

OIR
GROUP

**INTERIM REPORT REGARDING ISSUES SURROUNDING
THE DEATH OF KELLY THOMAS**

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Subsequent to the tragic in-custody death of Kelly Thomas, OIR Group was asked by the City of Fullerton to perform an independent review and investigation into the incident. One part of the assignment was to conduct an internal investigation into the incident to determine whether any of the involved officers violated policies and practices of the Fullerton Police Department (“FPD”). That investigation remains ongoing. A second part of the assignment was to examine current policies and practices of FPD and to offer recommendations intended to improve on those policies and practices. That review is also ongoing. Finally, criminal proceedings relating to the incident are currently pending. However, in an effort to begin to bring insight and transparency into issues surrounding the incident, OIR Group presents the following interim report and recommendations relating to issues prior and subsequent to the fatal incident. As detailed below, in its review of these issues, OIR Group found no evidence of intent by the Police Department to deceive or falsify but does offer recommendations as to some of these issues that, if followed, would likely improve its processes.

I.

The Circumstances Surrounding the Police Response

There have been questions raised about the initiation of the police response on July 5, 2011 that resulted in the eventual death of Mr. Thomas. The initial information promulgated by the Police Department was that the involved police officers were responding to a call for service. Some have disputed that there was such a call regarding Mr. Thomas that evening.

In response, OIR Group requested and received a copy of the actual dispatch recording. Our independent review of that recording indicated that a call was made on July 5, 2011 to an FPD dispatcher regarding an individual observed by the caller. The caller is recorded as stating that the individual was “roaming the parking lot”, “looking in cars”, and “pulling on handles”. The caller indicated that she knew the person being observed as “Kelly” and said the person was next to the bus station. The caller added that the person was observed “pacing through the cars and between each car”. The caller indicated that she observed that the individual was

not wearing a shirt and wearing a backpack. FPD records indicate that officers were dispatched to the location shortly after the call was received.

We located and interviewed the caller. The caller indicated that she was in the parking lot next to the bus station and talking with her husband on her cell phone when she observed the individual she knew from prior contacts as Kelly. She stated that she called police dispatch and related her observations as indicated on the recorded phone line.

A review of the audio of one of the responding officers' Digitally Activated Recorder ("DAR")¹ carried on his person indicates that the officers arrived at the location and asked a female if she had seen a male with no shirt in the area. The audio indicates that the female informed the officer that she had and pointed out his direction of travel. Later, the audio picks up part of the conversation between one of the responding officers and Mr. Thomas. During that conversation, Mr. Thomas is told by a Fullerton officer that they had received a call indicating Mr. Thomas had been trying to open car doors.

With regard to this issue, OIR Group has concluded that there was, in fact, a call for service made to the Fullerton Police Department on July 5, 2011, and that police arrived at that location in response to that call.

II.

The Back Pack

Official reports have indicated on the date of the incident, that Mr. Thomas was wearing a back pack and that items located during the search of that backpack became part of the officers' inquiry of Mr. Thomas. Some have questioned the legitimacy of those reports. Accordingly, OIR Group independently examined the issue.

A review of the Orange County Transit Authority videotape shows that Mr. Thomas is wearing a backpack at the time he is initially approached by Fullerton Police Officers. A review of the audio of the DAR of one of the responding officers further indicates that the officer asked Mr. Thomas if he could search the backpack to see if there was anything in the backpack with his name on it and Mr. Thomas assented to the search.

The audio from the DAR further reveals that one of the responding officers verbally indicates that the backpack contains mail relating to an attorney. At that point, the officer states that he suspects that Mr. Thomas may have received stolen property and radios dispatch to learn if the attorney may have reported stolen mail. Before dispatch can respond to that request, the force incident was underway.

¹ Fullerton Police policy requires that the DAR be activated when a citizen contact is made.

The night of July 5, the backpack was taken into evidence and the contents subsequently inventoried and photographed. That inventory and photographs indicate that the backpack did contain mail addressed to an attorney. The subsequent FPD investigation further revealed that the attorney to whom the mail was addressed had discarded it. The inventory further located a passport, employee identification, and other items apparently belonging to an individual other than Mr. Thomas. That individual was subsequently contacted by FPD investigators and it was learned that he had inadvertently left his backpack with those items at the nearby train station. That person identified the backpack retrieved on July 5 as the backpack he had left behind a few days earlier.

In sum, the evidence indicates that the initial search of the backpack provided sufficient reason for the responding officers to continue their investigation into the contents found therein even if eventually it was learned that the attorney correspondence was nothing more than discarded mail.

III.

The Booking Photo

Subsequent to Mr. Thomas' death, a media representative requested that the Police Department provide a booking photograph of him. The Department researched their records and located a photograph of a 2009 FPD arrest of Mr. Thomas and forwarded the photograph to the media representative. The Department provided other media outlets with the photograph upon request and eventually at least one outlet published the photo. Shortly thereafter, there was concern raised that the booking photo that had been released was not that of Mr. Thomas and that the Department had intentionally released the photograph of another person in an effort to present the visage of Mr. Thomas in an unfavorable light.

In response to this concern, OIR Group conducted a comprehensive examination of this issue. We examined the audio DAR recording of the FPD officer who made the trespass arrest in 2009. A review of that audio indicates that the person at the place of arrest identifies himself as Kelly Thomas. Later, on tape, the person being talked to by the officer provides a date of birth identical with Mr. Kelly Thomas' known date of birth.

