failed to meet its burden of proof, and pursuant to ORA the requested information should be released for review by Maharrey. Accordingly, Summary Judgement is to be granted in favor of the Defendant, Maharrey.

Entered this 12 day of June, 2018.



JUDGE JOHN REYNOLDS

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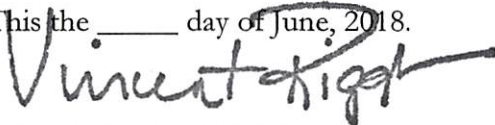
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JUN 19 2018

This the ____ day of June, 2018.



VINCENT RIGGS, C.F.C.C.

BY:  D.C.