

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

ENTERED
ATTEST, VINCENT RIGGS, CLERK
MAR 05 2020
FAYETTE CIRCUIT CLERK
DEPUTY

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

PLAINTIFF/APPELLANT

v.

OPINION AND ORDER

MICHAEL MAHARREY

DEFENDANT/APPELLEE

*** **

This case comes before the Court on remand from the Court of Appeals with instructions “to conduct an evidentiary hearing and, if necessary, an *in camera* review to address LFUCG’s concerns regarding disclosure of covert surveillance technologies.” *LFUCG v. Maharrey*, No. 2018-CA-1105-MR, 2019 WL 2712967 at *1 (Ky. App. June 28, 2019). The Court conducted an evidentiary hearing on December 5, 2019, at which Lexington-Fayette Urban County Government (“LFUCG”) presented the testimony of Lexington Police Sergeant Daniel Burnett. Defendant did not put forth evidence at the hearing.

“LFUCG has produced 467 pages of records regarding tax payer expenditures for the 29 surveillance cameras, but redacted the equipment’s make, model, and manufacturer of the cameras, and withheld training manuals as ‘an officer safety issue and decrease in effectiveness of investigations.’” *Id.* at *2. The issue before the Court is whether the documents at issue are protected from disclosure pursuant to KRS 61.872(6) of the Kentucky Open Records Act.

Defendant filed a post-hearing brief on January 15, 2020. LFUCG filed a post-hearing brief on February 14, 2020. Defendant filed a reply on March 2, 2020.

The Court, having considered the testimony of Sgt. Burnett, the arguments of counsel, the memoranda of the parties, and the materials submitted for an *in camera* review, hereby enters the

following Opinion and Order finding the documents are protected from disclosure under KRS 61.872(6).

Procedural History

On September 29, 2017, LFUCG filed a Complaint for declaratory relief and Appeal of the decision of the Attorney General in 17-ORD-179.

Following motion practice and oral arguments, on June 19, 2018, then Judge Reynolds issued an Order granting Appellee's Motion for Summary Judgment, finding LFUCG improperly relied upon KRS 17.150(2)(b)-(c) and KRS 61.878 as ground to withhold the documents. As to KRS 61.872(6), Judge Reynolds determined "LFUCG ha[d] not met the standard of clear and convincing evidence required by the statute[]" and had "failed to offer concrete examples of how [informant safety could be compromised] from the release of the models and training manuals for the cameras." *See* Order Granting Appellee's Motion for Summary Judgment at 4 (June 19, 2018).

On June 29, 2018, LFUCG filed a Motion to Alter, Amend or Vacate pursuant to CR 59.05 and requested "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." *See* LFUCG's Motion to Alter, Amend or Vacate at 2 (June 29, 2018). On July 20, 2018, Judge Reynolds denied LFUCG's Motion.

The Court of Appeals issued an opinion reversing and remanding the case to the Fayette Circuit Court. The Court gave specific instructions "to conduct an *in camera* review and an evidentiary hearing on LFUCG's concerns about disclosure of covert surveillance technologies." *See Maharrey*, 2019 WL 2712967 at *1.

Findings of Fact

LFUCG relies upon the testimony of Sgt. Daniel Burnett of the Lexington Police Department (“LPD”). Sgt. Burnett has been with LPD for fourteen years and serves as the Supervisor for Intelligence and Special Investigations. His department is the custodian of surveillance equipment and is tasked with acquiring, maintaining, training, deploying, and administrating the systems.

LPD owns twenty-nine covert cameras that are used for evidence collection in various types of cases. Of this number, about two-thirds are in use and the remainder are out of service and/or in need of repair. There are two types of covert cameras at issue in this case: stationary cameras and mobile cameras. Within the two types of cameras are several variants. The covert nature of the cameras at issue is entirely dependent on the particular form or housing of the camera. In some cases, the form or housing of the camera is what makes it covert. In other cases, the way in which the camera is affixed makes it covert.

Covert cameras are used to surveille criminal activity, whether that be from a stationary position or via a confidential informant or an undercover officer. Although the technical capabilities of the various cameras differ, the covert cameras in any given class are of equivalent technical capability.