We also reviewed the audio and video of the individual brought into the Fullerton jail of the man who identified himself as Kelly Thomas. This individual is heard in the jail again identifying himself as Kelly Thomas. During the booking process, the man is heard as providing a telephone number to jail personnel. The person can then be seen and heard talking on the telephone to an individual he refers to as "Grandma" and later another individual he addresses as "Mom". During the booking, the individual is seen signing a property sheet. The man shown on the video is similar in appearance to the booking photo that was released.

OIR Group researched the phone number provided by the man in the booking video and the number is associated with a number of people including a “Cathy Lee Thomas” and a “Kelly James Thomas”. OIR Group further obtained a copy of the fingerprint card obtained during the 2009 arrest and asked an independent fingerprint examiner to compare them to another known fingerprint array of Mr. Thomas. The fingerprint examiner found a match between the two sets of fingerprints. Finally, OIR Group retrieved a copy of the pre-booking form relating to the 2009 arrest and observed that the individual arrested that day signed the form as “Kelly James Thomas”. As a result of our review, we unequivocally concluded that the man who appears in the 2009 booking photo is Mr. Kelly Thomas.

While certainly a mistaken or intentional release of the wrong person’s booking photo would have greatly eroded the Fullerton community’s confidence in the Department, there still remains a significant issue about the Department’s decision to release the booking photograph at all. Generally, police departments in California have wide discretion about whether to release booking photographs. The law is also clear that law enforcement agencies also have discretion not to release booking photos, particularly here where the individual arrested is no longer in police custody. While generally OIR Group generally is a proponent of transparency and release rather than withholding information from public purview, there were clearly countervailing considerations unique to this case.

First, by the time the request for the photograph was made, Mr. Thomas’ role was not of suspect but of deceased potential victim. The law and general sentiment is that privacy interests of victims and their families are deserving of different considerations than an arrestee in custody. Further, in this case, the media’s interest in the 2009 booking photo did not stem from interest in the arrest of Mr. Thomas in 2009, but from Mr. Thomas being potentially victimized in a 2011 incident at the hands of Fullerton law enforcement. In our view, in determining whether to release the 2009 booking photograph, FPD should have considered and weighed these factors.

Even if the skepticism about releasing a photograph of the wrong man had not surfaced, the Department would likely still have been subject to criticism over the release of the 2009 photograph. The release by law enforcement of an unflattering booking photo of an individual who has died at the hands of police officers creates potential for the germination of inferences that the release was intended to portray Mr. Thomas in a negative light.² Those inferences, in fact, did occur in this case. And the problem with the development of such inferences is the intense difficulty in either proving or disproving such underlying motivation.

² In OIR Group’s experience, booking photos of persons who have just been arrested by police are never flattering.

A review of FPD's policies and practices shows there are no apparent written policies or protocols providing guidance on release of booking photographs. However, FPD's standard practice has been to consider a media request for booking photographs a public records act request, and has a history of routinely releasing such photographs. These circumstances are significant mitigating factors that should be considered in assessing the Department's decision to release the booking photo in this case. That being said, on a going forward basis, OIR recommends that the Department consider developing written internal policies to guide future requests consistent with the considerations articulated here. For example, the policy could make a distinction between the arrestee in custody versus a victim who has been previously arrested in determining whether to release the photo. In cases in which the victim is deceased, perhaps those guidelines should require consultation with surviving family members before such a photograph is released. The policy might also require written authorization at the highest level of the Fullerton command structure before a release is made. OIR Group is hopeful that FPD and the City will consider this recommendation as it charts its future path.

IV.

The Officers' Injuries

Shortly after the incident, the Department reported to the media that two of its officers had suffered "possible broken bones" as a result of the encounter. Some media outlets published this information to indicate that officers had received broken bones. Later, the Department informed some media outlets that, in fact, the officers had not broken any bones. The correction caused some members of the public to question the veracity of the Department and created a belief by some that the Department intentionally tried to fabricate or exaggerate the officers' injuries in an effort to create sympathy for them.

OIR Group has reviewed some of the medical records relating to the initial treatment of two officers who were involved in the incident. In both cases, initial documentation and triage indicated an early possibility that each may have suffered a fracture of the ribs or elbow respectively. In one case, x-rays eventually determined that there was no fracture to the ribs. In the second case, the officer was required to undergo surgery for a shoulder injury but it is unclear whether his elbow was ever actually fractured.

The question of how much information to release after a high profile incident and when has bedeviled law enforcement for a long time. There is inherent tension between the public's legitimate interest in learning some initial facts about the incident versus the potential that preliminary information gathered early in the process may not prove to be accurate.

In this case, while there are documents that indicate that treating physicians had not ruled out possible fractures to the officers at the time this information was disclosed, the

eventual diagnosis was apparently that there were no “broken bones”. It would have been advisable in this case to either delay the release of information about this issue until diagnoses were more definitive or to expressly make clear to the public that the information was extremely tentative and subject to further assessment by doctors.³ Secondly, once it was learned that subsequent medical examination had failed with certainty to detect the existence of broken bones, the Department would have been well-served to produce a clarifying public statement about the new facts. OIR Group recommends that the controversy surrounding this issue be used by the Department and the City as a stark reminder of the need to (1) get the information right; (2) if there is a felt need to produce information immediately, expressly alert the public about the tentative nature of the information; and (3) if it turns out that the initial information is inaccurate to disseminate corrections or clarifications quickly and broadly.

³ This report should not be taken that OIR Group is opining about how the officers acquired their injuries; rather, OIR Group is only prepared to say at this juncture that after the incident two officers did receive some medical attention.