The Firehouse Lawyer

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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

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Inside this Issue

Upcoming Training Opportunities

Back by popular demand, we will be putting on two virtual Municipal Roundtables in April, because we did not have any over the last six months or so.

The Municipal Roundtable (MR) is a free discussion group in which we consider issues that are relevant to the fire service and other municipal corporations. The MR gives us all an opportunity to learn from each other. Make sure to attend: you will be better for it.

The first MR is devoted entirely to one specific topic: when a governing body may go into executive session and what that governing body may *do* in executive session. This MR will take place on April 5 (Friday) from 9 to 11 AM, by accessing this link:

https://us06web.zoom.us/j/83647873898?pwd=C3WKP1PbqphmaI9InBUaqP4jd5HeBc.1

Our second MR will take place on April 12 (Friday) from 9 to 11 AM. This MR will relate to the procurement laws and upcoming changes to those laws—some of which are discussed below. This MR can be accessed through this link:

https://us06web.zoom.us/j/85269067636?pwd=UQyFbPB0VPfA7YoNbQOWTnXMPynURY.1

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MAJOR BID LAW CHANGES COMING SOON!

As we wrote about here in the *Firehouse Lawyer* last year, there are significant changes in the state bid laws applicable to public works and purchases of materials, supplies, and equipment ("MSE") by local governments that go into effect on June 30, 2024.

The current thresholds for fire districts are established at RCW 52.14.110, and those are reiterated here: for public works, $30 thousand, but you can use small works roster allowed under RCW 39.04.155, for projects estimated to cost up to $350,000, and an even easier alternative known as the "limited public works" process, if that estimate is between $250,000 and $350,000. Be advised though that RCW 39.04.155 sunsets; it is only effective until July 1, 2024 and is not being replaced. Well, it sort of is—see below.

As of June 30th, however, the public works threshold is raised from $30 thousand to $75,500 for a single craft project and to $150,000 for projects needing two or more crafts or trades. Notice the similarities below.

As for MSE, the current threshold is $40,000, but if less than $75,000 you can use the vendor list authorized by RCW 39.04.190. On June 30, 2024, the MSE threshold moves up to $75,500, but the vendor list can be used up to $150,000.

Also worthy of note, there is a brand new statute on small works rosters—RCW 39.04.151—adopted as Chapter 395 of the Laws of 2023. State and local government agencies may still adopt their own small works roster under RCW 39.04.151 with requirements similar to prior law. However, in RCW 39.04.151(2) the legislature tasked the State Department of Commerce to work with the Municipal Research and Services Center (MRSC) to develop a statewide small works roster. We think this is a very wise and reasonable approach so we predict most agencies will use that statewide roster. The subsection also tasks MRSC with developing criteria for the statewide roster, in collaboration with state and local agencies. Also, the statewide roster must have "filters" to use for different specialties or categories of anticipated work. (We believe the MRSC staff already had such filters available.)

Importantly, subsection (3) of this statute provides for the development of "guidance" about the statewide roster, which may take the form of a manual provided to local governments. The MRSC has a publication dated July 2023, which is excellent. Entitled "Small Works Roster – A Guide for Washington's Local Governments,"[1] this copyrighted guide does mention the effect of SB 5268 discussed in this article and states that the guide will be updated to reflect these changes. As we go to print, we are not sure the new manual or guidance has been disseminated.

RCW 39.04.151(4) makes it clear that the statewide roster is not the only alternative and that an SWR may still be established locally or in concert with another agency pursuant to an interlocal contract under chapter 39.34, the Interlocal Cooperation Act. If it were up to us, we would use the statewide roster through MRSC.

