



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

2425 Bristol Ct SW • PO Box 40109 • Olympia WA 98504-0109

MEMORANDUM

DATE: October 20, 2006

TO: Mary Selecky, Secretary
Bill White, Deputy Secretary
Department of Health, MS 47890

FROM: Joyce A. Roper, Sr. Assistant Attorney General *JAR*
Agriculture & Health Division, MS 40109

SUBJECT: **Public Health Emergencies – Update to January 31, 2002 Legal Authority Memo**

TABLE OF CONTENTS

- I. Introduction.....1
- II. Current Legal Authority to Respond in a Public Health Emergency.....3
 - A. Authorities of Local Jurisdictions3
 - 1. Local Health Officers and Boards.....3
 - a. Authority to Control Communicable Diseases5
 - b. Authority to Close Schools and Day Care Centers.....6
 - c. Isolation and Quarantine Authority and Procedures.....7
 - 2. Local Emergency Operations Center.....9
 - a. Scope and Definitions.....9
 - b. Authorized Activities.....10
 - c. Mutual Aid Agreements.....11
 - 3. Local Public Safety Authority.....12
 - B. Authorities of State Agencies.....13
 - 1. Department of Health.....13
 - a. Secretary’s Authorities.....13
 - b. Secretary’s Authority to Act in Lieu of Local Jurisdictions.....14
 - c. Secretary’s Authority Over Pet Animals.....14
 - 2. State Board of Health15
 - 3. State Military Department, Emergency Management Division16
 - a. Authority of Adjutant General and the CEMP.....17
 - b. Liability and Waiver of Professional Licensing Requirements.....18
 - c. Interstate and International Mutual Aid Agreements.....19
 - C. Authority of the Governor.....19
 - 1. Emergency Management.....19
 - 2. Emergency Proclamations.....20
- III. Conclusion21



ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 2

I. INTRODUCTION

On January 31, 2002, following the tragic events on September 11, 2001 in New York and Washington, D.C. and the widespread national concern about bioterrorism after letters containing anthrax were discovered in Florida, Washington, D.C., and New York, I prepared a memorandum describing the legal authorities of the different entities within the local and state government in responding to an emergency involving the public health. The public health system has a long history of responding to emergencies which trigger high mortality and morbidity for human populations. However, with the advent of modern medicine and environmental protections, such as wastewater treatment, immunizations, standards for drinking water, the public health system's work in nations such as the United States went unnoticed and underappreciated by the average citizen in the twentieth century. We now take for granted the public health protections put in place prior to and during our lifetime.

While public health officials were already concerned about the potential for bioterrorism and the rapid spread of diseases as greater numbers of the world's population began to travel quickly by air from one location to another and our nation's economy became increasingly dependent upon international trade, the public health infrastructure, taken for granted for so long in the United States, was being minimally maintained. The events following September 11, 2001 raised public awareness of the need to prepare for a bioterrorism event or a novel disease, such as SARS which affected large populations in Toronto, particularly with the imposition of quarantines. Public health officials realized that the pace of their planning needed to be accelerated. Several public health events (anthrax, monkeypox, SARS, bovine spongiform encephalopathy, west Nile virus, high pathology avian influenza, e coli in food), highlighted the need for a quick, decisive response and accurate communications among a variety of interested parties.

These events, even when we did not have active cases in our state, tested the public health system in Washington. Washington's public health system is comprised of a number of governmental agencies at the state and local levels. The purpose of this memo is to update the discussion of the roles of these various agencies and their intersection with other entities involved in emergency preparation and response, sharing a common mission of protecting the people of this state. Most of the roles overlap to some degree, which benefits the public with a deeper blend of resources to meet the public health emergency than a single authority may be able to provide. The alacrity with which the authorities must respond demands that each of the entities understand its own role and the roles of the other agencies, as well as becoming familiar with the available resources within the entire system. The government agencies need to partner with each other and with private entities to effectively fulfill this mission. Ultimately, every person should be prepared to protect and respond for oneself and one's family during an emergency; assisting neighbors, the community, and the government responders to the extent possible.

