

Quick Response Research Report

Operational Law In Disasters

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Introduction

“A disaster is over when you start thinking about legal issues.”
Dale Shipley, Former Ohio EMA Director and FEMA Region V Director.
October 13, 2008.

Often legal aspects are seen as litigation or avoiding litigation. This is not the definition here. Instead, the planning and operational aspects of law that are part of public management and decision-making are the focus of this study. Important aspects of long term relationships and planning involve policies imbedded in statutes, regulations and agreements that are put into effect during a disaster. Existing agreements and prior working relationships affect this temporary method of interdepartmental and interagency operation. These statutes, regulations, agreements, plans, protocols, relationships and on-the-scene agreements are all

aspects of what can be called operational law instruments and techniques. This research project considered operational aspects of law in Ohio's response to a pandemic emergency, specifically the H1N1 flu outbreak in April-May 2009.

As Marshall Dimock said: "Public management is law in action." This developmental study considers how law and legal considerations are part of the decision making and action of a response. The definition of law here encompasses the aspects of acting within legal requirements, guidance, documents and expectations. This definition of law considers the operations that managers and administrators are familiar with, rather than the lawyerly approach. As research has shown, the concerns of managers and lawyers in public settings differ, but managers, whether public, private or non-profit must act within legal requirements and social norms. This view of law downplays the consideration to fear liability or possible litigation and instead focuses on decisions and references to operational law instruments and techniques.

The emergency that is the subject of this research is the 2009 H1N1 Novel flu that was first identified in April 2009. During the period of this study the novel flu was widespread in the USA but, it did not meet World Health Organization (WHO) pandemic definitions until June 11. Thus, for this study epidemic will be used instead of pandemic. Because this is a pandemic/epidemic situation rather than a natural or technological hazard, the response, degree of activation, and roles of responders is somewhat different. However, given the foundation principle of all-hazards planning, it is expected that the general framework for response would be the same as for any other emergency. This, in fact, is one of the operational aspects considered during the study.

Research Questions:

The research questions were modified due to the nature of the response as a public health emergency rather than a natural or technological disaster. The primary research questions are:

1. How does law affect the operation of emergency response to a potential pandemic flu emergency?
2. What types of standard legal authority, agreements, and procedures are evident in how emergency managers and public health officials respond to a flu emergency?

These two fundamental questions focus the study on operational law during response to a pandemic emergency. Secondary and more focused questions were initially developed in order to organize the information collected and as prompts during the focused interview. The detailed format of these secondary research questions are as follows.

- What influence do you believe that the framework, preparation and requirements by Federal law and regulations has on the response to the disaster, the H1N1 novel flu?
- Are there any questions during this response for which you sought legal advice?
- Concerning decision making and response:
 - What established protocols assisted you in this task? How do you think they can be improved?
 - Do you think that the protocols provide a balance between standards or routines and management approaches to address the situation at hand?
- Concerning collaboration and cooperation:
 - Do you believe the joint operating agreements between government responders are effective?
 - What are benefits from these agreements?
 - What do you do if there are questions or issues that are not covered by an operating agreement?
 - Are there joint operating agreements between government and non government organizations that are effective?
 - Besides being based on written agreements, how is coordination achieved between government and non-profits?
- Would clearer mandates in statutes or regulations assist in effective response?
- Which of the following do you believe to useful in preparation and responses? Protocols, standard operating procedures, table top exercises, drills, regulations, statutes, agreements, or legal advice?

Given the unique nature of the emergency under investigation, not all of these questions proved applicable. Thus, the discussion of findings will focus on the two primary research questions and include some reference to the more detailed questions as appropriate.

METHODOLOGY

This is an exploratory case study incorporating observation, focused interviews, and document review. Due to the unique nature of a public health emergency, the researchers spent time on document review and environmental scanning. The Centers for Disease Control (CDC), WHO, Ohio EMA, and Ohio Department Of Health internet sites were reviewed frequently in order to stay current on the status of the H1N1 virus and recommended response actions. Current news information was also monitored on order to identify the public perception of the situation as well as the official positions take by emergency response agencies.

