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Continuity of Operations planning: Meeting the standard of care

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ABSTRACT

Recent disasters have increased the public's awareness of the lack of emergency preparedness of state and local governments. The attacks on the World Trade Center in 2001 highlighted failures in government agency coordination, while the anthrax attacks that followed and the more recent natural disasters of Hurricanes Katrina and Rita in 2005 have deepened concerns that our government is unprepared for emergencies. Partially in response to the public's concern, the federal government has encouraged Continuity of Operations (COOP) planning at the federal, state, and local government levels.

Public attention, government engagement, and the promulgation of federal directives and guidance are leading to an increase in the standard of care for all public sector planning efforts, thus creating potential liabilities in the areas of COOP planning, testing, training, and maintenance. At this point, COOP planning is becoming the norm for state and local government agencies, and while the process of COOP planning may itself expose agencies to certain liabilities, there is also an increase in the potential liability for agencies that do not undertake COOP planning efforts. Further, it appears that the potential liability of agencies that do not engage in COOP planning far exceeds any liabilities incurred through the planning process.

Key words: Continuity of Operations, legal, liability, standard of care, Federal Preparedness Circular 65

INTRODUCTION

The attacks on the World Trade Center and the anthrax scare of 2001 incapacitated government offices nationwide and bred fear among the general public.[1] In 2005, the government's failure to effectively evacuate or provide shelter for New Orleans residents during Hurricanes Katrina and Rita became an international embarrassment and a national tragedy.[2] Historically, government liability for emergency planning and subsequent emergency response failures have been difficult to prove. However, the focus on emergency planning and response that has been spurred by recent disasters may be creating potential liabilities for government actors in the area of emergency planning, and particularly, Continuity of Operations (COOP) planning.

BACKGROUND ON COOP

COOP planning ensures the continuity of an agency's essential functions across a wide range of emergencies and events.[3] As such, COOP planning helps an organization function after a disaster, providing consistency of services to the public and minimizing the chaos that may follow a disaster. In addition, this planning serves as a tool in the maintenance of vital institutional records, infrastructure, and equipment.

A COOP plan typically provides procedures for an organization to operate for a period of up to 14-30 days following an incident, working in conjunction with an organization's existing emergency operating procedures. This differentiates COOP planning from emergency operating procedures, which only address the immediate aftermath of an incident, like evacuation, shelter-in-place, active shooter, and bomb threat procedures. A COOP plan bridges the gap between the immediate response to an event and the point at which an organization can resume normal functioning. It references emergency operating procedures but

focuses on identifying the resources and staff needed to continue its essential functions. Finally, although COOP plans differ among organizations, because they should be tailored to an organization's specific needs, there are key elements that should be addressed in any COOP plan. These elements include planning assumptions and considerations, essential functions and personnel, orders of succession, vital records, systems and equipment, alternate facilities, communications, tests, training, and exercises.[3]

LEGAL FRAMEWORK OF COOP PLANNING

Federal

Federal agencies have been required to develop continuity plans for many years.[4]* President George W. Bush recently updated these requirements in the National Security Presidential Directive (NSPD) 51, issued in May 2007.[5] Pursuant to NSPD 51, each federal agency head is required to "develop continuity plans in support of the National Essential Functions and the continuation of essential functions under all conditions"†; plan, program, and budget for continuity capabilities; plan, conduct, and support annual tests and training; and support other continuity requirements, "in accordance with the nature and characteristics of the agency's national security roles and responsibilities."‡ The directive designates the Secretary of Homeland Security "as the President's lead agent for coordinating overall continuity operations and activities of executive departments and agencies."[6] However, while the Directive states that the Secretary "shall coordinate the development and implementation of continuity policy for executive departments and agencies," it is not clear whether the Secretary or another government official may reprimand executive branch agencies who have failed to develop and implement the continuity policy.§

States

Although federal continuity directives are purely guidance for state, local, territorial and tribal governments, states may create mandatory continuity planning laws or regulations on their own. For example, in Maryland, the Maryland Emergency Management Agency (MEMA) Act provides that the "Governor may issue orders, rules, and regulations necessary or desirable to . . . prepare and revise, as necessary, a comprehensive plan and program for the emergency management operations of this State; integrate the plan and program of this State with the emergency management operations plans of the federal government and other states; and coordinate the preparation of plans and programs for emergency management operations by the political subdivisions."[7] Thus, if the Governor deems it necessary or desirable, he may order state agencies to prepare COOP plans. Further, in recent years, Maryland has made it mandatory for various types of human service facilities to prepare COOP plans through specific statutes.[8]