We aim to publish a separate article in April diving deeper into the major change under RCW

[1] https://mrsc.org/getmedia/76f26736-17ec-4ef9-a082-64f50fdd7d2c/Small-Works-Roster.pdf?ext=.pdf

52.14.110,[2] in which a new section has been created, effective July 1, 2024. That new section (2) states as follows:

> *A fire protection district may have its own regularly employed personnel perform work which is an accepted industry practice under prudent utility management without a contract. For purposes of this section, "prudent utility management" means performing work with regularly employed personnel utilizing material of a worth not exceeding $300,000 in value without a contract. This limit on the value of material being utilized in work being performed by regularly employed personnel shall not include the value of individual items of equipment. For the purposes of this section, the term "equipment" includes but is not limited to conductor, cabling, wire, pipe, or lines used for electrical, water, fiber optic, or telecommunications.*

SCOTUS DECIDES LINDKE v. FREED IN FAVOR OF PUBLIC OFFICIALS MAINTAINING THEIR PRIVATE LIVES

Recently, the Supreme Court of the United States SCOTUS) issued its opinion in *Lindke v. Freed*,[3] which we wrote about previously in this newsletter.[4]

The case of *Lindke v. Freed* concerned James Freed, who had a private Facebook profile that he later converted into a public page. After being appointed as city manager of Port Huron, Michigan, Freed updated his Facebook page accordingly. The issue arose when Freed blocked Kevin Lindke from commenting on his posts, leading Lindke to sue Freed for allegedly violating his right to free speech. The core question was whether Freed's actions on his Facebook page constituted state action, subjecting his page to First Amendment protections, or if they were done in a private capacity.

On his Facebook page, James Freed shared a mix of personal and job-related content. After being appointed as the city manager of Port Huron, Michigan, he updated his page to reflect this position, including his title and a link to the city's website in the "About" section. Although many of his posts were about his personal life, including family events and personal interests, he also posted information related to his job. For example, he talked about mundane activities like visiting local high schools, more significant events like the reconstruction of the city's boat launch, city efforts to streamline leaf pickup, and stabilize water intake from a local river. Additionally, he highlighted communications from other city officials and solicited public feedback on city matters. During the COVID-19 pandemic, Freed shared both personal reflections and information related to his official duties, such as the city's response to the pandemic,

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2 https://app.leg.wa.gov/RCW/default.aspx?cite=52.14.110

3 https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf

4 https://www.firehouselawyer.com/Newsletters/January2024FINAL.pdf

showcasing a blend of his personal and professional life on his Facebook page.

The SCOTUS, in its unanimous opinion delivered by Justice Barrett, vacated and remanded the decision of the lower court. The SCOTUS held that a public official's social media activity is considered state action subject to the First Amendment only if the official (1) had actual authority to speak on the State's behalf, and (2) was purported to exercise that authority when engaging in the social media activity. The Court emphasized the need to differentiate between an official's private capacity and state action, pointing out that the mere appearance of authority or the official nature of the platform does not automatically translate to state action. The Court required a clear connection between the official's authority and the specific conduct in question.

The *Lindke* decision poses interesting questions about when a person's private social-media page becomes a public page subject to First-Amendment scrutiny. Consider the following factual scenarios:

1. **Mayor's Social Media Use**: A mayor uses her personal Twitter account to announce city-related updates, emergency procedures during natural disasters, and personal opinions on political matters. While she primarily shares updates about city affairs, she also posts about her personal life and hobbies.

2. **School Superintendent's Blog**: A school superintendent maintains a personal blog where he discusses educational policies, school events, and personal experiences in education. Although the blog primarily serves as a platform for sharing professional insights, it also includes posts about his vacations and family life.

3. **Police Chief's Facebook Profile**: A police chief in a small town uses his Facebook profile to communicate with the community about safety tips, crime reports, and department achievements. However, he also shares photos from community events, personal milestones, and his thoughts on non-police related community issues.

4. **City Council Member's Instagram**: A city council member uses her Instagram account to document her work with the council, including behind-the-scenes looks at council meetings and community projects. She also posts about her personal interests, such as local art, food, and her running hobby.

5. **Health Department Director's LinkedIn**: The director of a local health department uses LinkedIn to post about public health initiatives, job openings in the department, and professional articles. Alongside these posts, she shares personal achievements, such as completing a marathon, and her thoughts on work-life balance.

The above cases present a series of close questions that were similar to the questions presented in *Lindke*, and perhaps that is why we should continue to clearly distinguish between when we are clearly speaking for the government and when we are speaking for ourselves. For now, the SCOTUS is requiring a more explicit invocation of one's authority to require First Amendment scrutiny.