The memo commences with a description of the authority of the local health jurisdictions, as Washington's public health and emergency management systems recognize the primacy of local governments for both public health delivery and emergency management through the local health boards, local health officers, local emergency management, and heads of political subdivisions. The local health jurisdictions provide services tailored to the public health needs of the communities in which they serve. The local health jurisdictions are generally more familiar with the health providers, facilities, and other resources within their communities. The memo then describes the authorities of state agencies, both the public health agencies and the emergency management agency. The memo concludes with a description of the governor's authority.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 3

II. CURRENT LEGAL AUTHORITY TO RESPOND IN A PUBLIC HEALTH EMERGENCY

A. AUTHORITIES OF LOCAL JURISDICTIONS

- 1. Local Health Officers and Boards**
 - a. Updated Authority to Control Communicable Diseases**
 - b. Authority to Close Schools and Day Care Centers**
 - c. Isolation and Quarantine Authority and Procedures**
- 2. Local Emergency Operations Centers**
 - a. Scope and Definitions**
 - b. Authorized Activities**
 - c. Mutual Aid Agreements**
- 3. Local Public Safety Authority**

1. Local Health Officers and Boards

Local health officers and boards have broad authority to protect the life and health of the people within their jurisdictions. As discussed below, the courts have upheld a number of different actions taken by the local officers and boards under this broad authority.

The authority for local health officers and boards is contained in chapter 70.05 RCW. Local boards of health are granted the authority to “[supervise] all matters pertaining to the preservation of the life and health of the people within its jurisdiction.” RCW 70.05.060. Local boards of health are directed, in RCW 70.05.060, to take the following actions to preserve the life and health of the people within their jurisdiction:

- (1) Enforce through the local health officer . . . the public health statutes of the state and rules promulgated by the state board of health and the Secretary of health;
- (2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;
- (3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof;
- (4) Provide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department;
- (5) Provide for the prevention, control and abatement of nuisances detrimental to the public health;
- (6) Make such reports to the state board of health through the local health officer or the administrative officer as the state board of health may require;

...

Local health officers act under the direction of local boards of health and, under RCW 70.05.070, are mandated to:

- (1) Enforce the public health statutes of the state, rules of the state board of health and the Secretary of health, and all local health rules, regulations and ordinances within his or her jurisdiction . . .;
- (2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;
- (3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 4

- (4) Inform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his or her jurisdiction;
- (5) Prevent, control or abate nuisances which are detrimental to the public health;
- ...
- (9) Take such measures as he or she deems necessary in order to promote the public health,

In *Spokane County Health District v. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992), the Washington Supreme Court discussed and applied RCW 70.05.060 and .070. The Spokane County Health District Board of Health had directed its health officer to implement a needle exchange program to “slow the spread of AIDS and other infectious diseases among [intravenous drug users] and those with whom they come into contact.” *Supra* at 144. The Spokane County Prosecutor challenged the implementation of the needle exchange program on the grounds that it constituted an unlawful distribution of drug paraphernalia. The court noted that the local health officials had been given a broad grant of powers by the legislature in chapter 70.05 RCW. *Supra* at 148. The court went on to note that chapter 70.05 RCW should be liberally construed “[b]ecause protecting and preserving the health of its citizens from disease is an important governmental function.” *Supra* at 149. This governmental function was deemed so important that the court said “[t]he legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context.” *Supra* at 149.¹ The court upheld the needle exchange program as a valid exercise of the local health board’s police power, noting that the judiciary does not examine “the subject matter and expediency of public health disease prevention measures . . . except as they may violate some constitutional right guaranteed to defendants.” *Supra* at 149. *See also Brockett* at 155 (“Moreover, we are persuaded the broad powers given local health boards and officers under Const. art. 11, § 11 and RCW 70.05 authorize them to institute needle exchange programs in an effort to stop the spread of HIV and AIDS.”).

