



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

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DATE: June 17, 2002

TO: Glen Andreassen
Oregon State Fire Marshal's Office

FROM: Shannon N. Rickard, Assistant Attorney General *SR*
Government Services Section

SUBJECT: Liability Issues Relating to Local Emergency Planning Committee
DOJ File No. 920-001/GG0341-02

The federal Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted in 1986 to encourage and support emergency planning efforts at the state and local levels and to provide public and local governments with information concerning potential chemical hazards. The EPCRA requires each state to establish a State Emergency Response Commission (SERC) with responsibility to appoint volunteer members to Local Emergency Planning Committees (LEPCs) and to oversee and direct these committees.

The Interagency Hazard Communication Council (IHCC) is designated by statute as Oregon's SERC.¹ IHCC membership includes the Governor, fifteen state agency directors, two local government representatives, and three members of the general public.² The statute authorizes LEPC members to appoint designees. The Office of State Fire Marshal (OSFM) and the Department of Environmental Quality (DEQ) provide staff support for LEPC activities. You ask for our legal advice on various liability and related issues facing the committee and its members.

¹ ORS 453.510-527.

² ORS 453.510.

Questions Presented and Short Answers

1. *What is the legal status of the IHCC as an entity?*

The IHCC is a public body. It was created by the state legislature to perform public functions, its members are primarily public, another public body oversees its operations, and it is dependent upon public funds and facilities to operate.

2. *Is the IHCC a nonprofit corporation?*

The IHCC is not a nonprofit corporation. Specific legal requirements are necessary for an entity to achieve both corporate and nonprofit status. Those requirements include filing specific paperwork with the Secretary of State, as well as filing applications with federal and state tax authorities for tax exempt status. The IHCC has not met any of these requirements and, therefore, is not a nonprofit corporation.

3. *To what extent are the IHCC, its members and non-members covered by tort liability laws?*

Under the Oregon Tort Claims Act, public bodies are subject to tort liability for acts of officers, employees and agents acting within the scope of their duties. The IHCC is a public body and as such, comes within the terms of this law. The volunteer members, while not employees, are agents for purposes of the Tort Claims Act when acting within the scope of their official duties because they perform functions on behalf of the state. Furthermore, Oregon courts construe the definition of "agent" in this context liberally in order to promote the policy goal of encouraging people to volunteer their services without fear of personal liability in connection with activities performed on behalf of the state.

4. *What is the state's potential liability for the actions of members and nonmembers on official business?*

ORS 30.270 limits the amount of state liability under the Oregon Tort Claims Act. The specific monetary limits are set forth below in the analysis portion of this memorandum. More importantly, however, acts that constitute malfeasance in office or willful or wanton neglect of duty are considered to be outside the scope of employment or duties. If a member or nonmember engages in these types of acts, the state is not obligated to defend and indemnify for any resulting tortious injury to others.

5. *Does the LEPC require a charter or similar state recognition?*

Our research did not reveal any statutory or other obligation that requires the LEPC to draft a charter or to receive any other formal state recognition.

6. *Is the relationship between the LEPC and its non-members contractual, or are the non-members volunteers?*

According to your information, the LEPC *members* are volunteers. The *non-members* are “contacts” who provide assistance to the member volunteers. There is no evidence that any contractual relationship exists. We are not aware of any formal agreement that is signed by the LEPC members or non-members. It is our understanding that the non-members are recruited to assist, but that they are under no legal obligation to do so. Because there is no consideration (or bargained-for exchange), there is no contract.

7. *Can the IHCC/LEPC enter into contracts and/or make purchases on its own authority? If yes, what OSFM oversight would be required?*

The IHCC/LEPC *does not* have authority to enter into contracts and/or make purchases on its own behalf. Agency authority is derived from statute. The statute that sets forth the specific functions of the IHCC/LEPC does not grant this body the authority to enter into contracts and/or make purchases. Furthermore, this type of authority is not implied from any of the functions that are specified in the statute.

