

# The Firehouse Lawyer

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## Inside this Issue

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## EXTRA EMERGENCY EDITION

We decided to publish an extra edition this month because of the coronavirus emergency, since that topic has dominated our legal practice this month.

Starting in February, we have been inundated with calls and emails asking various questions about ways to deal with a crisis like this. This article summarizes just a few of the options that public-safety agencies may employ to respond to an emergency like this one. We recommend that you immediately review your department policies and resolutions to see if you are adequately dealing with these issues.

### 1. **Declare an Emergency.**

RCW 39.04.280 provides some options for dealing with emergencies, at least with respect to the application (or not) of public bid laws. It has been an infrequent question over the years that the Firehouse Lawyer has been practicing law and advising fire districts and regional fire authorities, but the question does come up over and over. We have consistently provided advice and sample resolutions for a board of elected officials to declare an emergency and to waive competitive bidding.

During the recent crisis, however, we have also developed another model resolution that

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delegates permanently to the Fire Chief the power to declare an emergency whenever the facts and circumstances justify it, so long as the board of elected officials acts within two weeks to enter findings, essentially ratifying the actions of the Chief. This resolution activates the Fire Chief's "emergency powers" under RCW 38.52.070 (2).<sup>1</sup> This means the Fire Chief can do what is necessary to deal with the emergency, including entering into contracts without bidding, or even exceeding any board-imposed limitations on his/her spending authority.

But what facts justify the declaring of an emergency? RCW 39.04.280, above referenced, provides a definition of emergency. The word means:

“unforeseen circumstances beyond the control of the municipality that either: (a) present a real, immediate threat to the proper performance of essential functions, or (b) will likely result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken.”

We certainly believe that the current coronavirus qualifies as an emergency. Of course, the Governor has already declared a state-wide emergency.

Our sample resolution is permanent in nature. Let me explain. The resolution permanently

<sup>1</sup>

<https://app.leg.wa.gov/RCW/default.aspx?cite=38.52.070>

delegates the power to declare emergencies from the board to the Chief so a meeting of the board is not even necessary to get started dealing with the emergency presented. The statute goes on to provide that if a contract is awarded without competitive bidding (when otherwise it would be required) then a written finding of the existence of an emergency must be made by the governing body and entered of record (presumably in meeting minutes) no later than two weeks after the contract award. In other words, the board ratifies the emergency declared by the chief and any consequent purchasing actions.

## **2. Open Meetings Questions.**

The OPMA also has an emergency clause, that allows the meeting place to be moved but also *suspends* all notice requirements of the statute. Since the main notice limitation is that a special meeting can only be held upon at least 24 hours written notice, this means that even that much notice is not required.

RCW 42.30.070 provides in pertinent part, as follows:

“If, by reason of fire, flood, earthquake or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting place other than the regular meeting site *and the notice requirements of this chapter shall be suspended during such emergency.*”

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Thus, as you can see, the requirements of both the bid laws and the open meetings law can be relaxed for a time during an emergency.

But clients still ask us, “What about public comment or participation by the public at all, if there is no notice?” Since the OPMA usually requires openness, this emergency situation is an exception, but you are free to provide some notice on your website and to allow attendance and participation by the public. You could even allow comments by email or to an assigned telephone number, in the effort to effectuate “social distancing.” There is no OPMA requirement for a public-comment period; the law requires ordinarily only that you be transparent by allowing the public to attend (without conditions upon attendance) and observe their government in action. If members of the public showed up at an emergency meeting, I would recommend they be allowed to attend all but any legitimately called executive session under RCW 42.30.110 or RCW 42.30.140.

Of course, the OPMA has long allowed participation in meetings by telephone or video conference. At a recent meeting of one of our clients, we had one board member and two attorneys participating remotely. Right now, this seems prudent. The only problem can be making sure you have the right technology and practices to ensure that all remote participants can be heard by those in attendance, including especially the public. More on this below.

We have been asked, “Can we require visitors to take a temperature or health check before

entry?” Probably not, since that would be a proscribed condition upon attendance. If an emergency is dire enough, I would just hold the emergency meeting without notice, which is certainly lawful.