Washington cases have upheld the exercise of the authority of local boards and officers to protect the public health in a variety of contexts: limitation on outdoor advertisement of tobacco products [*Lindsey v. Tacoma-Pierce County Health Department*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997)]; regulations on the installation of private sewage disposal systems [*Snohomish County Builders Association v. Snohomish County Health District*, 8 Wn. App. 589, 508 P.2d 617 (1973)]; fluoridation of the water supply [*Kaul v. City of Chehalis*, 45 Wn.2d 616, 277 P.2d 352 (1954)²]; smallpox vaccination as a condition of public school attendance [*Lehman v. Partlow*, 119 Wash. 316, 205 P. 420 (1922)]; quarantine of persons possibly infected with smallpox or syphilis [*City of Seattle v. Cottin*, 144 Wash. 572, 258 P. 520 (1927); *State v. Superior Court for King County*, 103 Wash. 409, 174 P. 973 (1918); *Westman v. Superior Court for King County*, 103 Wash. 701, 174 P. 979 (1918)].³

¹ Interestingly, the court cites to *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 420, 174 P. 973 (1918), one of a series of cases from the early twentieth century discussing the quarantine authority of the state and local health boards. These quarantines were primarily for the diseases of syphilis and smallpox.

² The local jurisdiction’s authority to require fluoridation of the water supply has been modified by the legislature’s specific grant of authority to water districts in RCW 57.08.012. *Parkland Light & Water Company v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

³ The discussion of the broad authority of the local health departments in these quarantine cases remains valid; however, while not explicitly overruled, these cases also held that the persons quarantined did not have access to the courts for review of their detention. In reaching this decision, the courts relied on legislation identifying the state board of health as the final arbiter of the propriety of the quarantine. The courts said that legislation precluded judicial review. More recent decisions make it clear that access to the courts must be available under the procedural

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 5

The variety of activities, addressing a myriad of public health concerns, upheld by the courts in these cases demonstrates one advantage with the broad grant of legislative authority in the current law. The local authorities have wide flexibility to tailor their activities to address the specific public health needs of the people in their jurisdictions.⁴ However, if the legislature has adopted a specific law on a particular topic, vesting authority traditionally within the local health jurisdiction to another entity, then the specific law overrides the broad grant of authority to the local health jurisdiction. *Parkland Light & Water Company v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

a. Authority to Control Communicable Diseases

In September 2003, the State Board of Health⁵ amended the administrative rules to update the authorities and responsibilities of local health officers, consistent with the renewed recognition of public health's key role in protecting the public health, safety and welfare with respect to emerging diseases, food safety, and the potential for bioterrorism. WAC 246-100-036(1), as amended in 2003, makes it the responsibility of the local health officer to "establish, in consultation with local health care providers, health facilities, emergency management personnel, law enforcement agencies, and any other entity he or she deems necessary, plans, policies, and procedures for instituting emergency measures necessary to prevent the spread of communicable disease or contamination." This amendment recognized the necessity of strong partnerships and collaboration to effectively protect the public.

WAC 246-100-036(4) recognizes the importance of these partnerships by authorizing local health departments to "make agreements with tribal governments, with federal authorities or with state agencies or institutions of higher education that empower the local health officer to conduct investigations and institute control measures [for isolation and quarantine] on tribal lands, federal enclaves and military bases, and the campuses of state institutions." "State institutions" are broadly defined in WAC 246-100-036 (4) as including, but not limited to, "state-operated colleges and universities, schools, hospitals, prisons, group homes, juvenile detention centers, institutions for juvenile delinquents, and residential habilitation centers."