Many states have laws similar to Maryland's, but state requirements vary across the country. Virginia has made COOP planning mandatory for executive branch agencies and requires that plans are updated and submitted to the Virginia Department of Emergency Management by April 1st of each year.[9] Florida has required agency heads to take responsibility for COOP planning for their agencies and promulgated guidance for them through its Division of

*The Executive Order, which appears to remain in force with respect to executive branch departments and agencies, requires agencies to have capabilities to meet essential defense and civilian needs in the event of a national security emergency. Section 202 of EO 12656 requires the head of each federal department and agency to "ensure the continuity of essential functions in any national security emergency by providing for succession to office and emergency delegation of authority in accordance with applicable law; safekeeping of essential resources, facilities, and records; and establishment of emergency operating capabilities." Other directives and legislation include the following: The National Security Act of 1947, July 26, 1947, as amended; EO 12656, Assignment of Emergency Preparedness Responsibilities, November 18, 1988, as amended; EO 12472, Assignment of National Security and Emergency Preparedness Telecommunications Functions, April 3, 1984; EO 12148, Federal Emergency Management, July 20, 1979, as amended; Presidential Decision Directive (PDD) 67, Enduring Constitutional Government and Continuity of Government Operations, October 21, 1998; PDD 62, Protection Against Unconventional Threats to the Homeland and Americans Overseas, May 22, 1998; PDD 63, Critical Infrastructure Protection (CIP), May 22, 1998; FPC 60, Continuity of the Executive Branch of the Federal Government at the Headquarters Level During National Security Emergencies, November 20,1990; 41 Code of Federal Regulations (CFR) 101-2, Occupant Emergency Program, revised as of July 1, 1998; 36 Code of Federal Regulations (CFR) 1236, Management of Vital Records, revised as of July 1, 1998; FPC 65 Authorities and References (July 26, 1999).

†Section 19(b) of Ref. 5.

‡Section 7 of Ref. 5.

§Section 6 of Ref. 5.

Emergency Management.[10] Because state requirements vary, it is important to research a jurisdiction's specific requirements and guidance before embarking on a COOP planning process. Knowing a specific jurisdiction's laws and regulations before beginning planning will not only help to determine whether an agency is required to have a COOP plan but also determine the governance structure for COOP planning in the state.

A survey of old and new legislation will reveal whether COOP requirements and guidelines in a state emanate from the Governor, the Adjutant General, or another state office. For example, a state may have recently passed legislation in response to the threat of pandemic flu, following the federal guidelines set forth in the Model State Emergency Health Powers Act (MSEHPA).[11] In Maryland, the Catastrophic Health Emergencies Act, passed in response to the MSEHPA, grants the Secretary the power to "require healthcare facilities to develop . . . contingency plans" addressing stockpiling of supplies, staff training, "treatment and decontamination protocols," coordination of care with other facilities, and anything else the Secretary deems necessary to "assist in the early detection and treatment of an individual exposed to a deadly agent."[12] As discussed previously, in reference to the federal government, laws regarding continuity planning may have been in place for many years, so it is prudent to conduct a thorough search of and old and new legislation, regulations, and orders.

LEGAL ISSUES: STANDARD OF CARE

One reason why it is vital to understand the legal framework of COOP planning is that a failure to follow this framework may contribute to potential liability. Although state and local agencies enjoy certain protections through the doctrine of sovereign immunity,[¶] federal and state tort claims acts carve out areas in which these agencies may be held liable for, among other things, negligence of their employees.[13**] According to case law, government negligence is hard to prove unless the government has created an expectation of service.[14††] Moreover, the government action that is considered discretionary is often completely immune to suits.[13‡‡] Although the definition of "discretionary functions" has been the source of much litigation, it has been accepted that it protects the government from suits based on high-level policy decisions by government actors, and it may be so expansive as to create immunity from suit based on regulatory actions of agencies.[15] However, as COOP planning becomes considered an integral part of many government agencies' missions, failure to provide a service that is normally provided, because of a lack of a COOP plan, may be considered negligence on the part of the government agency. Although there are not yet many cases addressing COOP planning liability specifically, as described later, the issues surrounding COOP planning will likely be resolved within the basic legal framework of government negligence.

