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Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Visit us at firehouselawyer.com for information about our practice

Inside this Issue

Playing Scrabble: What is the Intrastate Building Safety Mutual Aid System?

Today we are going to discuss what may be referred to as an "extra-territorial reimbursement statute": RCW 24.60, the Intrastate Building Safety Mutual Aid System (IBSMA). You may ask why your fire department has not heard of this statute. Put simply, that is because this statute does not apply—yet—to fire districts or regional fire authorities, absent a legislative fix. This article will break down, in digestible pieces, why this legislative fix is necessary to ensure your fire department is properly reimbursed for disaster response, or at least ensure another avenue for such reimbursement, beyond the state mobilization laws. We will break this statute down into six digestible pieces: (1) Legislative purpose; (2) procedures for reimbursement; (3) the provision of worker's compensation benefits; (4) state and local oversight; (5) liability; and (6) dispute resolution. But first, we should consider what the IBSMA does not say.

The IBSMA was enacted in 2011, and has one major glitch, which inhibits fire districts and RFAs from availing themselves of this clear and concise statutory scheme for reimbursement. To trigger reimbursement requirements under the IBSMA, the "**chief executive officer** of a requesting **member jurisdiction**, or his or her authorized designee, must request assistance under the intrastate building safety mutual aid system directly from the chief executive officer of another member jurisdiction." RCW

24.60.020 (2) (emphasis added). However, the definition of a "chief executive officer" is limited to four different categories: county executives or legislative authorities, and city mayors or managers. *See* RCW 24.60.010 (2). This seems strange, because in the section prior to that, "member jurisdictions" include counties; cities and towns; tribes; and "other governmental entities with responsibilities of ensuring building safety," which logically include fire districts and RFAs. *See* RCW 24.60.005 (1)(d).[1] The statute indicates that it is not intended to interfere with other mutual aid systems currently in place, particularly RCW 43.43.960, the Washington State Fire Services Mobilization Plan. *See* RCW 24.60.005 (5).

Legislative Purpose and "Mutual Aid"

As context: "Mutual aid" generally means "emergency interagency assistance provided without compensation under an agreement between jurisdictions under chapter 39.34 RCW." RCW 43.43.960 (6). In other words, fire departments may contract for mutual assistance for no compensation to either party. Of course, fire departments may enter into "any and all necessary contracts." *See* RCW 52.12.021. The IBSMA—and the need for a legislative fix—should be viewed through the lenses of municipal corporations bestowed with broad powers.

Our legislature established the IBSMA "to provide for mutual assistance among member jurisdictions in the case of a building safety emergency or to participate in training and exercises." RCW 24.60.005 (1). Nothing within the IBSMA states that a contract is necessary to carry out its purpose. But the statute has a stated purpose: the provision of "mutual assistance." As may be read from the statute, the IBSMA addresses a specific event: a building safety emergency. A "building safety emergency" is a "**situation** that temporarily renders a building safety department incapable of providing building safety services." RCW 24.60.010 (1) (emphasis added). This includes, but is not limited to, "declared states of emergency, declared disasters, and **other situations** that temporarily impair the jurisdictions [sic] ability to provide building safety operations." *Id* (emphasis added). The word "situation" is somewhat ambiguous. Consequently, this statute may apply to something more than a building collapse. This statute may apply to an "undeclared" event that *causes* a building collapse, such as a mudslide, bombing, earthquake, massive fire or shooting.

Procedures for Reimbursement

Under the IBSMA, "a requesting member jurisdiction shall reimburse responding member jurisdictions for the true and full value of assistance provided pursuant to the intrastate building safety mutual aid system." *See* RCW 24.60.020 (7). These responses are entirely voluntary, based on the agreement(s) between the responding jurisdiction and the requesting jurisdiction. *Id.* The statute does not delineate where these reimbursement funds are derived from, but does specify that requests for reimbursement must be made within 30 days from the date of response. *Id*. Having a clearly established timeline for reimbursement sets the IBSMA apart, as there are no clearly delineated timelines for reimbursement in the state mobilization statutes themselves.

[1] Perhaps the legislature meant only those government agencies that enforce the building code, which is designed to ensure building safety. Arguably, fire departments do not ensure safety; they only respond to emergencies.

Worker's Compensation

Under the IBSMA, "[A]n employee of a responding member jurisdiction that dies or sustains an injury in the course of his or her employment, while providing assistance under the intrastate building safety mutual aid system, is eligible to receive the benefits that would otherwise be available for injuries sustained or death in the course of employment." RCW 24.60.040. In other words, it appears that the IBSMA provides—very clearly—for worker's compensation benefits in the event of injuries incurred at building safety emergencies.

