

AOC-105
Rev. 1-07
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CIVIL SUMMONS

Case No. 17C13489

Court Circuit District

County Fayette

PLAINTIFF

Lexington-Fayette Urban County Government
200 East Main Street, 11th Floor
Lexington, Kentucky 40507

VS.

DEFENDANT

Michael Maharrey
1300 Smokey Mountain Court
Lexington, Kentucky 40515

Service of Process Agent for Defendant:

VIA
CONSTABLE, JEFF JACOBS

Michael Maharrey
1300 Smokey Mountain Court
Lexington, Kentucky 40515

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified a legal action has been filed against you in this Court demanding relief as shown on the document delivered to you with this Summons. Unless a written defense is made by you or by an attorney on your behalf within 20 days following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint.

The name(s) and address(es) of the party or parties demanding relief against you are shown on the document delivered to you with this Summons.

Date: SEP 29 2017, 2

By: VINCENT RIGGS, CLERK Clerk
FAYETTE CIRCUIT COURT
CIVIL DIVISION D.C.
120 N. LIMESTONE STREET C103
LEXINGTON, KENTUCKY 40507

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

this _____ day of _____, 2_____.

Served by: _____

Title

FAYETTE CIRCUIT COURT
CIVIL BRANCH
3 DIVISION

Civil Action No. 17C13489

FILED
ATTEST, VINCENT J. [unclear]
SEP 29 2017
FAYETTE CIRCUIT CLERK
BY DEPUTY

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

PLAINTIFF/APPELLANT

VS.

COMPLAINT/APPEAL

MICHAEL MAHARREY
1300 Smoky Mountain Court
Lexington, Kentucky 40515

DEFENDANT/APPELLEE

The Plaintiff, Lexington-Fayette Urban County Government ("Government"), through counsel, and for its cause of action, states as follows:

1. This action is brought pursuant to KRS 61.880(5)(a) and KRS 61.882(3) to appeal the decision of the Attorney General in 17-ORD-179.
2. The plaintiff, Lexington-Fayette Urban County Government, is an urban county government in the Commonwealth of Kentucky, created under the provisions of KRS Chapter 67A and is located in Fayette County Kentucky.
3. The defendant, Michael Maharrey, is an individual whose resides in Fayette County, Kentucky and may be served at 1300 Smoky Mountain Court, Lexington, Kentucky 40515.
4. On or about July 17, 2017, defendant filed an open records request to the Lexington Division of Police for all documents relating to surveillance technologies (See Exhibit 1) 5. On or about July 20, 2017, Government responded to the request. (See Exhibit 2)

6. Most of the request was denied as the Division of Police did not own the stated surveillance technologies; and therefor possessed no records regarding same.
7. Some of the request regarding 29 surveillance cameras was denied as an officer safety issue and hindering investigations pursuant to KRS 17.150(2)(b)(c) and KRS 61.878(1)(m).
8. Twelve pages of records were produced regarding body worn cameras.
9. On or about August 8, 2017, the defendant appealed the denial to the Attorney General.
10. In its response to the appeal the Government stated it was searching for documents that show expenditure of tax payer money for the surveillance technologies and all nonexempt documents would be released.
11. On September 8, 2017 the Attorney General issued 17-ORD-179 finding that the Government did not have to release documents that did not exist, but must release all documents related to the 29 surveillance cameras unredacted. (See Exhibit 3).
12. On September 14, 2017 the Government made available to defendant 467 pages of records regarding tax payer expenditure for the 29 surveillance cameras, the make, model and maker of the equipment were redacted pursuant to KRS 17.150(2)(b)(c) and KRS 61.872(6) as an officer safety issue and decrease in effectiveness of investigations. (See Exhibit 4)
13. There is no specific exemption in the Open Records Act for records that jeopardize officer safety unless the record is an intelligence or investigation report.

14. There is no specific exemption in the Open Records Act for records that decrease the effectiveness of surveillance equipment unless the record is an intelligence or investigation report.