Analysis

1. *What is the legal status of the IHCC/SERC as an entity?*

The IHCC/SERC is a public entity. While no Oregon court has addressed the question of whether the IHCC is a public entity, numerous cases discuss the requirements for determining the status of entities in other contexts.³

In *Marks v. McKenzie High School Fact-Finding Team*, the Oregon Supreme Court held that for purposes of determining whether an entity is a “public body” within the meaning of the public records law, a court should apply a “functional” approach that examines the “character of that entity and the nature and attributes of that entity’s relationship with government and governmental decision-making.”⁴ The court outlined its approach as follows:

³ Similar issues have been discussed in several formal Attorney General opinions. See 46 Op Atty Gen 155 (1989)(stating, *inter alia*, that the Oregon Medical Insurance Pool is not a state agency because it is fundamentally a private-sector body, under virtually total private control, even though it was created by the state to fulfill a public purpose); Letter of Advice dated May 28, 1986, to Representative Larry Hill and William L. Miles, Director, Audits Division, Secretary of State (Op-5885, -5896)(discussing whether the Eugene-Springfield Metropolitan Partnership, Inc. is a “public” entity for purposes of the Municipal Audit Law, the Open Meetings Law, the Public Records Law, the Oregon Government Ethics Law, and the Oregon Tort Claims Act); 48 Op Atty Gen 40 (1996)(examining whether recognized student governments at Oregon State System of Higher Education (OSSHE) institutions are state entities, required to obtain legal advice only from the Department of Justice).

⁴ 319 Or 451, 463, 878 P2d 417 (1994).

In determining the proper characterization of a particular entity, the following factors, which we have synthesized from the case law . . . are relevant, although no single factor is either indispensable or dispositive:

- (1) The entity's origin (*e.g.*, whether the entity was created by government or had some origin independent of government).
- (2) The nature of the function assigned to and performed by the entity (*e.g.*, whether that function is one traditionally associated with government or is one commonly performed by private entities).
- (3) The scope of the authority granted to and exercised by the entity (*e.g.*, does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).
- (4) The nature and level of governmental financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support).
- (5) The nature and scope of government control over the entity's operation.
- (6) The status of the entity's officers and employees (*e.g.*, whether the officers and employees are government officials or government employees).⁵

Marks addressed whether an entity is a public body for purposes of the Public Records Law. The Court of Appeals has recognized, however, that the *Marks* factors are consistent with a number of cases "in which courts have determined whether an entity is a 'state agency' for one purpose or another."⁶ Accordingly, we consider each of the factors identified in *Marks*.

First, we consider the origin of the IHCC. The IHCC was established by legislative act. ORS 435.510 establishes the IHCC as Oregon's SERC and specifically designates the composition of the council. Of the twenty-one members of the council, eighteen are representatives of various state agencies and are appointed to the council by virtue of the public office they hold. The remaining three members represent the public at large, but are appointed by the Governor, a state agent. Therefore, the first factor weighs in favor of IHCC/SERC being considered a "public" entity.

Second, we consider the functions performed by the IHCC. The IHCC is authorized to perform those functions set forth by the legislature in ORS 453.510. Under that provision, the council is charged with the responsibility for: (1) facilitating interagency cooperation in updating the hazardous substance survey; (2) facilitating access to data collected that relates to hazardous substances; (3) coordinating state agencies' regulatory responsibilities over hazardous

⁵ *Id.* at 463-64.

⁶ *Laine v. City of Rockaway Beach*, 134 Or App 655, 896 P2d 1219 (1995).

materials and substances; (4) providing advice and recommendations to state agencies regarding hazardous material programs; and (5) undertaking all duties of a state emergency response commission required by the EPCRA. Not only are these functions legislatively dictated, but each function is designed to carry out a public purpose. Further, the IHCC interfaces with other state agencies and performs all the duties required by the EPCRA, which mandates that *states* perform the requirements thereunder. In other words, the IHCC functions are of a type typically performed by a governmental body. As a result, the functions performed by the IHCC weigh in favor of the IHCC being a state agency.

Third, we consider the scope of authority granted to and exercised by the IHCC. The legislature has authorized the IHCC to facilitate and coordinate information and also to provide advice and recommendations to state agencies. More importantly, the IHCC maintains responsibility for the duties of a state emergency response commission under the EPCRA. Although the authority to provide advice and make recommendations cannot be characterized as authority to make binding governmental decisions, the IHCC's authority to fulfill the mandates of the EPCRA is not restricted to giving advice. As such, the IHCC has the authority to make decisions to perform EPCRA activities. Also, the IHCC performs duties that if not performed by the IHCC would have to be performed by some other state agency in order to ensure that Oregon remains in compliance with federal law. Therefore, the third factor supports a conclusion that the IHCC is a public body.