Regardless of who attends, clearly the 6-foot separation between individuals should be maintained. It goes without saying that any board member or employee exhibiting virus or flu conditions should be sent home.

### 3. Payment to Vendors.

Another law that we have been recommending adopting (for years actually) is contained in chapter 42.24.180 RCW. This statute allows claims of vendors or creditors to be paid (this could include payroll) in advance of the board meeting when needed. The statute requires the responsible official who is approving the payment, such as the Fire Chief, or the Auditing Officer, or the District Secretary, to be bonded for at least \$50,000. We recommend a higher bond amount actually if they are approving vouchers over \$50,000. The approval process concludes with the Board ratifying the spending at the next regularly scheduled board meeting. Many of our clients have had such a resolution in place for years, but if you do not, we can provide a sample.

### 4. Continuation of Government

Another interesting idea occurred to us due to other questions being asked about having remote board meetings. We remembered that, in about 2007, there was a prospect of a similar crisis due to an outbreak of avian flu. We

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developed a model resolution providing for a Continuation of Government (COG) plan. Some of our clients undoubtedly adopted that and ever since have had a rudimentary COG plan in place even if they forgot about it. Those who did not adopt such a resolution could certainly do so now.

What this COG resolution does is pretty simple and limited but could be necessary during the current covid-19 outbreak. It provides for certain remedies in the event of one or more board members becoming “unavailable” temporarily during such a pandemic. This does not mean an extended absence that might lead to a vacancy on the board as that is already dealt with in various statutes. See, e.g. RCW 52.14.050 and RCW 42.12.070. Instead, this means the person is not even available to participate remotely by telephone or video conferencing, by reason of the described emergency. The COG plan allows for the appointment of a temporary commissioner (such as the Fire Chief or the District Secretary) so that a quorum may be obtained to legally conduct essential business, such as processing payroll or paying bills. This particular resolution uses the word “disaster” and not just “emergency,” which we suppose is appropriate, if things are so bad that you cannot muster a quorum. Any district that wants our model COG resolution, just like the others above, can get that with a phone call or email to us.

Thus, as you can see, the requirements of both the bid laws and the open meetings law can be relaxed for a time during an emergency. This is

enshrined in the Continuity of Government Act itself:

*Whenever, due to a catastrophic incident, or when such an event is imminent, it becomes imprudent, inexpedient, or impossible to conduct the affairs of a political subdivision at the regular or usual place or places, the governing body of the political subdivision may meet at any place within or without the territorial limits of the political subdivision on the call of the presiding official or any two members of the governing body. After any emergency relocation, the affairs of political subdivisions shall be lawfully conducted at such emergency temporary location or locations for the duration of the emergency.*

RCW 42.14.075.

## **5. Shared Staffing.**

Recently, some Fire Chiefs asked us to draft an interlocal cooperative agreement (ILA) for shared staffing. The concept of the “borrowed servant” is not new, but in this application it has been suggested that a team could be assembled to fill a request for emergency staffing when a department is starting to fall below the minimum staffing required to keep one or more of their stations open. This could be caused by first responders unable to work due to infection or illness, or just because they

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quarantined for a time due to contact with a presumed positive patient, or while waiting for test results. The jurisdiction being asked to share a team would have to ensure they can afford to loan the resources, but if they could, a reserve apparatus (say, an engine or aid unit) and the personnel to operate it could be sent over temporarily to help. We expect that ILA to be adopted and in place in Pierce County any day now.

And now we may also need to do a similar ILA for shared administrative staff in the event of illness.

Along the same lines, we have long had a standard template for the loan of an extra engine, tender, or aid car, when in the past a department had an apparatus blow up or go out of service. We used that template once this week just to deal with the emergency.

