

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
THIRD DIVISION  
CIVIL ACTION NO. 17-CI-3489

LEXINGTON-FAYETTE URBAN  
COUNTY GOVERNMENT

PLAINTIFF/APPELLANT

VS. GOVERNMENT'S MOTION PURSUANT TO CR 59.05 TO  
ALTER AMEND OR VACATE JUDGMENT, FOR EVIDENTIARY  
HEARING AND FOR *IN CAMERA* REVIEW

MICHAEL MAHARREY

DEFENDANT/APPELLEE

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NOTICE

**NOTICE IS GIVEN** that the following motion will be brought on for hearing before Division 3 of the Fayette Circuit Court on Friday, July 6, 2018, at the hour of 1:00 p.m. (EDT), or as soon thereafter as counsel can be heard.

MOTION

Lexington-Fayette Urban County Government (LFUCG), by counsel, respectfully moves pursuant to CR 59.05 to alter, amend or vacate the judgment entered on June 19, 2018, on the grounds of officer safety, the safety of confidential informants, and the protection of covert law enforcement techniques which are utilized not only by Lexington but by other law enforcement agencies.

LFUCG moves to amend the Court's Order to the extent that the order requires release of make/model and training manual information for covert video and audio surveillance equipment if the release of the information would (or reasonably could lead) to the visual identification of the equipment and the nature of how it is deployed. Once the disclosure of this type of information is made, officers or confidential informants may

be targeted. The training manuals could potentially disclose the physical nature of the device (i.e., allow for visual identification) and the method of deployment (i.e., the general nature and manner on which the subject device is concealed from view in covert operations).

LFUCG respectfully requests clarification regarding the Court's Order because the Order assumes that release of the above-described information would, in all circumstances, *not* disclose the physical characteristics and nature of deployment of covert investigative tools. To the extent that disclosure of make/model and/or training manual records will reveal (or reasonably lead to the revelation of) such information, the order should be amended to not require disclosure. In conjunction with this motion, LFUCG respectfully requests an evidentiary hearing as well as *in camera* review of the records of concern so that LFUCG can further illustrate the potential effect on safety and enforcement operations.

#### ARGUMENT

CR 59.05 provides four potential avenues, under which relief may be granted to alter, amend or vacate a judgment: (1) correction of manifest errors of law or fact; (2) presentation of newly discovered or previously unavailable evidence; (3) prevention of manifest injustice; and/or (4) an intervening change in controlling law. Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478, 483 (Ky. 2009). On page 3 of it judgment, entered June 19, 2018, the Court in this matter held as follows:

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 of Jesse Harris. This suggest 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<sup>1</sup> 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.

The above-cited language from the Court's decision presumes that because certain vendor websites require law enforcement credentials to log in that disclosure of the make and model of surveillance equipment and training manuals<sup>2</sup> would not disclose the physical nature of the technology or how an officer or confidential informant would utilize (i.e., conceal) such technology in the course of covert law enforcement investigations. LFUCG respectfully seeks an evidentiary hearing and *in camera* review of these records to demonstrate its legitimate concerns as to why release of the requested records could disclose or reasonably lead to the disclosure of information that reasonably could be expected to impair law enforcement operations and jeopardize officer/informant safety. Likewise, the Court's order fails to consider the legitimate interests of vendors

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<sup>1</sup> The Court's Order does not address the question of whether public disclosure of the fact that LFUCG Division of Police utilizes a particular make model of a technology – even if the technology might be publically available -- in covert operations could of in and of itself harm investigations or cause officer/informant safety concerns. For example (in another context), a purchase order for a particular type of firearm or covert weapons holster could assist a suspect in a disarming an officer if it becomes common knowledge how covert officers conceal weapons and what covert weapons are carried. For this reason, LFUCG does not concede that disclosure of make/model information is always or inherently innocuous if it could lead a suspect or target of an investigation to determine that a person is likely an undercover officer or informant if a particular item is discovered on his or her person.

<sup>2</sup> The term "training manual" is ambiguous. LFUCG construe the term to encompass the manufacture instructions manuals that accompany the device in question. Disclosure of manufacture instructions to the extent the manuals contain pictures of the device and directions for use could reasonably have the ability to disclose the physical nature of the device in question as well as the means of concealment of the technology. LFUCG is prepared to provide the Court with the manuals/instructions of concern for *in camera* review.

and other law enforcement agencies that utilize the technologies in question -- that is disclosure of this information from Lexington could compromise the covert nature of the equipment as utilized by other agencies and adversely impact the business interests of vendors who elect to sell to law enforcement and restrict access to their products.

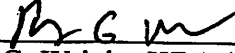
The principles enunciated in the ORA which protect the disclosure of confidential law enforcement techniques mirrors the federal law enforcement privilege. The federal law enforcement privilege protects law “information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel or the privacy of individuals involved in an investigation, and information that would otherwise interfere with an investigation.” United States v. Matish, 193 F.Supp.3d 585, 597 (E.D.Va. 2016).

The Court’s judgment appears to recognize, consistent with the federal law enforcement privilege, that information that compromises effective law enforcement is protected from disclosure under the ORA; however, it finds that LFUCG has not met its burden of showing disclosure of the make/model and training manuals of the devices encompassed within the request would disclose any meaningful investigative techniques. Due to the importance of this matter for future law enforcement investigations and the potential harm to third persons not before the Court, LFUCG respectfully requests the opportunity to demonstrate via an evidentiary hearing and *in camera* review that the records it seeks to protect should not be disclosed.

CONCLUSION

For all of the foregoing reasons, LFUCG requests the Court grant the relief requested herein.

Respectfully submitted,



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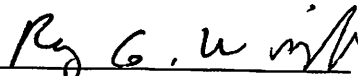
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CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing was served via U.S. mail, first class, postage prepaid, on the 29<sup>th</sup> day of June 2018, upon the following:

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