# Law Enforcement Digest

**MARCH 2015**

***Law enforcement officers: Thank you for your service, protection and sacrifice.***

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**HONOR ROLL**

**708th Basic Law Enforcement Academy – October 7, 2014 through February 19, 2015**

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| Best Overall: | Joshua N. Mills, Pierce County SO |
| Best Academic: | Nicolas J. Sangder, Renton PD |
| Patrol Partner Award: | Scott D. Bauer, Renton PD |
| Tac Officer: | Shelly Hamel, Renton PD |
| | Joseph Winters, King County SO |

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**SEARCH AND SEIZURE: OFFICERS' ENTRY INTO A GARAGE TO INTERVIEW AT RISK CHILDREN DURING A WELFARE CHECK FALLS UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT, AND OFFICERS LAWFULLY SEIZED A BOARD USED TO ABUSE THE CHILDREN UNDER THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.** State v. Weller, __ Wn. App. __, __ P.3d __, 2015 WL 686791 (February 18, 2015).

Law enforcement officers responded to a Child Protective Services investigator's request to conduct a welfare check on children suspected of suffering abuse. The officers arrived at the house to evaluate the home environment and the children's credibility to decide whether to place the children into protective custody.

When they arrived at the house, the officers explained to the children's caretaker that they were conducting a welfare check and asked if they could enter the house to speak with the children. The caretaker stepped away from the door and the officers entered the house.

The officers decided to speak with the children in the garage for privacy. The children told the officers that they were beaten with a board. While in the garage, the children - on their own initiative and not at the officers' direction - began looking for the board. The officer then saw a board in plain view. The officers could clearly see the board from where they were already standing in the garage, without moving to look for it. The officer "asked the children if that was the board used to beat them, and they replied that it was." At the time, the officers "had no idea that this was heading toward a criminal investigation." The officers seized the board as evidence. The caretakers were charged with assault and unlawful imprisonment.

The defense moved to suppress the board by arguing that "there was no immediate threat of injury to any persons and that entry into the house was a pretext for a search for evidence of a crime." Both the trial court and Court of Appeals, Division II, disagreed.

The Court relied on the "health and safety check exception" to the warrant requirement, which requires that: "(1) the officer subjectively believed someone needed health or safety assistance, (2) a reasonable person in the same situation would believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched."

In this case, these facts supported the "health and safety check exception": (1) "[t]he officers subjectively and reasonably believed that the . . . children needed health or safety assistance; (2) "[a] trained CPS investigator relayed to the officers her professional opinion that the . . . children were not safe and were expressing severe fear; (3) "the officers had a reasonable basis to associate the need for assistance with [this] residence - the CPS official told them that the children were in the residence;" and (4) "based on this information, the balancing process shows that the officers' initial entrance into the . . . residence was justified because the public's interest in having the officers perform a welfare check on the children outweighed the [caretakers'] privacy interests in the foyer of their residence."

As such, the Court held: "(1) the officers' entry into the garage to privately interview the children was lawful under the community caretaking function exception to the warrant requirement, and (2) the seizure of the board was lawful under the plain view exception to the warrant requirement."

**LED EDITORIAL NOTE**: **A critical fact in this case was that the officers "at all times" thought they were conducting a welfare check and not a criminal investigation. Both the trial and appellate courts noted that the officers went into the garage solely for privacy to speak with the children - not to find evidence of abuse or other crimes. Additionally, the Court of Appeals noted a distinction between the "emergency aid exception" and the "health and safety check exception." Unlike the "health and safety check exception," the "emergency aid exception" requires significant and immediate danger such as an imminent domestic violence incident or suicidal person. Since this case did not involve immediate danger to the children, the Court analyzed the officers' actions under the "health and safety check exception." It is unlikely that a court would apply the requirements of the "health and safety check" exception in cases where there is reason to believe that an emergency exists (i.e., immediate intervention is necessary to prevent imminent harm). In these situations, the requirements of the emergency aid exception are likely to apply.**

**Special thanks to King County Deputy Prosecuting Attorney Stephanie Guthrie for her assistance with this entry.**

**TORT: A "TAKE CHARGE" RELATIONSHIP BETWEEN COUNTY JAIL AND MENTALLY ILL INMATE MAY HAVE EXISTED THAT CREATED A DUTY TO PERSONS KILLED AND INJURED BY THE MENTALLY ILL INMATE AFTER HIS RELEASE FROM JAIL.**
Binschus v. State, __ Wn. App. __, __ P.3d __, 2015 WL 754230 (February 23, 2015).

For several years leading up to a rampage that killed six people and injured others, county law enforcement and the county jail had frequent contacts with Isaac Zamora. The estates of Zamora's victims, and the persons he injured, sued the county under various tort theories. A county is liable for a tort when: (1) the county owed a duty to the plaintiff; (2) the county breached that duty; and (3) the county's breach of duty caused the plaintiff's injury. The Court of Appeals, Division I, found that there were material issues of fact on whether the county (through police contacts and incarcerating Zamora) had a "take charge" relationship with Zamora - and thereby owed a duty to third parties.

A "take charge" relationship forms when: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319. The Court framed the questions as: (1) "whether the actor has taken charge of the third party"; and (2) "whether the actor knows or should know of the danger posed by the third party."