There were a number of documentary sources that were reviewed including legal authority of statutes, regulations, promulgated plans and guidance. These included review of NIMS, the Ohio Department of Health, ODH Pandemic Influenza

Preparedness & Response Plan (3/15/06); the Ohio Department of Health Infectious Disease Control Manual (2009), and the Ohio Emergency Management Agency Plan. These existing response plans were considered as binding agreements and so there were not any MOU developed for this particular emergency. Additional legal sources reviewed included the daily EOC agendas and reports; the press releases and public notices. Ohio has a statutory cooperative agreement for local agencies and so there were no separate MOUs. Finally the state “Proclamation of Emergency: Authorizing State Agencies and Personnel to Assist with the Receipt, Transportation and Storage of Medicine and Supplies Associate with the Swine Flu Virus” (April 28, 2009) was evaluated.

There were numerous federal documents and resources that were reviewed. These included the underlying legal authority in statues and rules that were published on line at FEMA, DHS, HHS, CDC, and White House web sites. In particular the official announcements about flu and guidance were evaluated on the CDC and the Pandemicflu.gov website.

Upon activation of the /natural Hazard Quick Response Grant, the researchers proceeded to the state EOC in order to observe the operational response to the H1N1 health emergency. Onsite observation of the State of Ohio Emergency Operations Center was conducted over two days from April 28 - 29 , 2009. Additionally, the researchers observed the operation of the Joint Information Center (JIC) since the dissemination of public information was a major component of the response to this public health emergency.

The observations gathered were then amplified with focused interviews of pertinent state and county personnel directly involved in the activation and response, The interviewees were selected initially based on their active involvement in the response and then expanded using a snowball sample based on referrals from the original interviewees.

Individuals interviewed include:

State Level

- Nancy Dragani, Director Ohio Emergency Management Agency
- Mel House, Operations Division Director
- Tami Little, Legal Counsel, Ohio Emergency Management Agency
- Sima Merick, Mitigation, Recovery & Preparedness Grants Division Director, Ohio Emergency Management Agency
- Dennis Tomcik, Field Operations, Training & Exercise Branch Chief, Ohio Emergency Management Agency
- Andrew Elder, Field Liaison, Region 2, Ohio Emergency Management Agency
- Rick Warren, Field Liaison, Region 6, Ohio Emergency Management Agency
- Steven A. Wagner, Chief, Office of Health Preparedness, Ohio Department of Health

County Level:

- Thomas Kelley, Director, Lorain County Office of Homeland Security & Emergency Management
- Alice Webber, Emergency Operations Manager, Lorain County Office of Homeland Security & Emergency Management
- Tim Warstler, Director, Stark County Emergency Management
- Richard Weber, Assistant Director, Stark County Emergency Management
- James M. Adams, R.S., M.P.H., Health Commissioner, City of Canton, Ohio

In the terms of interviews, the focused interview format was used. The focused interview technique has been in use for at least fifty years and utilizes the construction of an interview schedule that is used for each of the subjects in the study. The questions are carefully designed to elicit response focusing on the research question. The primary question may be enhanced through the use of secondary "prompt" questions that aid in getting the subject to talk and in keeping them on the topic at hand (Yin, 1984; Merriam, 1988). Keeping the conversation focused ensures that the researcher can gather a rich body of information on which to perform content analysis (Miles and Huberman, 1993; Yin 1984). This approach has the advantage of permitting the investigator to direct the interview while allowing the respondent freedom to answer in an open, unstructured fashion (Merton and Kendall, 1946). Interviews are best used to find out what kinds of things are happening rather than to "determine the frequency of predetermined things. The personal contact between the researchers and the subject is the principal advantage of the interview.