## 6. Speaking of Quarantines

Also this week, a good question was asked about the impact of quarantines on payroll issues such as overtime, or whether a firefighter is deemed working, when they cannot work due to a quarantine. Based on past precedent, it is my belief that a firefighter quarantined during a scheduled shift, due to the employer's requirement that they be isolated for whatever reason, is actually "working." It follows therefore, that even if they quarantined at home, the employer could request that they work from home, as in doing online training or other possible work. In this fashion, the department would continue the pay of the

individual just as if they were working. Call it "admin leave with pay" if you like, but pay them, as presumably in this scenario they are ready, willing and able to work but are just quarantined for public health reasons.

However, on their off days, when they were not scheduled to work anyway, I would argue that they are not "working" even though they are not totally free to go about their personal business, as that quarantine restriction is due to the public health emergency, not really the employer's order.

Now if an employee on quarantine becomes symptomatic, I would say they still get paid of course, but maybe you can use their sick leave. We will leave that question open for now.

Meanwhile, we noticed that the Department of Labor and Industries seems to be saying that the covid-19 disease may well be an occupational disease covered by LnI, at least if it infects a first responder who came into contact with an infected patient in their work. I find it somewhat odd, however, that the Department takes a different position for an office person who comes to work and then gets infected. It seems they are presuming such persons are not entitled to an LnI claim, perhaps because it cannot be proven that they caught the disease at work. It seems to me that should depend on the evidence.

## 7. Financial Issues.

A few clients have started to ask about the impact of the pandemic on their district finances. It may be too early to be concerned

about that, but we do think that all of the usual capacity to borrow funds will be available. Meanwhile, a simple resolution to release any reserve funds would be a quick and expedient response.

## 8. Jumping Through Hoops: Federal Aid is Not Automatic

Some clients have asked us to draft a resolution declaring an emergency under the “Stafford Act” in order for them to obtain federal aid. But there are complexities to that. Under Washington law, the Governor must request federal aid in order for a State to receive it and allocate that aid to local governments:

*Whenever the federal government or any agency or officer thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan, for purposes of emergency management, the state, acting through the governor, or such political subdivision, acting with the consent of the governor and through its executive head, may accept such offer and upon such acceptance the governor of the state or executive head of such political subdivision **may** authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the state or such political subdivision, and subject to*

*the terms of the offer and the rules and regulations, if any, of the agency making the offer*

RCW 38.52.100 (2) (emphasis added).

Governor Jay Inslee has declared a State emergency.<sup>2</sup> Governor Inslee may have, informally, asked President Trump to declare a national emergency and provide federal aid to Washington State to combat COVID-19.<sup>3</sup> President Trump declared a national emergency.<sup>4</sup> More specifically, President Trump has declared New York State to be undergoing a “major disaster.”<sup>5</sup> Will Governor Inslee’s informal request referenced in Footnote 3 be enough to ensure that your agency receives federal aid? No. Your agency needs to take the reins.

<sup>2</sup>

[https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20%28final%29.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20%28final%29.pdf?utm_medium=email&utm_source=govdelivery)

<sup>3</sup> (“I spoke to Vice President Pence yesterday and requested the federal government immediately declare COVID-19 a national emergency under the Stafford Act.”):

<https://www.governor.wa.gov/news-media/inslee-statement-potential-national-emergency-declaration>

<sup>4</sup>

<https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/?sfns=mo>

<sup>5</sup><https://www.nytimes.com/2020/03/21/nyregion/coronavirus-new-york-update.html?smid=nytcore-ios-share>

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Under the federal Stafford Act, the President may declare a National Emergency and declare that federal aid be allocated to States. Upon direction of the President, during a major disaster, and pursuant to 42 U.S.C. 5170b, federal agencies may provide local governments with Federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments to address a major disaster.<sup>6</sup>

Of course, “[A]ll requests for a declaration by the President that a major disaster exists shall be made by the **Governor** of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” 42 U.S.C. 5170.<sup>7</sup> (emphasis added)

In other words, although Governor Inslee has (perhaps vaguely) requested that federal aid be provided to the State of Washington, your agency should, pursuant to the Stafford Act,

pass a *resolution*, to be forwarded to the Governor’s Office, seeking that a portion of this federal aid be allocated to your agency, under RCW 38.52.100 (2). Either that, or your agency should pass a resolution requesting the Governor formally request a declaration of a “major disaster” or “emergency” specific to Washington State, in order that federal aid may be allocated to the State in the first place. As set forth above, FEMA and President Trump have declared New York to be a “major disaster.” You do not see the same news for Washington State, which has been referred to as the “epicenter” of this crisis.