15. In the instant case the records jeopardize officer safety are exempt by KRS 17.150(2) (a)(c) and KRS 61.872(6) as they are the most logical exemptions to protect undercover officers.

16. In the instant case the records that decrease the effectiveness of surveillance equipment and investigations are exempt by KRS 17.150(2)(b)(d) and KRS 61.872(6) as they are the most logical exemptions to protect critical investigations.

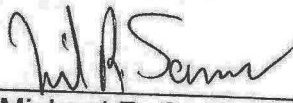
WHEREFORE, the Plaintiff/Appellant requests the following relief:

1. That this Court review this matter de novo as required by KRS 61.882(3), and pursuant to KRS 61.882(4) grant this matter precedence over all matters on the Court's docket.
2. That this Court overrule Attorney General Opinion 17-ORD-179 as the Division of Police undercover officer safety must be protected.
3. That this Court overrule 17-ORD-179 as the Division of Police surveillance cameras must be utilized to their full effectiveness and not endanger critical investigations.
4. That this Court grant the Plaintiff/Appellant its costs herein expended and that this Court grant any and all other relief to which plaintiff/appellant may appear entitled.

Respectfully submitted,

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

Department of Law
200 East Main Street
Lexington, Kentucky 40507
Telephone: (859) 258-3500

BY: 

Michael R. Sanner
Attorney Senior

ATTORNEY FOR PLAINTIFF/APPELLANT

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INITIAL REQUEST

Under the Kentucky Open Records Act § 61.872 et seq., I am requesting the following information relating to all of the listed surveillance technologies owned or used by the Lexington Police Department. If the LPD does not own, use, or have access to any of the technologies, please specifically note that this is the case.

- Cell site simulators (stingrays)
 - Automatic license plate readers
 - Video and audio monitoring and/or recording technology
 - Drones
 - Through-the-wall radar
 - Biometric surveillance technology, including voice recognition, facial recognition, and iris scanners.
 - Mobile DNA capture technology
 - Social media monitoring software
 - Radio-frequency I.D. (RFID) scanners
 - Surveillance enabled or capable light bulbs or light fixtures
 - Tools used to gain unauthorized access to a computer, computer service, or computer network
-
- Purchase orders for the acquisition of any of these technologies.
 - Grant applications for the acquisition of any of these technologies.
 - Applications to any federal program for the acquisition of any of these technologies.
 - Receipts for the purchase of any of these technologies.
 - Written policies governing the use of any of these technologies, including information relating to data sharing and retention.
 - Training manuals relating to the use of these technologies.
 - Contracts with any outside vendor that operates, maintains or monitors any of these technologies on behalf of LPD.
 - Copies of all Memorandums of Understanding with any federal law enforcement agency including, but not limited to the FBI, DEA, and ATF, relating to the use of surveillance technology, or the sharing of surveillance data and information.
 - Any agreements relating to surveillance or the sharing of surveillance data with other state law enforcement agencies, including but not limited to the Kentucky State Police.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$20. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the Lexington Police Department's use of surveillance technologies. I am a freelance journalist and this information is being gathered as a public service. This information is not being sought for commercial purposes.





LEXINGTON POLICE DEPARTMENT

150 East Main Street • Lexington, KY 40507 • (859) 258-3600

July 20, 2017

OR-17-784

Michael Maharrey
1300 Smoky Mountain Ct.
Lexington, KY 40515

Re: OR-17-784

Dear Mr. Maharrey,

In response to your request received on July 17, 2017 you have requested the following:

"The following information relating to all of the listed surveillance technologies owned or used by the Lexington Police Department. If the LPD does not own, use or have access to any of the technologies, please specifically note that this is the case."

RESPONSE:

The Lexington Police Department maintains an inventory of 29 cameras available for a variety of video surveillance applications. Cameras are deployed as needed in support of active investigations in accordance with SOP BOI 93-46A. Criteria for Surveillance Conducted by Special Investigations Section. These devices are only deployed in accordance with department policy, state and federal laws as well as applicable case law.