The fourth *Marks* factor addresses the nature and level of governmental financial involvement with the entity, including payment of fees, as well as provision of facilities and supplies. By statute, the Department of Environmental Quality and the State Fire Marshal, both public entities, provide staff support for the council.⁷ Presumably, this support includes access to telephones, computers, photocopying, and mailing facilities. The labor costs for processing reports is also paid with public funds. Furthermore, ORS 453.510 provides that "public members shall be entitled to compensation and expenses as provided in ORS 292.495 which shall be paid by the State Fire Marshal." According to the information you provided to us, the Office of the State Fire Marshal administers certain federal grants for the activities required under the EPCRA. These funds are certainly public funds. IHCC's financial dependence on public funds underscores the nature of the entity as a public one.

Fifth, we consider the nature and scope of government control over the entity's operation. It is unclear from the information you provided how much direct control OSFM maintains over the operations of the IHCC. However, it is our understanding that the IHCC has no control over contracts and expenditures on behalf of the council. OSFM oversees the council's operations and administers federal grants to the council. Furthermore, the IHCC provides advice and makes recommendations, but the ultimate decisions are made by the state agencies receiving the advice. As such, it appears that there is a significant amount of government control over the IHCC's operation, which leads us to the same conclusion as above – that the IHCC is a public entity.

Sixth, we consider the status of the IHCC members. As mentioned above, eighteen of the twenty-one IHCC members are public employees, appointed to the IHCC by virtue of that

⁷ ORS 453.517.

employment. The other three members (from the general public) are appointed by the governor and are compensated with OSFM funds. These factors support the conclusion that the IHCC is a public entity.

Analysis of the six *Marks* factors compels a conclusion that the IHCC is a public body. The IHCC was created by a governmental body to perform governmental functions. Further, IHCC is dependent upon public funds and facilities to operate. OSFM oversees the IHCC's operations, and IHCC membership is primarily public.

For these reasons, the IHCC likely would be subject to the Public Records law and the Government Ethics law. Other laws applicable to state agencies also may apply, including the Public Meetings law, contract laws and audit laws, depending upon whether the IHCC's activities make those laws applicable.

2. *Is the IHCC a nonprofit corporation?*

The IHCC is *not* a nonprofit corporation. Oregon entities must take affirmative steps to achieve corporate and nonprofit status. There is no *de facto* nonprofit corporation. Specifically, to gain nonprofit corporate status, an entity must file "Nonprofit Articles of Incorporation" and employee registration forms, and is required to develop bylaws.⁸ Nonprofits must also submit applications to the state and federal tax authorities for tax exempt status.⁹ The IHCC is a creature of statute and is clearly not a nonprofit corporation. Instead, it likely lacks authority to take the steps necessary to become a nonprofit corporation.

3. *To what extent are the IHCC, its members and non-members covered by tort liability laws?*

Under ORS 30.265(1), part of the Oregon Tort Claims Act (OTCA), "every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties." ORS 30.285(1) requires the governing body of any public body to defend and indemnify its "officers, employees and agents, whether elective or appointive" against any tort claim or demand arising out of an act or omission occurring in the performance of duty. ORS 30.285(2) provides, however, that "[t]he provisions of subsection (1) . . . do not apply in case of malfeasance in office or willful or wanton neglect of duty."

As noted above, the IHCC is a public body and is therefore subject to OTCA provisions. The volunteer members of the LEPC, however, appear to be neither officers nor employees. Accordingly, your inquiry requires us to determine whether those individuals are state "agents" as that term is used in the OTCA.

The meaning of "agent" in the OTCA is unclear. However, the issue of who qualifies as a state "agent" for purposes of the OTCA has been discussed in several cases. The first case to

⁸ See www.sos.state.or.us/corporation/bic/nonprofit.htm

⁹ Nonprofit corporations in Oregon are subject to ORS Chapter 65, the Oregon Nonprofit Corporation Act.

construe the meaning of “agent” in the context of ORS 30.265(1) was *Cain v. Rijken*.¹⁰ The *Cain* court applied the common law test of agency, focusing on the control a principal exerts on a purported agent.¹¹ In a later case, the Oregon Appellate Court suggested a broader test for determining the state’s responsibility for actions of putative agents, particularly with respect to volunteers.¹² That case set forth a two-part test that focuses on control *and* whether a person performs a function on behalf of the state. Based on this test, we conclude that LEPC volunteers are state “agents” entitled to state defense and indemnity under the OTCA when acting within the law and within the scope of their official duties.