The weakness of focused interviews identified by Nathan (1986) that they are "inadequate to do without other supporting evidence," (p. 109) is mitigated by the use of triangulation utilizing secondary data from the mitigation program documents and the visual assessments of the researchers. This interview technique has been successfully used in disaster research. (Quarentelli, 1997; Dynes, 2000, p.1)

Preliminary Findings

The outbreak of the novel H1N1 flu virus occurred April 2009 when it was called Swine Flu. This was declared a National Health Emergency by the US Department of Health and Human Services – Center for Disease Control. It was assumed that as a novel virus, it could reach pandemic and the Department of Homeland Security as a matter of national significance.

In March and April of 2009, there a number of flu cases reported in Mexico that were atypical and severe. On April 22, there was a nation-wide medial emergency alert issued in Mexico for an epidemiological alert for a influenza related illness. On April 23, United States public health officials report that seven people in California and Texas have been infected with a new version of an influenza virus then called Swine Flu, and later labeled as the Novel 2009 H1N1 Flu (MMWR, Morbidity and Mortality Weekly Report, April 30, 2009, WHO-DSEU, June 11, 2009).

On April 25, WHO issued an alert of a “Public Health Emergency of International Concern.”

On April 26, in a press conference the acting Secretary of HHS, the acting director of CDC declared a Public Health Emergency over "Swine Flu", also present at the event was Secretary Napolitano of DHS. On this date, federal anti-viral resources in the Strategic National Stockpile were released as part of this health emergency. The declaration also enables the release of the Strategic Reserve of anti-viral drugs. Janet Napolitano explained at the press conference that this was "standard operating procedure" in this type of a situation and should be considered a "declaration of emergency preparedness." (DHS Press Release, April 26th, 2009.) Before the week was over, this flu was called the Novel H1N1 A Flu and it was at the level 5 of the WHO pandemic alert scale; it reached the level 6 – full Pandemic Flu on June 11, 2009 (WHO-Euro, June 11, 2009).

On April 24, 2009, the first suspected Ohio case of the “swine flu” was reported in Lorrain County. This was one of the first confirmed cases in the nation. The case was confirmed as Swine Flu on Monday April 27, 2009 and the Elyria City Health Department and the Lorraine County EMA responded to this event. In Ohio, the state EOC was activated Sunday April 26, 2009 and the researchers arrived at the state EOC on Tuesday April 28th. The state EOC had limited activation at a CAS 2 level. The Governor issued the “Proclamation of Emergency: Authorizing State Agencies and Personnel to Assist with the Receipt, Transportation and Storage of Medicine and Supplies Associate with the Swine Flu Virus” on April 28, 2009.

The Ohio EMA communicated with county EMAs on Sunday and notified them of the opening of the EOC and institution of readiness activities. County EMAs had a variety of rezones, some engaged full activation, such as Lorraine County, others had limited activation, such as Stark and Summit Counties, and a few simply went to alert status and monitored information without activating the EOC.

1. How does law affect the operation of emergency response to a potential pandemic flu emergency?

The response to the H1N1 virus was fairly direct and primarily followed the existing plans for response to a pandemic. However, questions of law emerged when state and local officials considered alternative actions that might be required had the pandemic evolved into a “worst case scenario”. For example, authority to quarantine is delegated to different entities in different states and frequently the public entity with authority to quarantine is not the same as that empowered to order evacuation or closing of public venues. Thus, considerable discussion was held concerning what the procedure of taking recommended action might be.

In point of fact, however, the only legal question that was observed was the drafting of the very narrowly defined emergency situation which authorized the State of Ohio to receive the federal Strategic National Stockpile (SNS) and to utilize the

Ohio National Guard to receive, store, secure, and transport the SNS. The development of this executive order, issued by the Governor of the state of Ohio, was achieved via a nominal group led by Tammy Little. The language was drafted and circulated among the legal counsels for the Ohio Emergency Management Agency, the Ohio Department of Health, and the Office of the Governor in order to achieve consensus not only on the legal content, but also the tone and specific language used. This was a fairly rapid process given that the members had worked on other projects prior to this.