In addition, the Lexington Police Department owns 824 Body Worn Camera's. Our office is releasing the General Order for Body Worn Camera – G.O. 2015-15 Body-Worn Cameras pursuant to your request.

Further, the Lexington Police Department does not possess any of the following surveillance technologies:

- Cell site simulators (stingrays)
- Automatic license plate readers
- Drones
- Through-the-wall radar
- Biometric surveillance technology, including voice recognition, facial recognition, and iris scanners, Mobile DNA capture technology
- Social Media monitoring software

EXHIBIT

- Radio-frequency I.D. (RFID) scanners
- Surveillance enabled or capable light bulbs or fixtures
- Tools used to gain unauthorized access to a computer, computer service, or computer network

As such, we do not maintain any records, policies, procedures, and/or regulations governing them. Therefore, your request for information has been denied as the Attorney General has stated that agencies do not have to provide documents that do not exist, nor honor requests for information as opposed to requests for specifically described documents, nor create records that do not already exist in order to answer questions, nor are they required to do research to make lists or compile information to answer questions. 00-ORD-04, 99-ORD-71, 01-ORD-216. The Open Record provisions do not require public agencies to carry out research or compile information to confirm to the parameters of a given request.

The Lexington Police Department routinely shares criminal intelligence information (which sometimes includes surveillance) with other local, state and federal law enforcement partners as outlined in General Order 2015-13 Criminal Intelligence and both permitted and encouraged by 28 CFR Part 23 and the National Criminal Intelligence Sharing Plan.

The purchase orders, grant applications, federal program applications and purchase receipts, training manuals and written policies governing the use of any of these technologies and SOP BOI 93-46A are exempt pursuant to KRS 17.150(2)(b)(c) and KRS 61.878(1)(m) which states:

KRS 17.150(2)(b)(c)

Intelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made. However, portions of the records may be withheld from inspection if the inspection would disclose: (b) Information of a personal nature, the disclosure of which will not tend to advance a wholesome public interest or a legitimate private interest; (c) Information which may endanger the life or physical safety of law enforcement personnel.

KRS 61.878(1)(m)

*“Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly;
(m) 1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act...”*

Therefore, the Lexington Police Department is unable to provide the requested documentation and the aforementioned documentation is also denied.

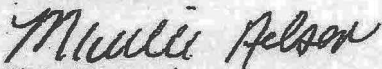
The Lexington Police Department has completed your request. The abovementioned documents are available for inspection for thirty days from the date of completion. You have the option to review the documents before purchasing them at 150 E. Main Street between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. If you decide to forego that option, the documents can be purchased for \$1.20. This fee includes twelve (12) pages at \$.10 per page. Payment can be made by cash, check or money order. If paying with a check or money order, please make it payable to the Lexington Police Department. If the documents mentioned herein are not retrieved within the allowed thirty days, they will be returned to the filing system and the matter will be considered closed.

Please note, future requests for the same documentation may be denied pursuant to the following Attorney General opinion:

"The Attorney General has held that a public agency may properly rely on KRS 61.872(6) to deny a duplicative request for the same records unless the requestor "can explain the necessity of reproducing the same records which have already been released to him, such as loss or destruction of the records." 95-ORD-105, p.7."

If you have any questions please feel free to contact our office.

Respectfully,



Michelle Nelson

Assistant Records Custodian
Lexington Police Department
859.258.3481



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR,
ATTORNEY GENERAL

SEP 11 2017
pt

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

17-ORD-179

September 8, 2017

In re: Michael Maharrey/Lexington Police Department

Summary: Lexington Police Department's initial and supplemental responses lacked the specificity required under KRS 61.880(1) and 61.880(2)(c). LPD failed to satisfy its burden of proving that disclosure of the records in dispute would have a reasonable likelihood of threatening the public safety as required to successfully invoke KRS 61.878(1)(m), and improperly relied upon KRS 17.150(2)(b) and (c); KRS 17.150(2) is facially inapplicable. LPD cannot produce that which it does not have and thus properly denied request as to nonexistent records.