The control issue is construed broadly. Even if the state does not exercise direct control over the manner in which the LEPC conducts its affairs, if the state has the authority to act on recommendations or advice, the requisite control exists.¹³ The test is also met if the state has the *right* to control, even if that control is not exercised.¹⁴ The rule is that “[t]he right of control, whether meaningfully exercised, is an important consideration in deciding whether an agency exists as a matter of law.”¹⁵ The Oregon Court of Appeals also explains that “control is not necessary to establish an agency relationship in the context of OTCA, at least with respect to those who volunteer their services to the state at its request.”¹⁶ Public policy dictates that such persons be encouraged, rather than discouraged, to volunteer their services by holding them harmless from personal liability arising out of services performed on behalf of the state.¹⁷

The OSFM is a state agency authorized to control the funding and activities of the IHCC and the LEPC. The IHCC prepares reports, gives advice, and makes recommendations, but ultimate authority lies with the state to act on that information. We conclude, therefore, that with respect to IHCC members, the control test for agency under the OTCA is met, and is not applicable to the volunteer members under the holding referenced above.

The second part of the test requires that the LEPC perform a function on behalf of the state. This test is met here. The LEPC is acting under a statutory mandate to fulfill Oregon’s requirements under federal law. LEPC activities fulfill a public purpose and are supported by public funds. Therefore, the LEPC performs functions on behalf of the state and the LEPC volunteers are state agents for purposes of the OTCA, when those volunteers are acting within the scope of their official duties.

¹⁰ 300 Or 706, 717 P2d 140 (1986).

¹¹ 300 Or at 713.

¹² *Samuel v. Frohnmayer*, 82 Or App 375, 728 P2d97 (1986), *modified* 84 Or App 80, *rev den* 303 Or 261, 735 P2d 1224 (1987).

¹³ *Moxness v. City of Newport*, 89 Or App 265, 268, 748 P2d 1014 (1988).

¹⁴ *Id.*

¹⁵ *Id.* at 269 (citing *Peeples v. Kawasaki Heavy Indust, Ltd.*, 288 Or 143, 603 P2d 765 (1979)).

¹⁶ *Frohnmayer*, 82 Or App at 380.

¹⁷ *Id.*

4. *What is the state's potential liability for the actions of members and nonmembers on official business?*

As noted above, the existence of an agency relationship is significant in tort actions because of the state's obligation to defend and indemnify its agents under the OTCA. There are limits to that obligation, however. ORS 30.270 limits the amount of liability under the OTCA.¹⁸

It is important to remember that the OTCA excludes cases of "malfeasance in office or willful or wanton neglect of duty" from the state's obligation to defend and indemnify. Additionally, under the express terms of ORS 30.265(1), covered conduct must be within the scope of employment or duties.

Malfeasance means an "evil doing or the doing of an act which is wholly wrongful and unlawful."¹⁹ Willful or wanton neglect of duty applies to reckless conduct or an intentional act done with the intention to harm someone. The Oregon Supreme Court has said that "where a tort is committed with a bad motive, or so recklessly as to imply a disregard of social obligations," it is equivalent to a willful and wanton act."²⁰

Furthermore, to be covered by the OTCA, acts of employees, officers and agents must be within the scope of employment or duties. Oregon employs a three-part test to determine whether an employee is acting within the scope of employment, inquiring:

(1) Whether the conduct that gave rise to a tort claim was of a kind the employee was hired to perform;

¹⁸ ORS 30.270 provides that:

(1) Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed:

(a) \$50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.

(b) \$100,000 to any claimant as general and special damages for all other claims arising out of a single accident or occurrence unless those damages exceed \$100,000, in which case the claimant may recover additional special damages, but in no event shall the total award of special damages exceed \$100,000.

(c) \$500,000 for any number of claims arising out of a single accident or occurrence.

(2) No award for damages on any such claim shall include punitive damages. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

(3) Where the amount awarded to or settled upon multiple claimants exceeds \$500,000, any party may apply to any circuit court to apportion to each claimant the proper share of the total amount limited by subsection (1) of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to the claimant bears to the aggregate awards and settlements for all claims arising out of the occurrence.

(4) Liability of any public body and one or more of its officers, employees or agents, or two or more officers, employees or agents of a public body, on claims arising out of a single accident or occurrence, shall not exceed in the aggregate the amounts limited by subsection (1) of this section.

¹⁹ *State v. Langley*, 214 Or 445, 315 P2d 560, *rehearing den*, 323 P2d 301, *cert den* 358 US 826 (1958).