Assume that President Trump declares that Washington State is experiencing a “major disaster” and allocates aid to Washington State. Again, RCW 38.52.100 (2) indicates that the State *may* (does not have to) issue federal aid to a specific local government, but logically, this aid must be requested in order for the above discretionary emergency aid law to apply. In other words, as we said before, if your agency would like to receive a “chunk” of federal funds issued to Washington State, you must take the reins. Receipt of federal aid does not appear to be automatic, under the Stafford Act or State law.

We have made available a “Stafford Resolution” that may be used to (1) activate the provisions of RCW 38.52.100 (2), and (2) request that Governor Inslee (or some future governor) implore the President to provide specific federal aid to the requesting agency.

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<sup>6</sup> Thinking more “long term,” pursuant to the Stafford Act, specifically 42 U.S.C. 5184 (a), the President is authorized to make loans to any local government which may suffer a substantial loss of “tax and other revenues” as a result of a major disaster, and has demonstrated a need for financial assistance in order to perform its governmental functions.

<sup>7</sup> See the full text of the Stafford Act here: [https://www.fema.gov/media-library-data/1582133514823-be4368438bd042e3b60f5cec6b377d17/Stafford\\_June\\_2019\\_508.pdf](https://www.fema.gov/media-library-data/1582133514823-be4368438bd042e3b60f5cec6b377d17/Stafford_June_2019_508.pdf)

## 9. Protecting Public Safety Employees from “Shelter in Place” Orders

Under Washington law, “every violation of any rule, regulation, or order issued under the authority of this chapter (RCW 38.52, the law governing emergency management) is a misdemeanor.” RCW 38.52.150 (2)(a). In other words, an individual who knowingly disobeys an order of the Governor to “shelter in place” during an emergency may be found guilty of a crime. Whether the person has committed a crime, however, would depend on the language of the rule or order. The Emergency Proclamation of Governor Jay Inslee states that public agencies must “identify and provide appropriate personnel for conducting necessary and ongoing incident related assessments,” i.e. to provide essential services (such as patient assessments for virus symptoms) necessary to confront and alleviate the Covid-19 pandemic.

Due to the responsibility of fire departments to provide fire protection and suppression, emergency medical services, and the protection of life and property, firefighters, and administrative support staff which support the daily operations of the fire department, are the “appropriate,” and in fact *essential* personnel, who would be exempt from a “shelter in place” order issued by Governor Inslee (or any future governor).

So what if your public-safety agency would like to protect your essential civilian *administrative* employees (non-Fire/EMS

personnel)<sup>8</sup> from being found guilty of a misdemeanor merely because they are moving from one place to another on the employer’s time? We find that the “CEO” of a public safety agency may protect his or her civilian employees by drafting and signing a letter which states substantially as follows:

*I, (CEO Name), (Position) of (name of agency), hereby declare (employee name) to be appropriate and essential personnel whose ability to travel to and from the workplace is exempt from national or statewide prohibitions pertaining to “sheltering in place,” and/or other similar prohibitions promulgated by (name of governor), or (name of President), in response to the (name of the reason for the emergency declaration).*

*Signed:* \_\_\_\_\_

*(Name, Position and Agency)*

In closing, thank you to our first responders and the employees of all public-safety agencies, *and* all healthcare workers. You are the rock of our society.

**DISCLAIMER. The Firehouse Lawyer newsletter is published for educational purposes only. This newsletter creates no attorney-client relationship. Those needing legal advice are encouraged to contact an attorney practicing in their jurisdiction of residence.**

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<sup>8</sup> No reasonable law enforcement employee would arrest a firefighter/EMT/paramedic, engaged in the scope of his or her employment, for not adhering to a “shelter in place” order. Hence our focus on non FF/EMS personnel.