Open Records Decision

The question presented in this appeal is whether the Lexington Police Department ("LPD") violated the Kentucky Open Records Act ("Act") in partially denying Michael Maharrey's undated request for certain records pertaining to "all of the listed surveillance technologies owned or used by the [LPD]. If the [LPD] does not own, use, or have access to any of the technologies, please specifically note that this is the case."¹ Mr. Maharrey asked for the following:

¹ The following items were listed:

- Cell site simulators (stingrays)
- Automatic license plate readers
- Video and audio monitoring and/or recording technology
- Drones
- Through-the-wall radar

EXHIBIT
2

- Purchase orders for the acquisition of any of these technologies.
- Grant applications for the acquisition of any of these technologies.
- Applications to any federal program for the acquisition of any of these technologies.
- Receipts for the purchase of any of these technologies.
- Written policies governing the use of any of these technologies, including information relating to data sharing and retention.
- Training manuals relating to the use of these technologies.
- Contracts with any outside vendor that operates, maintains or monitors any of these technologies on behalf of [the LPD].
- Copies of all Memorandums of Understanding with any federal law enforcement agency including, but not limited to, the FBI, DEA, and ATF, relating to the use of surveillance technology, or the sharing of surveillance data and information.
- Any agreements relating to surveillance or the sharing of surveillance data with other state law enforcement agencies, including but not limited to the Kentucky State Police.

With the exception of what Mr. Maharrey described as "Video and audio monitoring and/or recording technology," the LPD denied possessing or using any of the listed technologies; accordingly, the LPD advised that it does not "maintain any records, policies, procedures, and/or regulations governing them."

The LPD cannot produce nonexistent records for inspection or copying; nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that certain records exist. See *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 341 (Ky. 2005) ("before a complaining party is entitled to such a hearing [to refute the agency's claim that records do

-
- Biometric surveillance technology, including voice recognition, facial recognition, and iris scanner.
 - Mobile DNA capture technology
 - Social media monitoring software
 - Radio-frequency I.D. (RFID) scanners
 - Surveillance enabled or capable light bulbs or light fixtures
 - Tools used to gain unauthorized access to a computer, computer service, or computer network.

not exist], he or she must make a *prima facie* showing that such records do exist"); 07-ORD-188; 14-ORD-145; compare *Eplion v. Burchett*, 354 S.W.3d 598, 604 (Ky. App. 2011)(declaring that "when it is determined that an agency's records do not exist, the person requesting the records is entitled to a written explanation for their nonexistence"); 12-ORD-195. The record on appeal is devoid of any showing and the right to inspect records only attaches if the records being sought are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2); 02-ORD-120, p. 10; 04-ORD-205; 07-ORD-190. A public agency's response violates KRS 61.880(1), "if it fails to advise the requesting party whether the requested record[s] exist[]," but discharges its duty under the Act in affirmatively indicating that no such records exist and explaining why if appropriate. On many occasions, the Attorney General has expressly so held. 04-ORD-205, p. 4; 99-ORD-98; 09-ORD-029; 11-ORD-069. Under the circumstances presented, our duty is not "to conduct an investigation in order to locate records whose existence or custody is in dispute." 01-ORD-36, p. 2. Rather, KRS 61.880(2)(a) narrowly defines our scope of review.

However, this office has recognized that "the existence of a statute, regulation, or case law directing the creation of the requested record" creates a rebuttable presumption of the record's existence at the administrative level, which a public agency can overcome "by explaining why the 'hoped-for record' does not exist." 11-ORD-074, p. 4; 12-ORD-038. No such authority has been cited here. See 11-ORD-091 (appellant did not cite, nor was the Attorney General aware of, "any legal authority requiring agency to create or maintain" the records being sought from which their existence could be presumed under 11-ORD-074); 11-ORD-118. Because Mr. Maharrey "produced no affirmative evidence . . . that [the LPD] possesses [or uses the specified technologies, records pertaining to which] he has requested, we do not have a sufficient basis on which to dispute the agency's representation that no such records exist." 09-ORD-214, pp. 3-4; see 07-ORD-033. In the absence of a *prima facie* showing, or any evidence to suggest that the LPD ever had occasion to possess or maintain such records, the agency's disposition of Mr. Maharrey's request is affirmed in this respect.