²⁰ *Day v. Holland*, 15 Or 464, 469, 15 P 855 (1887); *Harrell v. Ames*, 265 Or 183, 188, 508 P2d 211 (1973).

(2) Whether the conduct occurred substantially within the authorized limits of the employee's work time and work place; and

(3) Whether the employee in engaging in the conduct, was motivated at least in part by a purpose to serve the employer.²¹

Pursuant to this test and the other exclusions listed above, the state is liable for injury caused by acts or omissions within the scope of employment or duties, as long as those acts are not willful or wanton. Members and nonmembers alike are agents of the state and, as such, the state is obligated to defend and indemnify those persons for tortious wrongdoing as long as none of the above-noted exclusions apply.

A final determination of whether the OTCA applies in any specific circumstance can be definitively determined only when the circumstance arises. And even when the appropriate state agencies determine whether to cover a particular activity, a court can make a different determination. Please contact us if you need advice as to whether a particular activity is covered.

5. *Does the LEPC require a charter or similar state recognition?*

The LEPC is not required to draft a charter. Neither is it necessary for the LEPC to receive any formal state recognition beyond that specified by both state and federal statute. ORS 453.510 sets forth the IHCC functions, which obviates the need for a charter. Furthermore, the legislature has already recognized the IHCC. In fact, it was created by statute, and no additional state recognition is required.

6. *Is the relationship between the LEPC and its non-members contractual, or are the non-members volunteers?*

According to the information you provided to us, the LEPC is comprised of volunteer members who recruit local "contacts" to assist them in accomplishing their mandate. You refer to these "contacts" as non-members, but the distinction here is unimportant. A volunteer is someone who performs a service of his own free will and whose actions are not founded on any legal obligation to act.²² A contractual relationship is a different creature. In order to have a contract, specific elements must be present – such as, offer, acceptance and consideration. The legal definition of consideration is an exchange of promises or a benefit conferred by one party and some detriment or responsibility undertaken by the other party.²³ We have no information to indicate that the *non-members* are acting out of some legal obligation. We are not aware of anything signed by these non-members obligating them to take part in LEPC activities and there is no remuneration paid to the non-members. As a result, this is a voluntary relationship and is in no way contractual.

²¹ *Hanson v. Versarail Systems, Inc.*, 175 Or App 92, n 6, 28 P3d 626 (2001); *Chesterman v. Barmon*, 305 Or 439, 442, 753 P2d 404 (1988).

²² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2564 (unabridged 1993).

²³ *Mitchell v. Pacific First Bank*, 130 Or App 65, 880 P2d 490 (1994).

As noted above, the status as a volunteer is irrelevant in determining tort liability, because the courts want to encourage people to volunteer their services by holding them harmless from personal liability arising out of services performed on behalf of the state.

a. *Is a letter acknowledging their agreement to cooperate with the LEPC sufficient?*

Please refer to the discussion above relating to an LEPC volunteer's status as an agent of the state, subject to the provisions of the OTCA.

b. *Should the IHCC/SERC appoint the non-members to the LEPC for a limited duration?*

Appointing the LEPC non-members for a limited duration is discretionary. However, doing so likely will be a decision that would have to be done in compliance with the Public Meetings Law.

7. *Can the IHCC/LEPC enter into contracts and/or make purchases on its own authority? If yes, what OSFM oversight would be required?*

The IHCC/LEPC does not have the authority to enter into contracts and/or make purchases on its own behalf. Like all agencies, the IHCC is a creature of statute. It has no inherent power, but only such power and authority as has been conferred upon it by statute.²⁴ This power includes that expressly conferred by statute, as well as such implied power as is necessary to carry the power expressly granted.²⁵

The legislature has not granted IHCC any contracting authority. The Department of Administrative Services (DAS) is authorized to contract on behalf of state agencies. Accordingly, the legislature's decision not to grant any contract authority to IHCC indicates that it intended for IHCC to do any contracting through DAS.

Because we have concluded that the IHCC cannot enter into contracts or make purchases, it is unnecessary to answer your follow-up question.

c: Bob Albers, Oregon State Fire Marshal's Office
Sergeant David Scholten, Oregon State Police
Keith Kutler, Government Services Section
Herbert F. Lovejoy, Government Services Section

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²⁴ *Lee v. Oregon Racing Commission*, 142 Or App 114, 920 P2d 554 (1996).

²⁵ *Warren v. Marion Count et al.*, 222 Or 307, 320, 353 P2d 257 (1960).