State and Local Oversight

The IBSMA is administered by no one: The creation of an oversight committee was vetoed by the governor in 2011. *See* Reviser's Note to RCW 24.60.020. Consequently, the statute contains a hole which may be filled by private agreement and enforcement. This is, no doubt, a double-edged sword.

Liability

Under the IBSMA, the responding member jurisdiction is not liable for the acts or omissions, made in good faith, of its responding emergency workers *See* RCW 24.60.070 (2) As is true in numerous other contexts, good faith does not include gross negligence or wanton misconduct. *See* RCW 24.60.070 (3). The IBSMA has conferred immunity on responding member jurisdictions in the same way as the other state mobilization statutes.

Dispute Resolution

The IBSMA leaves dispute resolution to the parties. One member jurisdiction may submit a written request to the jurisdiction that requested assistance, seeking to resolve the matter within 30 days. *See* RCW 24.60.060 (1). If the dispute over reimbursement is not resolved within 30 days from receipt of the written request, "either party may request arbitration." *See* RCW 24.60.060 (2). This leaves us with a simple remedy for when issues of reimbursement arise.

It's Time to Play Scrabble

One question left open by this statute is whether fire districts and RFAs must contract with other "chief executive officers"—establishing an agency relationship—in order to arguably be deemed a "requesting" or "responding" member jurisdiction (as we already established that fire districts and RFAs could be deemed "member jurisdictions") and thus entitled, maybe, to reimbursement and the other protections afforded by the IBSMA. But this may not be sufficient.

Perhaps the biggest question is whether some legislative changes may be made to articulate the following: Not only are fire districts and RFAs member jurisdictions, but these municipal corporations are "responding (and requesting) member jurisdictions" because our legislature conferred authority on the CEO's (chiefs) of these fire departments to request or respond in the event of a building safety emergency. Our legislature needs to play scrabble, and formulate a broad definition of "chief executive officers," so that fire departments may avail themselves of this clear and concise extra-territorial reimbursement statute.

Gifts to Local Government Officials are Actually Ticking Time Bombs

When a fire district official or employee receives a gift from a private citizen, or other municipal corporation or political subdivision, ask whether that gift is lawful under Washington law and rules promulgated by the Washington Public Disclosure Commission (PDC). Receipt of this gift may draw the eye of the state auditor and/or the PDC.

Under RCW 42.23.070 (2), "[N]o **municipal officer** may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's **service**s as such an officer unless otherwise provided for by law." (emphasis added). Furthermore, "municipal officer" or "officer" "shall each include all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer." RCW 42.23.020 (2). Consequently, a "municipal officer" is more than the fire chief, or a fire commissioner, but includes those that work at their behest.

But what is a "gift"? Confusingly, the term "gift" is not defined in RCW 42.23. So we look elsewhere. Under RCW 42.52.010, the statute relating to ethics for state officers, a "gift" is "anything of economic value for which no consideration is given." Without talking like a lawyer, "consideration" is generally a bargained-for exchange, where both parties give something of value to the other with the expectation that they will receive something in return. The same statute above states that a gift may not be received if it could reasonably be expected to affect the judgment of the officer. *See* RCW 42.52.140. Some have ascribed a "de minimis" test to discern whether an unlawful gift has been made. We do not rely on that test alone here. Additionally, we ask that fire officials consider whether a citizen would think that the gift is of such economic value that it would affect the recipient's judgment. Regarding the "de minimis" test, the term is not used in the statutes in the context of gifts made to public officers. But various examples of items that are *not* gifts are included in the statutes:

- Items from family members or friends if it is clear beyond a reasonable doubt that the gift was not intended to influence the officer
- Items related to the outside business of the gift's recipient if the item is not related to the recipient's official duties
- Payments by a governmental or non-governmental entity for reasonable expenses incurred in connection with a speech, appearance or presentation
- Payments of enrollment, course fees and reasonable travel expenses to attend seminars sponsored by a bona fide governmental or nonprofit professional, educational, trade, or charitable association or institution
- Cookies or candy
- Flowers for occasions such as injury or death
- The cost of a single meal for one person when discussing business

Most importantly, RCW 42.52.010 (9)(g) sets forth another "non-gift": "Items returned by the recipient to the donor within thirty days of receipt or donated to a charitable organization

within thirty days of receipt." What this means is that if your fire district or RFA receives a gift, it should be returned within thirty days to the donor of the gift, or donated to a charitable organization. Although this statute does not technically apply to municipal corporations not associated with the state, we believe this could be applied by analogy.

The statutes do not assign a dollar amount for what may constitute a gift. Instead, we are left with a "sniff test." Fundamentally, your fire district is being asked to do the right thing in the context of receiving items that could be construed as gifts. For that reason, you should develop an ethics policy that addresses this issue and consult your attorney if faced with an issue that the policy does not deal with.

