

# MEMORANDUM

State of Alaska  
Department of Law

TO: MG Jake Lestenkoff  
Adjutant General/Commissioner  
Department of Military  
and Veterans Affairs

DATE: July 17, 1997

FILE NO.: 661-97-0323

TELEPHONE NO.: 269-5136

SUBJECT: Succession to the Office of the  
Governor in Relation to  
Certain Disaster Management  
Issues

FROM: Mary A. Gilson  
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This memorandum is in response to your question concerning what provisions are made in Alaska law for succession to the office of the Governor. Specifically, you asked if the Governor becomes unable to hold office who then would have the authority to declare a state disaster emergency, and/or request the President declare a federal disaster. You have also asked what sort of provisions have been made for the continuation of local government.

## **Brief Answer**

Under Alaska law, if the Governor becomes unable to hold office, the Lieutenant Governor succeeds to the office. If the Lieutenant Governor is unable to hold the office, then Alaska statutes provide that a third person, previously appointed, becomes the acting Governor. Currently, that third person appointee is the Attorney General, Bruce Botelho. There are no further provisions for other persons to succeed to the office of the Governor.

Under AS 26.23.020, the Governor, or a person authorized to hold the office, has the power to declare a state disaster emergency. Under AS 26.23.220, the Governor may be able to delegate the power to declare a state disaster emergency to the Commissioner of the Department of Military and Veterans Affairs.

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) 42 U.S.C. § 5121 *et. seq.*, the Governor, defined as the state's "chief executive officer," must request the President to declare a "major disaster" or an "emergency" as a prerequisite to federal assistance under the Act unless the President determines that the emergency involves a subject area for which the federal government has exclusive or preeminent authority.

If no one was authorized to hold the office of state "chief executive officer," the President could determine that a request for disaster or emergency assistance from a state official

other than the Governor was “substantial compliance” with the Stafford Act, but whether the President would do that is unknown and would depend on specific facts. It is also possible that a state could seek direct relief from Congress; however, the outcome of a request for Congressional relief would depend on Congress.

In the absence of a Presidential declaration, or a situation for which the federal government has primary responsibility, federal agencies would still be able to provide emergency or disaster assistance under their existing authority outside the Stafford Act. For example, the Coast Guard could assist in search and rescue operations. Also, assistance would, of course, be available from volunteer organizations such as the Red Cross and Salvation Army.

Local governments should, and do, have ordinances setting out procedures for filling vacant elective offices, in the legislative as well as executive branch, and for emergency meetings. As a planning matter, such provisions should be reviewed by local emergency planners, if they have not already done so, to confirm their understanding of what the procedures are for filling vacancies in elective offices in their community.

## Analysis

### A. Succession to Office of the Governor

Under the Alaska state constitution, the Lieutenant Governor succeeds the Governor. If that is not possible, then the Alaska statutes provide for a third person previously appointed to fill the office of Governor until a special election is held. Governor Knowles has selected Attorney General Bruce Botelho as that person.

The Alaska Constitution provides that: “**Succession; Failure to Qualify.** If the Governor-elect *dies, resigns* or is *disqualified*, the Lieutenant Governor elected with him shall succeed to the office of Governor for the full term. . .” (emphasis added). Alaska Const. art. III, § 10. “In case of a vacancy in the office of Governor *for any reason*, the Lieutenant Governor shall succeed to the office for the remainder of the term”<sup>1</sup> (emphasis added). Alaska Const. art. III, § 11.<sup>2</sup>

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<sup>1</sup> If the Governor is continuously absent for a six-month period or has been unable to discharge the duties of his office because of mental or physical disability, the office shall be deemed vacant. *See* Art. III, § 12.

<sup>2</sup> The Lieutenant Governor also serves as acting Governor during a temporary absence of the  
(continued...)