LPD further advised that it "maintains an inventory of 29 cameras available for a variety of video surveillance applications. Cameras are deployed as needed in support of active investigations in accordance with SOP BOI 93-46A. Criteria for Surveillance Conducted by Special Investigations Section."

According to LPD, these devices "are only deployed in accordance with department policy, state and federal laws as well as applicable case law." In addition, LPD "owns 824 Body Worn [Cameras]." LPD released "the General Order for Body Worn Camera - G.O. 2015-15-Body-Worn Cameras pursuant" to Mr. Maharrey's request. In addition, LPD advised that it "routinely shares criminal intelligence information (which sometimes includes surveillance) with other local, state and federal law enforcement partners as outlined in General Order 2015-13 Criminal Intelligence and both permitted and encouraged by 28 CFR Part 23 and the National Criminal Intelligence Sharing Plan." LPD maintained that responsive "purchase orders, grant applications, federal program applications and purchase receipts, training manuals and written policies governing the use of any of these technologies and SOP BOI 93-46A are exempt pursuant to KRS 17.150(2)(a)(b) and KRS 61.878(1)(m)."

On appeal, Mr. Maharrey asserted that records pertaining to "the acquisition of surveillance technology such as purchase orders and receipts, or grant applications to federal agencies such technology would not reveal specific tactical information that could compromise law enforcement operations, nor would it put law enforcement officers at risk." The public "has a right to know how government agencies are spending taxpayer dollars," Mr. Maharrey continued, "and what types of surveillance technology law enforcement agencies use in their communities." Mr. Maharrey acknowledged that releasing "training manuals and written policies governing the use of surveillance technology could reveal tactical information that could compromise covert surveillance," but argued that LPD "should provide the requested documentation with the option of redacting operationally sensitive information." A blanket refusal such as that given by LPD, Mr. Maharrey asserted, exceeds the parameters of the statutory exceptions upon which LPD relied. Based upon the following, this office agrees.

KRS 61.880(1) provides that a "response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." (Emphasis added). In construing the mandatory language of KRS 61.880(1), the Kentucky Court of Appeals observed that the "language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of records to provide *particular and detailed information* in response to a request for documents. . . . [A] limited and perfunctory response [does not] even remotely

compl[y] with the requirements of the Act-much less [amount] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); 04-ORD-208; 07-ORD-226; 12-ORD-211. In other words, a public agency must cite the applicable statutory exception, if any, and provide a brief explanation of *how* that exception applies to the records being withheld, or portions thereof, per KRS 61.880(1), in order to satisfy the burden of proof that KRS 61.880(2)(c) imposes upon public agencies. 04-ORD-106, p. 6; 03-ORD-045.

Although there is no "clear standard of proof under the Kentucky Open Records Act, with one narrow exception [codified at KRS 61.872(6),"] this office has long recognized, "it is clear that the *burden* of proof in sustaining public agency action in the event of an appeal to the Attorney General, or to the circuit court, is on the agency. KRS 61.880(2)(c); KRS 61.882(3)." 00-ORD-10, pp. 10-11(citation omitted)(original emphasis). A "bare assertion" simply does not satisfy that burden. *Id.*, p. 11. "Whereas in most disputes both sides have more-or-less equal access to the relevant facts, so that factual assertions and legal claims can be adversarially tested," the Kentucky Supreme Court observed, "in ORA cases only the agency knows what is in the records." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). A public agency "should provide the requesting party and the court with sufficient information about the nature of the withheld record (or the categories of the withheld records) . . . to permit the requester to dispute the claim and the court to assess it." *Id.* at 852. See 15-ORD-003 (agency failed to provide sufficient detail in either its original or its appeal response); 14-ORD-039.