While most vendors require a passcode and deal only with authorized law enforcement entities, Sgt. Burnett testified that information regarding the make, model and form of the covert cameras is available on the “dark web” and in certain chat rooms where the criminal element gathers to discuss ways in which to thwart detection by law enforcement.

Sgt. Burnett testified that if the specific make or model of the covert cameras is released into the public domain, word will travel quickly to the criminal element. If that happens, the

cameras will no longer be useful because the users of those products would be at an increased risk of detection. Sgt. Burnett testified he could not, in good conscious, ask an undercover officer or confidential informant to use a covert camera if the information becomes public due to the risk of detection. In other words, if the target of any investigation knows what to look for, the confidential informant or undercover officer using a covert camera is at risk of detection and, if detected, at risk of physical harm.

Sgt. Burnett testified that the threat of physical harm is real. He testified regarding an example of a confidential informant being suspected of using a recording device and being confronted in an aggressive manner. That particular confidential informant felt unsafe and refused future assignments. He testified regarding another incident within the last three years in which a confidential informant was killed. Sgt. Burnett testified about another incident in which a citizen's behavior suggested he/she recognized a covert camera being deployed. In that instance, the camera was pulled back and could not be used for fear of detection.

Sgt. Burnett testified that if the make and mode of covert cameras is revealed, LPD would have to cease operations of most devices. The options to replace marginalized covert cameras are nonexistent due to the small number of options available and the budget restraints of the LPD.

Opinion

On remand, LFUCG focuses solely on KRS 61.872(6) as the basis for withholding the documents at issue. Under KRS 61.872(6), “[i]f the application places an unreasonable burden in producing public records ... the official custodian may refuse to permit inspection of the public records or mail copies thereof.” *See also* 03-ORD-254, 2003 WL 23199433 at *1 (Dec. 30, 2003) (“It is well settled that if a request creates an unreasonable burden on an agency it may be denied.” (citations omitted)).

Kentucky Revised Statute 61.872 provides, in pertinent part:

- (1) All public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right. No person shall remove original copies of public records from the offices of any public agency without the written permission of the official custodian of the record.

*** **

- (6) *If the application places an unreasonable burden in producing public records* or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, *the official custodian may refuse to permit inspection of the public records* or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

KRS 61.872(1), (6) (emphasis added).

LFUCG did not initially rely upon the provisions of KRS 61.872(6) as grounds to withhold the documents. Accordingly, the Attorney General did not consider the applicability of this provision. *See* 17-ORD-179, 2017 WL 4081556 at *7 n.4 (noting, “LPD has not invoked KRS 61.872(6) and this office therefore lacks adequate information to affirm its denial, in whole or in part, on that basis.”).

The Circuit Court is not under the same constraints. Where the agency fails to raise a potential exception to disclosure, “it is incumbent upon the circuit court to examine this material and to make a determination as to whether it is substantively exempt from disclosure.” *Edmondson v. Alig*, 926 S.W.2d 856, 859 (Ky. App. 1996).

Although prevented from applying the statute to this case, the Attorney General opinion makes clear that the unreasonable burden provision applies in circumstances akin to the case at bar:

‘Although there is no ‘catch-all’ exception to the Open Records Act for records the disclosure of which would compromise significant agency operations and functions,’ the *Attorney General noted in 04-ORD-058, this office has recognized ‘that a public agency may properly invoke KRS 61.872(6) to deny a request for*

public records . . . if release of those records would compromise a significant governmental interest, thereby necessitating an immediate revision of policy or practice so as to avoid the subversive use of the records, or information contained therein. 95-ORD-121, p. 4; 04-ORD-058; 10-ORD-147. Such a request may be treated as unreasonably burdensome within the meaning of KRS 61.872(6); however, refusal under this section shall be sustained by clear and convincing evidence. *Id.*