If the Lieutenant Governor is unable to succeed to the office of Governor, the Alaska Constitution provides: “**Further Succession.** Provision shall be made by law for succession to the office of Governor and for an acting Governor in the event that the Lieutenant Governor is unable to succeed to the office or act as Governor. . . .” Alaska Const. art. III, § 13. Accordingly, AS 44.19.040 provides that:

After taking an initial term of office, the Governor shall appoint, from among the officers who head the principal departments of the state government or otherwise, a person to succeed to the office of Lieutenant Governor if the office of Lieutenant Governor becomes vacant. The appointment is subject to confirmation by a majority of the members of the legislature meeting in joint session. The person designated and confirmed is next in line for succession to the office of Lieutenant Governor, subject to the pleasure of the Governor. If the person designated and confirmed is removed from or vacates the appointment, the Governor shall appoint a successor subject to confirmation in the same manner as the person initially appointed.

The person appointed under AS 44.19.040 succeeds to the office of Lieutenant Governor if that office becomes vacant for whatever reason, for the remainder of the term or until a special election is held. AS 44.19.042. The Governor would then appoint another person to succeed to the office of Lieutenant Governor in case of a subsequent vacancy. *See* AS 44.19.042.

Under AS 44.19.044, if the regularly elected Lieutenant Governor succeeds to the office of Governor, and thereafter during the regular term, the office of the Governor again becomes vacant, the appointed Lieutenant Governor becomes the acting Governor until a special election to elect a Governor and Lieutenant Governor is held.

If there is a simultaneous vacancy in the office of the Governor and the office of the Lieutenant Governor, the person appointed under AS 44.19.040 succeeds directly to the office of acting Governor until successors to the respective offices are elected in a special election. AS 44.19.046.

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<sup>2</sup> (...continued)  
Governor from office. Alaska Const. art. III, § 9.

There are no further provisions for additional persons to succeed to the office of the Governor. Legislation, not an administrative order or executive order, would be required if further provisions are desired.

**B. Authority to Declare a State Disaster Emergency**

Under the Alaska Disaster Act (AS 26.23 *et. seq.*) the power to declare a condition of disaster emergency rests with the Governor. AS 26.23.020(c).<sup>3</sup> As noted above, in the event the elected Governor is unable to hold the office, the authority of the office may be assumed by the Lieutenant Governor or the person appointed under AS 44.19.040, as appropriate. The person with the authority of the Governor would have the power to declare a disaster emergency under AS 26.23.020(c).

We have previously determined that under AS 26.23.220, the Governor can delegate authority under Chapter 26 to the Department of Military and Veterans Affairs. *See* 1997 Inf. Op. Att’y Gen. 661-94-0165 (June 16, 1997) (determining that the Governor can delegate to DMVA the power to make findings under AS 26.23.300(c)). Thus, the Governor may be able to delegate the power to declare a state disaster under AS 26.23.020 to the Commissioner of DMVA. The delegation could be limited to be effective only in situations in which those persons authorized to fill the office of Governor are not able to hold the office. Such a delegation may provide one additional person with the authority to declare a state disaster emergency. We have not researched this issue to determine whether such a delegation would raise any legal issues, but would be happy to do so upon your request.

**C. Requesting a Presidential Declaration under the Stafford Act**

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 *et seq.*, federal assistance is available to states, to supplement

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<sup>3</sup> The lack of a gubernatorial declaration of a disaster does not prevent state agencies from exercising their statutory authority to respond to an event. However, a declaration of a disaster emergency under AS 26.23.020 does authorize the use of certain monies to fund agency activities and provide authority for certain government actions during the event. *See* for example, AS 26.23.300 (use of disaster relief fund), AS 26.23.020(e)-(g), AS 26.23.100 (temporary housing), and AS 26.23.110 (debris removal).

local and state resources, from the Federal Emergency Management Agency (FEMA) in “emergency” situations and in a “major disaster.”<sup>4</sup>

## **1. Emergencies**

Under the Stafford Act, “emergency” means:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

Under 44 C.F.R. § 206.63, assistance authorized by an emergency declaration is limited to “immediate and short-term assistance, essential to save lives, to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.” Emergency assistance does include temporary housing and debris removal. 42 U.S.C. § 502(a)(5) & (6); 44 C.F.R. § 206.62(e) & (f).