In denying Mr. Maharrey's request, LPD neglected to cite KRS 61.878(1)(l), pursuant to which KRS 17.150(2) is deemed incorporated into the Act; LPD quoted the purportedly controlling language of KRS 17.150(2)(b) and (c), as well as KRS 61.878(1)(m)1., but failed to provide any explanation of how any of those statutory exceptions applied to specific records or information withheld as required under KRS 61.880(1). On appeal, the LPD reiterated its agency's original bases for denial and elaborated regarding KRS 17.150(2) and 61.878(1)(m) jointly, and generally, as follows:

[T]he special investigations section of the Division of Police advises that the documentation pertaining to the purchase of these technologies including purchase orders, grant applications, federal

program applications and receipts would reveal specific models of equipment the [LPD] uses and would jeopardize the safety of officers and informants who utilize the technology in an undercover capacity. Additionally, if the specific equipment were public knowledge, it would decrease the effectiveness of their deployment and endanger critical investigations. The release of training manuals would create the same risks for the same reason.

Bearing in mind that public agencies like the [LPD] have the burden of proof under KRS 61.880(1) and 61.880(2)(c) in denying requests, "the Attorney General must conclude that both responses lacked the requisite specificity and thus were both procedurally and substantively deficient."² 12-ORD-211, pp. 7-8. That is particularly true with regard to LPD's invocation of KRS 61.878(1)(m), which authorizes the withholding of:

1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terroristic act and *limited to*:
 - a. Criticality lists resulting from consequence assessments;
 - b. Vulnerability assessments;
 - c. Antiterrorism protective measures and plans;
 - d. Counterterrorism measures and plans;
 - e. Security and response needs assessments;
 - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These

² On appeal, LPD advised that it was "trying to gather purchase orders for the" specified technologies. "Because of the age of some of the technologies," LPD observed, "some of the purchase orders may have been destroyed pursuant to the regular retention schedule. Once all of the purchase orders showing expenditure of taxpayer money are gathered, the specific models of the equipment purchased will be redacted pursuant to the above referenced statutes because the release would jeopardize the criminal investigation and safety of officers that are undercover." LPD did not comply with KRS 61.872(5) in delaying release of these responsive public records nor did it cite the applicable records series from its retention schedule. See discussion below concerning the propriety of its reliance on the referenced exceptions.

- critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
- g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and
 - h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact location of hazardous chemical, radiological, or biological materials.

- 2. As used in this paragraph, "terrorist act" means a criminal act intended to:
 - a. Intimidate or coerce a public agency or all or part of the civilian population;
 - b. Disrupt a system identified in subparagraph 1.f. of this paragraph ["critical systems, including public utility critical systems"]; or
 - c. Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.

(Emphasis added.) This office has recognized that "[s]uccessfully invoking KRS 61.878(1)(m), popularly known as the 'homeland security' exception, requires a public agency to meet a heavy burden. *See, e.g.,* 09-ORD-100; 05-ORD-175." 09-ORD-124, p. 5 (finding the City of Bardstown had not made a "serious effort to meet this burden"). In 05-ORD-175, for example, this office rejected the agency's reliance on KRS 61.878(1)(m)1.f. as the basis for denying access to "infrastructure records and the security of critical systems, including information technology." *Id.*, p. 2. This office agreed "with that portion of the [Transportation] Cabinet's position that the CICS is an information technology system as defined in KRS 61.878(1)(m)1.f. and that it could be subjected to a 'terrorist act,' such as a criminal act intended to '[d]isrupt a system identified in subparagraph 1.f.' KRS

61.878(1)(m)2.b." *Id.*, p. 4. The Attorney General nevertheless concluded that responses by the Cabinet failed to "establish how disclosure of the records in dispute, i.e., records that reveal the level of access of each person in state government with CICS privileges would result in a 'reasonable likelihood of threatening the public safety by exposing a vulnerability,' as required by KRS 61.878(1)(m)." *Id.*

