Law Enforcement Action Forum NEWSLETTER

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BITS AND PIECES OF NEWS: *Good News on the Information Protection Front, a New Law on Police Statements & a New Hit from the Sixth Circuit*

By Gene King, LEAF Coordinator

In 2006, Michigan Legislature's Lame Duck session passed a number of bills that concern law enforcement. LEAF felt this Newsletter should follow up on training that LEAF provided at the MACP Mid-Winter Conference. Two bills, which may affect how law enforcement agencies do business, were topics of discussion during this training. These bills are now law. They are the *Identity Theft Protection Act* and the *Disclosure by Law Enforcement Officer Act.* This issue also discusses an important case out of the Sixth Circuit of the US District Court that puts more responsibility on Michigan law enforcement to ensure that employees receive training.

LEAF Legal Advisor Has Good News On Identity Theft Act Change

In training held by LEAF on January 31, 2007, at the MACP Conference, about police agencies keeping personal information held in their files confidential, part of the discussion included requirements to report a "security breach" or the release of "Personal Information" under PA 566 of 2006, the new amendment to the *Michigan Identity Theft Protection Act*, MCL 445.61 - MCL 445.77. Upon further review of the Act, LEAF's Legal Advisor, Audrey Forbush of O'Connor, DeGrazia, Tamm, O'Connor, determined that the language in the new law defining "Agency" refers only to State Government. It, in fact, changes the old language and removes local government's responsibility for reporting a security breach of data to the owner. While this change lasts, it is good news. However, good news or not, it does not change the responsibility of local government to protect and keep confidential the personal information held in their files about the public.

Responsibility To Protect Information Remains

There are cases and laws at both the federal and state level that require the protection of personal information that, if released, could harm the owner. In past LEAF Newsletters (March 2001, *Victims Rights Act* & December 2002*, FOIA*) and again at the MACP, we discussed the need to protect private information from release to the public. The discussion often revolved around the *Michigan Freedom of Information Act*, PA 442 of 1976; MCLA 15.243 and the exemptions that are allowed in Section 13. These exemptions serve to protect law enforcement from releasing information that puts their own people or the public at risk. Section 13 also contains exemptions for information that is of a personal nature that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. In looking at the exemptions in FOIA, Section 13, it is clear the language in the statute exempts information that law enforcement may compile on individuals that is personal in nature and serves no legitimate purpose if disclosed. If departments would not release personal information about its employees, why should it release information about people who need their services?

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The issue of privacy is the thrust of two Michigan court cases that have spoken directly to this issue. In *Mager v. State, Dept. of State Police,* 460 Mich. 134, 595 N.W.2d 142 (1999), Mr. Mager wanted the release of the names and addresses of any person who owned a registered handgun. The Michigan State Police refused to grant his FOIA request and he sued. The Michigan Supreme Court ruled, **"A request for information on private citizens-unrelated to any inquiry regarding the inner workings of government- would be an unwarranted invasion of the privacy of those citizens."** On June 23, 2000 the Michigan Court of Appeals in *Midwestern Audit Services, Inc. v. Department of State Police,* (Unpublished Opinion) 2000 WL 33418082 (Mich.App.) (June 23, 2000) agreed with *Mager*. In this case, the plaintiff FOIA requested non-redacted copies of all UD-10 traffic crash reports for a period of three years. The Michigan State Police refused to provide the personal information listed on the forms. The Court said, "**The core purpose of the FOIA is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduc**t."

The public has a right to have access to records that reveal what the government is doing and how the government is doing it. However, the court has ruled that **the public does not have a right to personal information contained in government files when a person is fulfilling their statutory or moral obligation to report information or when the police are conducting legitimate investigations.**

In Michigan, there are other laws that require privacy of information such as the *Crime Victims Rights Act,* MCL 780.751 that demands that the victim's personal information and image not be released. Another is *CJIS Policy Council Act* (LEIN) MCL 28.214 that seeks to ensure that a person shall not access, use, or disclose nonpublic information governed under the act for personal use or gain or disclose information in a manner not authorized by the act.

On the federal level, the latest law requiring the protection of personal information is the *Health Insurance Portability and Accountability Act of 1996*. This law requires holders of medical information not to disclose the information to people who do not need to know it. It is addressed in the *Victim's Rights Newsletter*.

On the federal court side, three specific cases are important. The first is *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 195 (1989). In this case, Social Services received reports that a child was suffering abuse at the hands of his father. The father eventually killed the child. The U.S. Supreme Court ruled that the Due Process Clause created no substantial right to a minimal level of safety and security provided by government. The Court noted that while the state may be aware of the danger, it played no part in the creation, nor did it do anything to make the child more vulnerable to the dangers.