In WAC 246-100-036(3), local health officers are charged with "conduct[ing] investigations and institut[ing] *disease control and contamination control measures*, including medical examination, testing, counseling, treatment, vaccination, decontamination of persons or animals, isolation, quarantine, vector control, condemnation of food supplies, and inspection and closure of facilities, consistent with those indicated in the 17th edition, 2000 of the *Control of Communicable Disease Manual*, published by the American Public Health Association, or other measures he or she deems necessary based on his or her professional judgment, current standards of practice and the best available medical and scientific information." "Disease control measures" are defined in WAC 246-100-011(11) as "the management of persons, animals, goods, and facilities that are infected with, suspected to be infected with, exposed to, or suspected to be exposed to an infectious agent in a manner to prevent transmission of the infectious agent to humans." "Contamination control measures" are defined in WAC 246-100-011(8) as "the management of persons, animals, goods, and facilities that are contaminated, or

due process protections in the state and federal constitutions. See *Brockett, supra* at 149; *Snohomish County Builders Association v. Snohomish Health District, supra* at 623.

⁴ This can also raise concern about lack of uniformity; however, under the authority of state agencies, that concern can be addressed at the state level if necessary.

⁵ The authority of the Washington State Board of Health (WSBOH) is discussed in the section addressing authorities of state agencies.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 6

suspected to be contaminated, in a manner to avoid human exposure to the contaminant, prevent the contaminant from spreading, and/or effect decontamination.”

RCW 70.05.090 requires physicians to report dangerous contagious or infectious diseases, or any disease required to be reported by the state board of health, to local health officers or the department of health within twenty-four (24) hours of attending to that patient. Physicians who refuse or neglect to report are guilty of a misdemeanor, and if convicted, are fined from ten to two hundred dollars for each case not reported. RCW 70.05.120.⁶

Under RCW 70.05.110, the local boards and officers are required to report to the state board of health certain specified diseases, upon discovery of the diseases. Failure of the local board to report subjects the members of the board to misdemeanor charges and, upon conviction, fines of ten to two hundred dollars.

WAC 246-101-505(10) authorizes the local health officer to:

- (a) Carry out additional steps determined to be necessary to verify a diagnosis reported by a health care provider;
- (b) Require any person suspected of having a reportable disease or condition to submit to examinations required to determine the presence of the disease or condition;
- (c) Investigate any case or suspected case of a reportable disease or condition or other illness, communicable or otherwise, if deemed necessary;
- (d) Require the notification of additional conditions of public health importance occurring within the jurisdiction of the local health officer.

The question of whether a person is affected or sick with a dangerous, contagious or infectious disease is solely within the authority of the local health officer, until the state department of health is notified. RCW 70.05.100. The state department of health’s “executive officer,” or a physician she appoints to examine the case, makes the final determination.

In the last paragraph of RCW 70.05.120, it is declared a misdemeanor, subject to a fine of twenty-five to one hundred dollars and/or up to ninety days imprisonment in the county jail for any person:

- (i) violating chapter 70.05 RCW;
- (ii) violating, refusing or neglecting to obey the state board, local board or officer’s rules, regulations or orders for the prevention, suppression and control of dangerous contagious and infectious diseases;
- (iii) who leaves an isolation hospital or quarantined house or place without the consent of the health officer;
- (iv) who evades or breaks quarantine or assists in evading or breaking any quarantine; or
- (v) who conceals a case of contagious or infectious disease.

b. Authority to Close Schools and Day Care Centers

Under chapter 246-110 WAC, local health officers have the authority, after consultation with the Secretary of the Department of Health or her designee, to take all medically appropriate actions deemed necessary to control or eliminate the spread of disease, including, but not limited to:

⁶ RCW 70.05.090 and .120 contain different reporting timelines; RCW 70.05.090 refers to twenty-four hours and RCW 70.05.120 refers to twelve hours. In addition, RCW 70.05.120 allows the physician to report to an “administrative officer” or the “proper health officer” and there is no definition of “administrative officer.” This could become an issue in implementing the enforcement provisions of RCW 70.05.120. The differing timelines for reporting are contained in statutes, so clarification of this ambiguity must be by legislation. The definition of “administrative officer” could be clarified by an administrative rule.