Again relying upon the reasoning of 05-ORD-175, this office subsequently found that the Madison County and Madison County Emergency Management Agency failed to satisfy their statutory burden of proof in partially denying a request for public records pertaining to "the planning, funding, and decision to locate and construct a free standing 300 plus foot antenna tower on county owned land that lies immediately adjacent to a partially developed residential subdivision." 09-ORD-100, p. 1. The agencies had invoked KRS 61.878(1)(m)1.f. and g. in declining to provide "the engineering, structural, civil, or any other engineering or design or operational information about our new emergency communications system." *Id.*, p. 2. Significantly, the Attorney General noted in referring to 05-ORD-175 that "[c]ritical to our determination was the agency's failure to meet its burden of proof in establishing a reasonable likelihood of threatening the public safety, the linchpin upon which the language of the exemption turns." 09-ORD-100, p. 4. In 12-ORD-136, the agency denied access to "infrastructure records, certain maps [seemingly referring to 1.g.] and drawings," thereby implicating a different portion of 61.878(1)(m)1.f., but 05-ORD-175 remained controlling. When viewed in light of the fundamental policy codified at KRS 61.871, the mandatory language of KRS 61.880(2)(c) and the holding of 05-ORD-175, this office also found the agency's denial was deficient in 12-ORD-136.

As in 05-ORD-175, this office recognized in 09-ORD-100 that the records in dispute "consist, in part, of communications infrastructure records per KRS 61.878(1)(m)1.f. and g., and that the infrastructure system to which they relate is vulnerable to disruption per KRS 61.878(2)(m)(b)." *Id.* However, the agencies' broad assertion coupled with recitation of the statutory language was "not, standing alone, . . . sufficient to satisfy the agencies' burden of proof even if, in the agencies' view, their rationale is evident." *Id.* (Emphasis added.) In so holding, this office reasoned:

The restrictive language found at KRS 61.878(1)(m)1.a. through h. and KRS 61.878(1)(m)2. requires that disclosure of the disputed records must have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act as defined at, and only as defined at, KRS 61.878(1)(m)2. The inclusion of these distinct and separate requirements imports a legislative resolve that the provision be invoked judiciously and only when all requirements have been met. Consistent with "[g]eneral principles of statutory construction hold[ing] that a court must not be guided by a single sentence of statute but must look to the provisions of the whole statute and its objects and policy," *County of Harlan v. Appalachian Regional Healthcare, Inc.*, Ky. 85 S.W.3d 607, 611 (2002), the statement of legislative intent found at KRS 61.871 . . . and the assignment of the burden of proof to public agencies found at KRS 61.880(2)(c), we conclude that the [agencies] failed to meet their burden of proving that there is a reasonable likelihood that disclosure of the records withheld threatens the public safety by exposing a vulnerability that could lead to the disruption of the communications system.

Id., p. 4. This office reaches the same conclusion here. See 15-ORD-041 (reaffirming 09-ORD-100 in holding that Kentucky State Police failed to satisfy its burden as it was insufficient to merely state "that surveillance camera footage could expose a vulnerability in a building's security system" and KSP "articulated a potential risk of danger to individual officers and employees, but not a reasonably likely threat to the general public"); 16-ORD-059 (adopting the reasoning of 09-ORD-100 and 15-ORD-041 in holding that agency did not satisfy its burden under KRS 61.878(1)(m)1.g. to justify deny request for video footage).

LPD did not justify its reliance on KRS 61.878(1)(m) in simply quoting KRS 61.878(1)(m)1. LPD did not specify which subparagraph, if any, was applicable, either initially or in responding to Mr. Maharrey's appeal, nor did LPD establish if or how disclosure would create a "reasonable likelihood of threatening the public safety by exposing a vulnerability" in the manner

described. The remaining question is whether LPD properly invoked KRS 17.150(2) as the alternative basis for denial, which, in relevant part, states:³

- (2) Intelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made. However, portions of the records may be withheld from inspection if the inspection would disclose:
 - (b) Information of a personal nature, the disclosure of which will not tend to advance a wholesome public interest or a legitimate private interest;
 - (c) Information which may endanger the life or physical safety of law enforcement personnel[.]