The threat of liability is a concern for many emergency planners. To assess this threat, planners should consider the applicable statutes and case law of their jurisdiction, as discussed earlier. However, planners must also consider the appropriate standard of care that must be exercised throughout the COOP planning process, despite one's jurisdiction. In the context of COOP planning, the standard of care is driven by federal directives and guidelines. Although these directives and guidelines are not mandatory for state and local agencies, they serve as the benchmark for appropriate standards of care for all public sector planning

[¶]Alexander Hamilton described sovereign immunity in The Federalist No. 81 when he wrote, "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*," June 28, 1788.

**The Federal Tort Claims Act (FTCA) provides a small exception to its immunity to suits by stating that "when the federal government may be sued for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. S 1346(b)(1). Most states have enacted similar laws that limit state sovereign immunity.

††Restatement (Second) of Torts §323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion).

‡‡28 USCA §2680 (a), that creates an exception from liability for, "[a]ny claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

efforts.[§§] In light of this legal framework and the legal concerns many planners face, we will address some of the liability issues that may arise during the COOP process: specifically, meeting standards of care in having, developing, and testing a COOP plan.

MEETING THE STANDARD OF CARE: HAVING A COOP PLAN

The public impression of the need for emergency planning in the public sector has been changing, based in part on recent tragedies that highlighted a lack of preparedness resulting in harm to many, and particularly to vulnerable populations. Following Hurricanes Katrina and Rita in the US Gulf Coast, several suits were filed against hospitals and medical care facilities whose failures to continue care for or evacuate their customers resulted in injury or, in some cases, death. One such suit revolved around a failure to continue service during an electrical outage, causing the death of a patient reliant on a ventilator.[16] A COOP plan may have allowed the care givers to ensure that their patients continued to receive services that they needed, whether through arranging for a back-up power source, use of an alternate site, or temporary devolution of their care responsibilities to another organization.

Although these suits were not ultimately successful in establishing liability, portions of the courts' opinions in the cases indicate that the courts will begin to carve out some legal territory for such claims in the future.[16(p228)¶¶] One commentator wrote that, though the facts may not have been favorable to a finding of liability in past cases, it appears from the holdings in recent cases that "there is considerable likelihood that a failure to evacuate may, in some cases, be considered malpractice if the decision is based in part on an actual assessment of a patient's individual medical condition."[¶¶] If true, this may be a harbinger that failures to continue to provide service, because of a lack of COOP planning, training, testing and maintenance may also be the source of negligence or other types of claims. Thus, in the future, failures to continue to provide service that result in harm to the public may form the basis of a suit in negligence pointing to the inadequacy of an agency's COOP plan.

MEETING THE STANDARD OF CARE: DEVELOPING A COOP PLAN

Federal directives provide guidelines for COOP planning, outlining topics that must be covered by a COOP plan, standards for training personnel to use the plan, and for testing and maintaining a plan. Federal Preparedness Circular (FPC) 65 states that a viable COOP plan should:

- "delineate essential functions and activities;
- outline a decision process for determining appropriate actions in implementing COOP plans and procedures;
- establish a roster of fully equipped and trained emergency personnel with the authority to perform essential functions and activities;
- include procedures for employee advisories, alerts, and COOP plan activation, with instructions for relocation to predesignated facilities, with and without warning, during duty and nonduty hours;
- provide for personnel accountability throughout the duration of the emergency;
- provide for attaining operational capability within 12 hours; and
- establish reliable processes and procedures to acquire resources necessary to continue essential functions and sustain operations for up to 30 days."[¶¶]

However, FPC 65, like most federal circulars, is a brief document that does not provide great detail

[§§]Both the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security (DHS) sponsor free programs for state and local government emergency planners on how to write COOP plans according to federal standards. One such program, *Preparing the States, Implementing Continuity of Operations Planning*, is administered by the authors' employer, the University of Maryland Center for Health and Homeland Security.

[¶¶]Section 7, Elements of a Viable COOP Capability.

regarding the fulfilling of these main components.[3] As such, organizations aiming to comply with federal guidelines still have a fair amount of latitude in developing the contents of their COOP plan. Given this latitude, questions of "how" and "how much" often arise while planning. For example, federal guidance states that, an organization's COOP plan should provide for "alert and notification" of its personnel.[3] The way that alert and notification should take place is not specified. Must an agency purchase new public announcement system, satellite phones or text alert software in order to meet the standard? It is not always clear.