Are Facebook Posts and Call Logs Public Records?

We were recently asked at a seminar whether call logs in which agency phone numbers are contained are "public records." Recall that a record, in addition to being a writing related to the conduct of government, must be something "prepared, owned, **used, or retained** by any state or local agency" to be considered a public record. *See* RCW 42.56.010 (3). The precise issue of whether call logs are public records has been addressed only once, in *Nissen v. Pierce County*, 183 Wn.App. 581 (2014), a case that the Firehouse Lawyer has followed with great interest. Certainly, call logs are not prepared or owned by a public agency. These records are generally retained by cell phone providers, and simply provide a list of calls made from and received by a particular cell phone.

Importantly, the *Nissen* court found that "call logs for [Pierce County Prosecutor Mark Lindquist's] private cellular phone constitute 'public records' only with regard to the calls that relate to government business **and** only if these call logs are **used or retained** by a government agency." *Id.* at 585 (emphasis added). The court reasoned that, hypothetically, the prosecutor would have "used" the call logs if he reviewed them to see if he had talked to a particular person about government business. *Id.* at 596.

From *Nissen*, we may deduce the following: If a government official—or employee of a public agency—uses an otherwise non-public record to conduct government business, the record becomes a public one. But what if a record is not currently being used by a government official, but was initially "prepared" by that official? An example of preparing a record would be a fire commissioner making a comment on a Facebook page—for purposes of this article, a page not operated or maintained by the fire district, and therefore not generally "used" by the district. The comment is a "writing" that is created (aka "prepared") by the commissioner. The "record" that contains the "writing" would be the Facebook page itself—which is a searchable website. Consequently, it may be argued that despite the "writing" being contained on Facebook, the public agency would be responsible for obtaining and producing for inspection that record, even if the agency does not own, retain or use the record—if, of course, the record related to the conduct of government. In other words, before claiming that a record is not public because it is not owned, used or retained by the agency, consider whether the agency or any of its agents created (aka "prepared") the record. As a side note, remember that a public agency has no obligation to create a record (that does not otherwise exist) to respond to a public records request. And the

prosecutor in *Nissen* may have "prepared" a text message or made a cell phone call, but he did not "prepare" the call logs. The question, therefore, is not that straightforward, is it?

Backup Files and "Requests for Information" under the PRA

A mere "request for information" is not a valid public records request; a request must be made for "identifiable public records." RCW 42.56.080; *See Also Wood v. Lowe,* 102 Wn.App. 872, 879 (2000). Recently, the Washington Court of Appeals, Division II, decided *Belenski v. Jefferson County,* No. 45756 -3 –II (2015). In *Belenski,* the requestor sought "electronic copies of every electronic record for which Jefferson County does not generate a back up." Jefferson County responded that this was not a request for "identifiable" public records. The *Belenski* court agreed, and found that this was essentially a request for information, not one for identifiable public records. What this means is that if a public records requestor seeks a list of those records that are *maintained in a particular way*, that this is just a request for information. As the court in *Belenski* reasoned, if an agency is asked for a determination of how its records are maintained (i.e. what records are "backed up"), then the agency would be forced to create a record. And this is not mandated by the PRA.

Legislative Note: SB 5348

Senate Bill 5348 becomes effective this July. This bill adds a new section to RCW 39.34.030. In the context of the public bid laws, this statute authorizes either joint or cooperative purchasing, or "piggybacking" on another agency's bid. The new section of RCW 39.34.030 provides: "[A]ny two or more public agencies may enter into a contract providing for the joint utilization of architectural and engineering services." The statute provides that the contract between agencies must be in effect before the contractor is hired. We interpret this to mean that fire districts may enter into an ILA for the joint purchase of the services of an architect or engineer, but we do not believe this supports "piggybacking" due to that timing requirement mentioned above.

Policies on "Peer Support Group Counselors"

Under Washington law, a "peer support group counselor" (PSGC) shall not, "without the consent of the law enforcement officer or firefighter making the communication," testify—ever—about any communication made to the PSGC by the officer or firefighter while receiving counseling. RCW 5.60.060 (6)(a). The testimonial privileges are in place so that people are not reluctant to confide in certain designated professionals or persons (lawyers, priests, mental health counselors etc…) when faced with traumatic or stressful events. But a person does not qualify as a "peer support group counselor" unless they are (1) among other things, a firefighter, civilian employee of a fire department or a "nonemployee counselor" designated by the fire chief; and (2) have "received training to provide emotional or moral support" when a firefighter needs counseling as the result of an incident that occurred while they were performing their duties. Please be sure your policies reflect these requirements, and make sure the Fire Chief designates in writing the appropriate persons—such as departmental chaplains—as "peer support group counselors" for departmental personnel. or otherwise the statutory privilege will not be applicable.

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