This office has consistently determined that the term "investigative report" is "broad enough to extend to laboratory, forensic, and other reports generated in the course of an investigation." 05-ORD-246, p. 2. Conversely, the Attorney General has consistently recognized that KRS 17.150(2)(b) only applies, "by its express terms, to 'intelligence and investigative reports maintained by criminal justice agencies.'" 06-ORD-230, p. 9; 09-ORD-227. With the exception of a general claim that disclosure would "endanger critical investigations," LPD has not referenced any ongoing investigation here nor did Mr. Maharrey request intelligence or investigative reports. Here, as in 06-ORD-230 and 09-ORD-227, the records in dispute "cannot properly be characterized as intelligence or investigative reports." 06-ORD-230, p. 9; 16-ORD-088. Thus, KRS 17.150(2) is facially inapplicable.

Even assuming that KRS 17.150(2) was not facially inapplicable to "grant applications, federal program applications and purchase receipts, training manuals and written policies" governing use of the specified technologies, none

³ Pursuant to KRS 17.150(3):

When a demand for the inspection of the records is refused by the custodian of the record, *the burden shall be upon the custodian to justify the refusal of inspection with specificity.* Exemptions provided by this section shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this section.

(Emphasis added.)

of the above is likely to contain any "[i]nformation of a personal nature" nor has LPD identified any such information is contained therein; further, there is a "wholesome public interest" that disclosure would serve as Mr. Maharrey succinctly described on appeal. The assertion by LPD that information contained in some of the records would fall within the parameters of KRS 17.150(2)(c) is entirely credible though LPD is required to "separate the excepted and make the nonexcepted material available for examination" per KRS 61.878(4) rather than denying access to all of the responsive documents in their entirety. 16-ORD-273, p. 4. See *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 88 (Ky. 2013)(citing KRS 61.878(4) and holding that "blanket denials of ORA requests" are not permitted); 12-ORD-197 (Sheriff would have been required "to provide those portions of the policy and procedure manual to which the exception did not apply" even assuming that he discharged his duty under KRS 61.880(1)).⁴ In summary, LPD properly denied the request as to nonexistent records but failed to justify its reliance on KRS 61.878(1)(m)1. and 17.150(2).

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS

⁴ 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

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61.880(3), the Attorney General must be notified of any action in circuit court, but must not be named as a party in that action or in any subsequent proceeding.

Andy Beshear
Attorney General

Michelle D. Harrison

Michelle D. Harrison
Assistant Attorney General

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Distributed to:

Michael Maharrey
Michelle Nelson
Janet Graham
Michael Sanner

Jim Gray
Mayor



LEXINGTON

September 14, 2017

Janet M. Graham
Commissioner

Michael Maharrey
1300 Smoky Mountain Court
Lexington, Kentucky 40515

Re: Open Records Request
Log No. 17-0778

Dear Mr. Maharrey:

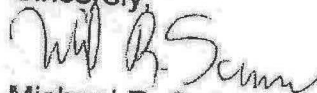
This is a follow-up to your open records request for Purchase Orders, Grant Applications, Federal Program Applications, Purchase Receipts, training manuals and written policies governing the use of 29 cameras used by the Intelligence Units and the body worn cameras.

These documents are now available for your review in the Department of Law, 200 East Main Street, 11th Floor. There are 467 documents. Should you wish copies of these documents the cost is \$.10 per page or \$46.70.

The documents are available for your review subject to the following: portions of the documents have been redacted pursuant to KRS 17.150(2)(b)(c) and KRS 61.878(1)(m) and KRS 61.872(6). Identification of the exact make, model and maker of the surveillance equipment would jeopardize the safety of officers and informants who utilize the technology in an undercover capacity. Furthermore, this equipment is used in current and future criminal investigations. If the specific equipment were public knowledge, it would decrease the effectiveness of their deployment and endanger critical investigations. The release of training manuals would create the same risk for the same reason.

After you have inspected the documents copies may be made at \$.10 per page. The documents will be available for 30 days from the date of this letter after which time the documents will be returned to the file and this matter will be considered closed.

Sincerely,


Michael R. Sanner

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