Under the Stafford Act, requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected state. 42 U.S.C. § 501(a). “Governor” means “the chief executive officer of any state.” 42 U.S.C. § 102(5).<sup>5</sup> However, the President may declare a state of emergency and order federal agencies to provide emergency assistance under the Stafford Act in the absence of a Governor’s request if the President determines that the primary responsibility for the response rests with the United States because the emergency involves a subject area for which, under the federal constitution or laws, the

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<sup>4</sup> At the outset it is important to note that some assistance is available from the federal government and voluntary agencies without a Presidential declaration of an emergency or disaster. Federal establishments such as military installations located in or near the disaster area may provide immediate lifesaving assistance, and other federal agencies may be able to provide assistance under their own statutory authority. For example, the U.S. Coast Guard may assist in search and rescue operations, evacuation of disaster victims, and transportation of supplies and equipment. In addition, the American Red Cross, Salvation Army, and other organizations may provide significant assistance in an event without the necessity of a Presidential declaration or a request from the Governor. Depending on the situation, the U.S. Congress might also be a source of immediate assistance.

<sup>5</sup> FEMA regulations require that the request be submitted within five days after the need for assistance becomes known and no later than 30 days after the incident. The Governor is required to make certain findings and confirmations with the request. 44 C.F.R. § 206.35.

United States exercises exclusive or preeminent responsibility and authority. 42 U.S.C. § 501(b). It is possible that a situation in Alaska which resulted in no authorized person being available to act as Governor might also rise to the level of an emergency in which primary responsibility for the response rested with the United States, as for example a national emergency. The likelihood of this of course would depend on specific facts.

## **2. Major Disasters**

Under the Stafford Act a “Major disaster” means:

[A]ny natural catastrophe [the Act lists some examples] or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

In order to obtain FEMA assistance under the major disaster assistance programs available under the Act, the Governor or acting Governor of the affected state must request the President to declare that a major disaster exists. 42 U.S.C. § 401.<sup>6</sup>

## **3. Authority to Request Declaration**

As noted, the Stafford Act defines “Governor” as “the chief executive officer of the state.” Therefore, under a strict construction of the Stafford Act, the authority to request the President to declare a Presidential disaster or emergency rests only with the state Governor and those persons entitled to hold that office. It is possible that if there was no one authorized to hold the office of Governor and therefore no “Governor or Acting Governor” to request a Presidential declaration of a “major disaster” or “emergency,” that the President would view a request by other state government officials to be “substantial compliance” with the Stafford Act and regulations. However, there is no caselaw on this point, and this possibility would depend on specific facts.

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<sup>6</sup> The request must be submitted within 30 days of the occurrence of the incident. The period may be extended by FEMA but only if a written request for an extension is submitted by the Governor or acting Governor within the 30-day period. 44 C.F.R. § 206.36(a). The Governor’s request is required by FEMA regulation to contain certain findings and make certain confirmations. *See* 44 C.F.R. § 206.36.

**D. Local Government**

Local government provisions for filling elective offices, i.e., city council/assembly positions and the office of the mayor, are varied. Home Rule municipalities include some provisions in charter and then provide further by ordinance. Other local entities have procedures for succession set out in numerous ordinances. Local emergency planners may want to ensure that they are familiar with the applicable law in their jurisdictions.

Under AS 26.23.140, only the principal executive officer of a political subdivision has the power to declare a local disaster emergency. The effect of such a declaration is to activate the response and recovery aspects of all applicable local or interjurisdictional disaster emergency plans and to authorize the furnishing of aid and assistance under those plans. AS 26.23.140(b). Therefore, as a local planning matter it is important to know the provisions for secession for the principal executive officer.

However, state assistance can be provided in the absence of a local declaration of disaster emergency. Under AS 26.23.300(c), the Governor can expend up to \$500,000 in a fiscal year from the disaster relief fund to prevent or minimize the effects of an event that occurs in the state and that, in the determination of the Governor, poses a direct and imminent threat of a disaster of sufficient magnitude and severity to justify state action. Assets from the disaster relief fund are also available to alleviate the effects of a *state* declared disaster. AS 26.23.300(b); AS 26.23.025. The Governor may make a finding that a disaster has occurred or is imminent without a prerequisite requirement of a locally declared disaster. AS 26.23.020. The Governor's proclamation of a disaster emergency also activates the disaster response and recovery aspects of the state, local, and interjurisdictional disaster emergency plans applicable to the political subdivisions or areas in question.

We hope the information in this memorandum is helpful. If you would like further information on any issue, please let us know.

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