In a court of law, the federal guidelines would be considered in determining whether an organization has fulfilled its obligations to citizens through its emergency planning. In addition, financial restrictions, as well as whether an organization should have known to plan for a particular disaster affecting its capabilities would be considered. The types of preparations that other agencies in its state or locality had made as well as other agencies of its type may come into the analysis as comparables. Overall, the possible success of a suit against a government agency based on not meeting the standards of care and best practices of other agencies would depend on a strong showing of inadequacy of emergency preparations accounting for many variables. The lack of precedent for similar cases and the discretion implied by broad federal guidelines would likely make it difficult for a plaintiff to prove an agency's liability for negligence at this time.

MEETING THE STANDARD OF CARE: TESTING THE COOP PLAN

Once an institution has written a COOP plan, it must be tested to ensure that it is a viable plan and that the institution's decision makers and personnel have had a chance to exercise, or at least discuss, their specific duties during COOP activation. COOP plans are typically tested through a variety of exercises, including tabletops and full-scale exercises. While testing its plan, an agency must take care to exercise its plan responsibly, especially if a full-scale exercise is being used. Not only will a responsible exercise produce better results for the institution while improving confidence and investment in the plan, but it will also help avoid unnecessary expenditures and potential lawsuits.

Negligent testing of a COOP plan is one way in which an agency may open the door to potential lawsuits. Imagine a scenario where an armed gunman bursts into a classroom, orders the professor to close the door and forces students to line up against a wall while threatening to shoot. Such was the scene when officials at the Elizabeth State University in North Carolina were testing their ability to respond to an active shooter threat.[17] Although the intent behind the drill was commendable, its execution resulted in undue fear and confusion on the part of students and faculty. Failure to give a reasonable amount of notice to exercise participants, in this case, students and faculty, prior to carrying out a full-scale exercise may be construed as negligent, thus exposing an agency to liability.

To avoid liability, an exercise coordinator should provide a reasonable amount of notice to exercise participants. According to the Elizabeth State officials, students, staff, and faculty were notified via e-mail and text messages that a drill would take place sometime over a period of 5 days. The notification explicitly stated: "This is a test. ECSU is holding a test drill where an armed intruder will enter a room in Moore Hall and be detained by campus police."[17] However, in this case, the professor and many of the students in the targeted classroom stated that they had not received the e-mail or text message notification. Fortunately for the University, no one suffered serious harm from the drill and no lawsuit was filed.

If something had gone wrong in that drill because of the lack of appropriate notice or the manner in which the exercise was conducted, the University may have been facing a lawsuit alleging negligence. In a negligence action, the plaintiff, possibly a student or professor, must show that (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered injury or damages.[18] Assuming one could satisfy the other prongs of a negligence claim, establishing duty, causation, and damages, it is the second prong—that

the defendant breached their duty by a negligent act or omission—that becomes a concern during the planning and execution of an exercise. In the case of the Elizabeth State, it could be argued that the University negligently failed to act by not giving enough warning to the students and faculty, or negligently acted in choosing to execute the drill during a real class rather than a mock setting.

Best practices while testing a plan include beginning all exercise communications with the verbal or written notice—"this is a test." Although test coordinators often worry that increased notice can decrease the effectiveness of the test, ie, resulting in practiced rather than realistic responses from participants, one should never err on the side of less disclosure just to benefit their test. If an agency's exercise simulated a hazmat spill, and because of a negligent communication failing to state "this is a test," the jurisdiction spent valuable resources and personnel responding to the site, those resources and personnel would be unavailable if a real event were to occur. Mistakes are bound to happen during an exercise, and while every mistake does not translate into negligence, it is something that should be considered every time a COOP plan is tested.

CONCLUSION

A COOP plan is an integral tool in contingency and emergency planning; it provides an agency with the ability to maintain records and continue essential functions during and after an event. The federal government has recognized the importance of such planning and has required its agencies to engage in COOP planning. States should use the federal guidance for reference and must also conform to any state laws or regulations. As COOP planning becomes more commonplace in the world of emergency preparedness, the door is open for agencies to face liability for failing to comport with appropriate standards of care. An agency could potentially face liability for failure to have, properly develop, or test a COOP plan. Yet, because COOP planning is by its nature preparation geared toward strengthening an agency and its personnel, agencies that undertake COOP planning will be much less likely to face liability in the aftermath of an event.

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