Since DeShaney, the courts have concluded there are two types of situations the state can create that might result in danger sufficient to violate the Due Process Clause:

> In the first, government places the person in a position that removes the person's access to remedies to address the harm (A prisoner does not receive medical care.).
>
> In the second, the state, through its actions, places a person in some heightened or special danger (Police make a drunk walk home.).

In *Kallstrom v City of Columbus* 136 F3d 1055 (Sixth Cir 1998) the City of Columbus, Ohio released the personal information of their undercover officers under the Ohio Public Records Act to the attorney for members of a drug gang that were under arrest. He passed the information on to the gang. The Court ruled that the release of the information did create a state created danger and violated the officers' Fourteenth Amendment rights. The Sixth Circuit said the ruling was not limited to situations when criminal defendants seek personal information but applied when the released information increased the risk that the information may fall in the wrong hands.

The Seventh Circuit in *Monfilis v Taylor* 166 F3rd 511 (7th Cir 1998) cert. denied 120 S. Ct 43 (1999). In this case, City of Green Bay released a 911 audio tape to a thief whom an anonymous caller identified as the person stealing materials from his workplace. The thief bragged at work that he was going to get the tape and identify who called. Monfilis, who was the anonymous caller, repeatedly called the Green Bay Police and told them the thief was violent and he was afraid. He was told the tape would not be released. Nobody told Dispatch, and Dispatch released the tape. This resulted in Monfilis death because the tape identified him.

All the cases cited here are graphic examples of the need for police departments to be diligent in how they handle the public's personal information. In most cases, there is protection under the law but departments must be diligent in removing the personal information before releasing a report or investigation. **There is no way to determine why an individual is looking for information.** Just because he or she was mixed up in an incident involving another person does not mean he or she has the right to examine all the data that the department requires for their reporting process on another individual. That is the main reason that the police obtain personal information is to ensure that some time in the future law enforcement can verify the identity of the person.

Action Steps

To make sure information is protected, Departments need to do the following:

- The Employer's Right to Search: Establish that employees have no expectation of privacy in the workplace and that all documents and equipment brought or used in the work environment are subject to inspection. (See LEAF Newsletter, A Public Employer's Right to Search, December 2005)

- Release of Information: The policy should outline what and how information can be released or removed from the department. Have one person ultimately responsible to release information from the department, especially for FOIA or any court order or subpoena. Regulate information that is removed from the department by employees in the course of doing business.

- Use of Computer Policy: The policy should include use of e-mail, the internet and LEIN. It is important to have an incident response plan that includes the use of a computer competent person who can move quickly to ensure records pertinent to the incident are preserved.

- Audit Policy: The department needs to have a regular internal audit process that requires periodic audits of the handling and release of information, audit of video recordings for officer performance, audit of computer security records and the inspection of equipment and materials used in the workplace by employees. Document all audits and inspections that are performed.

Michigan's New Disclosure By Law Enforcement Officer Act Does Not Change *Garrity*!

The Legislature passed and the Governor signed a bill -- which took immediate effect – that makes confidential any involuntary statement made by a police officer during an internal investigation by their department. Not only is the statement confidential under the law and, therefore, not open to public inspection, but any information derived from the statement is unusable in a criminal proceeding against the officer. The law does include some exceptions to the restriction of release for employers and the officer's labor or legal representatives. In all cases, the statement must remain confidential unless the officer who gave the statement authorizes its release. Go to MCL 15.391 – 15.395 for the full text of the new law.

Several LEAF members have asked how this law changes the Garrity rights of an officer. The short answer is that **it does nothing to change the application of *Garrity v New Jersey* 385 U.S. 493; 87 S. CT. 616; 17 L.Ed. 2d 562 [1967] to internal investigations.**

Management can still require officers to provide an accounting of how they have fulfilled their duties by requiring them to fill out a report, activity log, appear on department video/audio recordings, or otherwise perform their daily duties.

Officers still have their Fifth Amendment protections against self-incrimination. An officer can invoke their "Garrity" rights only when an investigation becomes criminal in nature and the officer is the focus of the investigation and has been ordered, under the threat of dismissal, to answer questions about the incident.

For more information on the application of Garrity Rights go to the LEAF *Manual for Law Enforcement Risk Control* and see the LEAF Newsletter, *Garrity — WHEN AND HOW IT APPLIES TO YOUR EMPLOYEES,* September 2002, in Chapter 13, Internal Investigation, Topical Resources.

New Sixth Circuit Case Requires Officer Training

Legal Advisor Audrey Forbush thought a Sixth Circuit U.S. District court case was important and should be brought to the attention of the LEAF Members. The case, *Griffith v. Coburn*, 473 F.3d 650 (Sixth Cir. 2007) [decided January 10, 2007] has at issue the reasonableness of using a chokehold to restrain a subject who allegedly died because of the application. In the Court's ruling on reversal of the granting of summary judgment by the district court, they took a twist that makes this case even more important. Here is a brief description of the incident:

It is important to understand that some of the facts of this case are in dispute. It seems the subject's mother came to seek the advice of the police because her son was acting strangely. Without being a threat, he was not eligible for involuntary commitment to the hospital. In the process of dealing with the situation, the officers found that he was wanted on a traffic warrant. All agreed that the son would be arrested and then taken for evaluation. The mother permitted the officers to enter her home to carry out the plan.