LPD has not invoked KRS 61.872(6) and this office therefore lacks adequate information to affirm its denial, in whole or in part, on that basis. *However, “[i]f the agency can establish, by clear and convincing evidence, that complying with a request for public records would place an unreasonable burden on it ‘because the agency would be forced to overhaul an existing system each time the records were requested and released, it may properly invoke this provision. The clear and convincing standard which is built into this provision is sufficient, in our view, to discourage abuse by public agencies.’* *Id.*; 04-ORD-058; 10-ORD-147.” 12-ORD-153, p. 5 (emphasis added). *See* 95-ORD-121 (affirming jail’s denial of inmate request for policy and procedures manual containing details of security systems currently in place); 97-ORD-26 (holding that nondisclosure of KSP policy manual was justified on basis of KRS 61.872(6) *to extent portions, if revealed*, ‘would enable persons to impede the goals for which the policies and procedures were adopted’ or could be used to ‘circumvent or violate the law’); 97-ORD-129 (affirming drug task force’s denial of request as to portion of its manual dealing with the use of confidential informants); 99-ORD-83; 06-ORD-167; 10-ORD-147; 14-ORD-187; 16-ORD-155.

17-ORD-179, 2017 WL 4081556 at *7 n.4 (emphasis added). While not binding, “[a]n attorney general opinion is highly persuasive[.]” *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991). *See also Salinas v. Correct Care Solutions, LLC*, 559 S.W.3d 853, 856 (Ky. App. 2018) (“The circuit court is not bound by the prior OAG opinion in any way or limited to the OAG’s evidentiary record.” (citation omitted)).

The Court has reviewed the following documents submitted by LFUCG for an *in camera* review:

- A listing of eleven brands and models of covert cameras;
- Nine color photographs depicting the eleven brands/models of covert cameras;
- Operating Instructions for three types of covert cameras (each containing photographs);
- Marketing materials for a covert camera (with a photograph);
- Model manual for a covert recorder (with photograph);
- Operation manual for a stationary covert camera (with photographs and a diagram); and
- Marketing materials for a stationary covert camera (with photographs).

Having considered both the testimony of Sgt. Burnett and the additional evidence reviewed *in camera*, the Court concludes the usefulness of each covert camera is dependent on the form of the camera being unknown to the target of any investigation in which it is used. If the form of the cameras were to become public knowledge, the cameras would be subject to detection. There is no question that detection endangers the life and safety of the person using the covert camera and, further, the mere threat of detection would compromise the prospective use of covert cameras. Disclosure will necessitate an immediate halt of LPD's deployment of covert surveillance. Public safety will be compromised if the general public is apprised of the specific nature and capability of LPD's covert surveillance operations.

Accordingly, LFUCG has, by clear and convincing evidence, met its burden by establishing compliance with the request would be unreasonably burdensome. If production were required, LPD would be forced to abandon the current methods of covert surveillance without any budget to acquire a new cache of covert cameras. Assuming, *arguendo*, a budget existed to replace the existing covert cameras, a subsequent open records request would result in yet another overhaul of all surveillance operations. Such a system necessitating replacement of covert surveillance equipment after each document production is entirely unworkable and unmanageable and compromises the safety of confidential informants, undercover officers, and the general public's interest in public safety. Specifically, the Court concludes the release of the records

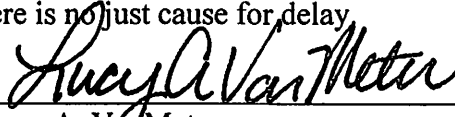
would compromise a significant governmental interest, namely public safety and the ability of LPD to effectively prevent, investigate, and deter crime.

Order

For the reasons set out herein, the Court finds LFUCG has met its burden of proof, by clear and convincing evidence, that production of the documents at issue would place an unreasonable burden on LFUCG. The documents at issue are not subject to production pursuant to the exception set out in KRS 61.872(6) of the Kentucky Open Records Act.

Entered this 5 day of March, 2020.

This is a final and appealable order and there is no just cause for delay.




Lucy A. Van Meter
Judge, Fayette Circuit Court

Attest copies to:

Hon. Michael R. Sanner
Hon. Roger G. Wright
Hon. J. Todd Henning
Counsel for the LFUCG

Hon. Clay A. Barkley
Hon. Corey M. Shapiro
Hon. Heather L. Gatnarek
Hon. Julia D. Taylor
Counsel for Maharrey


This ___ day of March, 2020.

VINCENT RIGGS, C.F.C.C.

BY 