The Court based its holding on these facts that could have potentially shown that the county knew of should have known of Zamora's risk to the public:

- "Zamora had an extensive criminal history. By September 2008, he had been arrested 21 times in [the] County and incarcerated 11 times. [The] County Jail had a list of Zamora's criminal history at the time of 2008 incarceration."

- "[D]uring the years preceding the September 2008 tragedy, Zamora had several encounters with [the] County police whereby police officers became aware of Zamora's mental illness."

- "[W]hile at the [county] jail, Zamora was incarcerated in [the] unit, known for inmates who had severe behavioral issues and mental health issues. . . . Significantly, when [a] mental health professional . . .visited Zamora at jail, she submitted a strongly worded statement expressing concern regarding Zamora's mental health, noting his 'rageful thinking.' Another mental health counselor, . . ., later made note of Zamora's erratic and angry temperament and appearance, recommending that Zamora continue taking 'psych. meds.'"

- "[O]n September 2, 2008, Zamora's name on the computer at the 911 call center was tagged with a 220 alert code, which indicated that Zamora had mental health issues and was unstable."

**LED EDITORIAL NOTE**: **The Court did not expressly find that the county owed a duty to the plaintiffs under a "take charge" relationship. The Court found that under a summary judgment standard, where all reasonable inferences will be made in favor of the non-moving party, there were questions of material fact that could show that the county knew or should have known about Zamora's dangerous propensities (e.g., county law enforcement's frequent contacts with Zamora, and Zamora's behavior in the county jail). As always, agencies are encouraged to discuss these issues with their legal advisors.**

**PRA: THE NAMES OF WITNESSES, ACCUSED OFFICERS, AND THE REQUESTOR'S OWN IDENTIFYING INFORMATION IN AN INTERNAL INVESTIGATION ARE NOT EXEMPT FROM THE PUBLIC RECORDS ACT.** City of Fife v. Hicks, __ Wn. App. __, __ P.3d __, 2015 WL 774964 (February 24, 2015).

In the wake of a whistleblower complaint alleging racial discrimination, retaliation, misappropriation of public funds, gender discrimination and harassment, and improper romantic relationships, the City's attorney requested a private company to investigate the complaint. The investigation reported that the allegations were not sustained (i.e., "insufficient evidence to prove or disprove the allegation") or unfounded (i.e., "the allegation was false or not factual").

A requestor submitted a public records request for "records related to [the] whistleblower complaint and the [subsequent] investigation." The City responded that "it would provide the responsive records in installments." Before producing the first installment, the City sued the requestor and asked the trial court to grant a declaratory judgment and injunction. Among other arguments, the City asked the trial court to "determine the extent to which the names and identifying information of interviewees, witnesses, complainants, and the persons accused can be redacted."

To support its position that these names and identifying information were exempt, the City presented a declaration by one of the accused officers (an Assistant Chief) that stated "nondisclosure of the identities of witnesses in an internal investigation into police misconduct was essential to effective law enforcement, because witnesses would feel reluctant to cooperate if they knew that anyone could subsequently learn their identities and what they had said."

The requestor countersued the City and requested the trial court to find that the City violated the Public Records Act by redacting the identifying information of witnesses and accused officers

from the responsive records. The trial court found that the City violated the PRA by redacting witness names and names of some of the accused officers. The City appealed.

The Court of Appeals, Division II, found that the City violated the PRA by redacting the witness' names, the accused officers' names, and the requestor's name from the responsive records. Under RCW 42.56.240(1), information may be exempt if: (1) it is an investigative record or specific intelligence information; (2) compiled by a law enforcement agency; and (3) nondisclosure is essential to effective law enforcement or to protect a person's right to privacy.

In this case, the Court found that the investigation was an investigative record compiled by a law enforcement agency. However, the Court found that redacting the witnesses, officers, and requestor's names was not essential to effective law enforcement. The Court found that Assistant Chief's "generalized concerns" about disclosure chilling witnesses were "insufficient" to show that nondisclosure was essential to effective law enforcement.

In addition, the Court found that the City failed to show that redacting the identifying information was essential to protect a person's privacy. Specifically, the Court found that "the identities of the accused officers qualify as a matter of legitimate public concern", in part, because the allegations "concerned the official conduct of high-ranking police officials, inherently a matter of greater interest to the public than, for example, allegations of misconduct by rank-and-file officers."

Finally, the Court found that the City failed to prove that a specific exemption justified withholding the requestor's identifying information from the responsive records.

**LED EDITORIAL NOTE**: **When an agency withholds information based on RCW 42.56.240(1)'s "essential to effective law enforcement" prong, it is prudent to have specific facts on why disclosure in a specific case will chill witnesses or compromise effective law enforcement. In this case, the Court noted that the Assistant Chief's "declaration [said] nothing specific about the facts of the case." In contrast, releasing names of confidential informants (and describing how disclosing their names would make them reluctant to share information or jeopardize their safety) in pending or related cases may show a chilling effect that compromises effective law enforcement.**

**This is the first appellate decision finding that an agency should not redact a requestor's name from the responsive records. Whether an agency should or should not redact the requestor's name may depend on the exemption and the situation. For example, it may be prudent to produce a requestor's own medical records because the policy to withhold the records (i.e., to protect the patient's privacy) is absent. However, if the requestor is the subject in an active investigation, redacting the requestor's name may be essential to protect the investigation's integrity. As always, agencies are encouraged to discuss these issues with their legal advisors.**

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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