When the officers arrived at the home, the son was sitting on the couch watching TV. The officers told him about the warrant and asked for his date of birth. He refused to give information and protested that the warrant was not his. He remained passive and ignored the officers. The officers told him it would not be good to fight them, and then the officers moved a coffee table out of the way. This action resulted in a struggle with the son. The facts of the struggle are a point of dispute. At the end of the struggle, the son lay handcuffed face down on the floor. The mother protested that her son was having physical distress. The officers eventually checked him and applied CPR. The son was DOA at the hospital. The Medical Examiner ruled the cause of death to be asphyxia associated with physical restraint, specifically improper application of a neck restraint.

This Case Is Important

This case is very important because during the court's explanation for sending this case back, the Sixth Circuit said that a relevant factor was that the record established that the officers knew before they arrived at the house that the subject was having some mental or emotional difficulty that had caused alarm in his mother. The Court quoted their findings in *Champion v Outlook Nashville Inc.*, 380 F.3d 893,904 (Sixth Cir, 2004) which was similar to this case. The Court noted, "It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or retarded, even though the officers may not have known the full extent of (his) autism and his unresponsiveness. **The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted**." They referred to *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir.2003) in that the handcuffing of a mentally ill subject behind the back and using their entire weight on his upper torso to hold him down to apply hobbles violated clearly established rights. The Drummond court went on to say, "Any reasonable officer should have known that such conduct constituted the use of excessive force."

Audrey points out that the Court is being very specific about officers being responsible for recognizing mentally ill or emotionally distressed individuals. They also must be able to handle them without using excessive force. Even though the Michigan Mental Health Code at MCL 300.1427a allows officers to take reasonable steps to protect themselves when taking a subject in to custody for evaluation, the permissible force is that which an officer would use when arresting an individual for a warrantless misdemeanor. This situation is one in which there is little resistance. For more information, see the LEAF Newsletter, *Handling the Mentally Ill – Managing the Process*, June 2003.

This case demands our attention and puts the focus on the officers' actions. In fact, these actions may have increased the subject's resistance. The Court is holding the officers responsible for managing the situation based on the mental condition of the subject. Even though the court may have not specifically said so, its expectations appear to be that officers in these incidents need skills to recognize the situation, rather than unnecessarily escalating it, or decompressing the situation to avoid requiring a high level of force response.

Audrey is concerned because this is the first time in the Sixth Circuit that the Court has been this specific concerning delineation in the evaluation of force other than the reasonable officer found in Garner and Graham. This case raises the bar on what is considered the reasonable officer standard when facing these types of incidents.

Action Steps

There are specific things that Audrey recommends departments do to protect them from this exposure.

1. Make sure officers have documented training in how to recognize incidents where the subject may be mentally ill or suffering from emotional distress and the techniques that officers may use to avoid escalation of the situation or to decompress it.

2. Provide officers with mental health contacts and resources that they can use if the subject's behavior does not require officers to take immediate action. If none is available, ask for assistance from EMS.

3. Provide officers with documented training in what force techniques to use in incidents involving subjects who appear mentally ill or in emotional distress whose resistive behavior does not rise to the level for Intermediate Controls or Lethal Force.

4. Require officers to report accurately and in plain language the force that they used during an incident. The Courts will measure whether they can defend the need for the level of force they used and how it got to the point that force was required.

5. Make sure that Command audits these types of incidents to ensure officers are responding appropriately and within the parameters of policy and the law.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund has formulated Policy that fits most departments' operations. These Policies are found in the Manual for Law Enforcement Risk Control, which on the MML Web site. LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance with the loss control techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.

LEAF NEEDS YOUR HELP!

The MML has received several requests to provide the LEAF Newsletter electronically. Those who have requested electronic delivery say it allows them to share the Newsletter with members of their department more efficiently. Other members would like to be able to cut and paste information from the newsletter for their use just as they do with the LEAF Manual. The MML wishes to fulfill the request but needs your e-mail address to do so. The plan remains to publish the Newsletter each quarter covering important topics that affect public safety in Michigan.

Please e-mail **leaf@mml.org** with the following information:

- Your name,
- Position,
- The name of the municipal entity you represent, and
- Your e-mail address

This will guarantee you will not miss any future editions of the LEAF Newsletter. We will maintain all addresses in a separate LEAF database. The MML plans to convert the LEAF Newsletter to electronic delivery by January of 2008. Thank you for your help in making this transition.

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