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20-ORD-142

September 2, 2020

In re: Jacob Ryan/Louisville Metro Police Department

Summary: Louisville Metro Police Department ("Department") failed to respond to an open records request within the statutory time period. The Department met its burden to show that Incident Action Plans were "antiterrorism protective measures and plans" under KRS 61.878(1)(m)1.c and that their disclosure would have a reasonable likelihood of threatening public safety by exposing vulnerabilities in the Department's potential response to protests that turn violent. The Department did not violate the Open Records Act ("the Act") by failing to provide records that did not exist.

Open Records Decision

On June 1, 2020, Jacob Ryan ("Appellant") requested the "Incident Action Plan, rules of conduct, [and] After-Action Report completed or compiled in relation to protest events between" May 28 and June 1, 2020. The Department failed to respond to Appellant's request until June 30, 2020.

Normally, a public agency must respond to an open records request within 3 business days. KRS 61.880(1). To address the novel coronavirus public health emergency, however, the General Assembly modified that requirement when it enacted Senate Bill 150 ("SB 150"), which became law on March 30, 2020, following the Governor's signature. SB 150 provides, notwithstanding the provisions of the Act, "a public agency shall respond to the request to inspect or receive copies of public records within 10 days of its receipt." SB 150 § 1(8)(a). The Department violated the Act by failing to respond to Appellant's request within 10 days.

On June 30, 2020, after Appellant had filed this appeal, the Department denied Appellant's request under KRS 61.878(1)(m), and explained that the requested records "contain LMPD strategies, proposed medical routes, gathering places for LMPD and other tactical and operational information that, if released, could place LMPD personnel and civilians at greater risk of being harmed." Appellant objected that the denial was overly broad and that the Department had failed to meet its burden of proof.

The Department issued a supplemental response on July 21, 2020, and further explained that it denied of the request for Incident Action Plans under KRS 61.878(1)(m)1.c and 1.d. The Department stated that those records "contain strategic and tactical information such as roll call locations/staging areas, hospital routes and radio channels," the release of which would "directly affect the vulnerability" of the Department's "counterterrorism/antiterrorism protective measures and plans." The Department asserted that disclosure of the records would endanger the safety of both the public and police officers because "officers have been directly targeted with violence dealing with civil disturbance." Specifically, Department intelligence "has intercepted multiple plans between violent demonstrators" which include "ambushing law enforcement officers at staging locations and known response routes," thus endangering public safety as well as the safety of officers. Additionally, the Department stated that the release of designated hospital routes poses a risk to public safety because persons planning criminal acts could use this information "to block those routes and prevent needed medical care." Finally, the Department asserted that its radio communication channels are sensitive information because "violent demonstrators" have accessed those channels "so that they may evade and attack officers as they move in real time," thus preventing the officers from responding to other locations as needed to protect public safety.

KRS 61.878(1)(m)1 exempts from disclosure "[p]ublic 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 terrorist act." The Department claims that its Incident Action Plans are exempt from the Act under subsections (1)(m)1.c, "[a]ntiterrorism protective measures and plans," and (1)(m)1.d, "[c]ounterterrorism measures and plans."

The Act does not define "antiterrorism" or "counterterrorism," nor have any decisions of the courts or this Office formulated a definition of "antiterrorism protective measures and plans" or "counterterrorism measures and plans."[1] However, KRS 61.878(1)(m)2 defines, in relevant part, a "terrorist act" as "a criminal act intended to [i]ntimidate or coerce a public agency or all or part of the civilian population." KRS 61.878(1)(m)2.a. Therefore, at a minimum, "antiterrorism protective measures and plans" under KRS 61.878(1)(m)1.c include response plans designed to protect the public in the event of a criminal act intended to intimidate or coerce either a public agency or the civilian population.

The Department describes its Incident Action Plans as "response tactics and strategies to various scenarios as they relate to protests." This alone would not meet the definition of "antiterrorism protective measures and plans," because a peaceful protest is not a criminal act. However, in this case, the Department has intelligence that its officers may be targeted for an "ambush" at staging locations and response routes, and that some individuals are monitoring Department radio channels to plan such attacks. A person who attempts to cause physical injury to a peace officer commits the criminal offense of assault in the third degree. KRS 508.025(1)(a). Furthermore, in the context of a protest against a police department, such an assault could be intended to intimidate or coerce the department, and in that case would constitute a "terrorist act" under KRS 61.878(1)(m)2.a. Therefore, under these facts, the Incident Action Plans, which specify radio frequencies, staging locations, and emergency response routes employed to prevent, protect against, mitigate, or respond to such acts, are "antiterrorism protective measures and plans" under KRS 61.878(1)(m)1.c.[2]

Because knowledge of the radio channels, staging locations, and emergency response routes could, in this case, facilitate potential terrorist acts, the disclosure of this information could have the effect of "exposing a vulnerability" within the meaning of KRS 61.878(1)(m)1. Furthermore, an attack, ambush, or blockade of emergency response routes identified in the Incident Action Plans "would have a reasonable likelihood of threatening the public safety" by incapacitating the Department or an ambulance service and hindering the ability to respond to

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[1] *But see* 05-ORD-119 (finding that records documenting the number of officers assigned to a security detail for the Vice President were "antiterrorism protective measures and plans").

[2] Because the Incident Action Plans are "antiterrorism protective measures and plans" under KRS 61.878(1)(m)1.c, this Office need not consider whether they are "counterterrorism measures and plans" under KRS 61.878(1)(m)1.d.

locations where police protection or medical care may be needed. Accordingly, the Department has met its burden of showing that the Incident Action Plans are exempt from the Act under KRS 61.878(1)(m)1.c.

In its supplemental response, the Department agreed to provide Appellant the requested "rules of conduct," which consisted of the Department's "Emergency Response Plan" and standard operating procedures for use of force and "Civil Disturbances/Disorderly Crowds." This appeal is therefore moot as to that portion of the request. 40 KAR 1:030 § 6.

The Department further stated that it "did not locate any 'After Action Reports.'" Once a public agency states affirmatively that it does not possess any responsive records, the burden shifts to the requester to present a *prima facie* case that the requested records do exist. *Bowling v. Lexington-Fayette Urban Cty. Gov't,* 172 S.W.3d 333, 341 (Ky. 2005). If the requester establishes a *prima facie* case that records do or should exist, "then the agency may also be called upon to prove that its search was adequate." *City of Ft. Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling,* 172 S.W.3d at 341). In this case, Appellant has not established a *prima facie* case that an "After Action Report" exists or should exist. Therefore, this Office is unable to find that the Department violated the Act as to that portion of the request.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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/s/ James M. Herrick

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Distributed to:

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