One of the interesting topics that frequently came up in discussion was how the pandemic planning had focused on the absolute worst case scenario and that it was a challenge to operate at a limited scale since the virus proved to not be as rapidly spreading or deadly as originally supposed that it could or would be. Thus, the mass inoculations, quarantine, social distancing, etc. aspects of the plans were not implemented, although self-quarantine and social distancing were recommended as voluntary activities on the part of the general public. No such behaviors were mandated. Several comments were made that this was, in fact, a good live exercise that helped prepare the emergency response network to get ready for an actual pandemic. It should be noted that during the time of the study the disease reached level 5 of the WHO pandemic indicators but level 6 was full pandemic status. Additionally, individuals recognized that plans needed to be scalable so that they could be more applicable in more moderate outbreaks of disease which affected the population but did not require full scale activation of pandemic plans.

2. What types of standard legal authority, agreements, and procedures are evident in how emergency managers and public health officials respond to a flu emergency?

Ohio EMA personnel followed standard EOC protocol during the activation of the EOC. Everyone interviewed believed that the existing operations plan provided the necessary balance between routine and flexibility. The difference was the establishment of the Ohio Department of Health's Department Operations Center (DOC) and the briefings that were held from that site. Thus, the centralized twice daily (9 am and 3 pm) briefings from the EOC, following standard reporting format according to the ESFs, were supplemented with a telephone briefing by the Ohio Department of Health at 10:00 am. These health department briefings often lasted 2 hours and did not follow a standard agenda. While various departments, especially those with fairly substantial roles in a disaster, often activate DOCs, in the past the communication with local/county level emergency management and other responding agencies has been through the State EOC, from a unified source.

The established ERP and associated agreements among state agencies and departments worked well, even during the limited activation. The Ohio National Guard, Department of Health, and Emergency Management Agency worked together to provide distribution of the SNS to the Regional Distribution Nodes (RDNs). CHECK TERM FOR ACCURACY. This activity was organized as a

standard “mission”, detailed in the EOC and distributed to the responsible agency for execution. Thus, existing protocols were used effectively.

There is somewhat of a dissonance between the emergency operations plans and the pandemic plans at the local level. The primary challenge emerged around the dispersal of the SNS. Given that the Ohio Department of Health was in charge of the dispersal of the SNS, they had authority over how and when it would be distributed. There are existing protocols in place which enable local counties to request supplies and assistance through the county emergency management agency to the state emergency management agency. However, in the case of the SNS, these protocols were not operational. The Ohio Department of Health decided to establish their own protocols, procedures, and forms to request supplies from the SNS. Thus, the established protocols were not utilized and therefore caused concern and discussion the novel H1N1 epidemic.

At the county level the working relationship between the local departments of health and the emergency management agencies are generally good, but the agencies have varying degrees of formality based on their history of working together in emergencies. In many counties in Ohio, including the two visited for this study, there are multiple departments of health, usually one being the county health department and another one or more being local city departments. While these departments cooperate, the degree of cooperation, coordination, and interaction varies. Each county in Ohio has a county level emergency management agency (EMA). The county EMA prepares the Emergency Operations Plan for the county, including details concerning role of the health department(s). However, pandemic planning is conducted by both the EMAs and the health departments. The degree of cooperation varies, although in the counties visited, the health departments and EMA worked closely together and had exercised pandemic scenarios prior to this event.

Lorain County, which was the site of the first confirmed case of H1N1 flu in the State of Ohio, activated the county EOC according to standard procedures. Agencies responded and staffed the EOC according to established agreements. The local health departments worked closely with EMA in communicating with first responders’ and the public as well as in coordinating request and orders for supplies. The county EM Director worked with the local health departments in communicating with the schools and other public entities. The school attended by the infected patient was closed, but other schools in the county were not.

The local emergency responders were concerned about transmission of infection and the county EMA distributed N95 masks to EMS, fire and law enforcement personnel. At the end of the event, EMA asked these first responders to return any unused masks so that they could be returned to the store of materials available for county emergencies.

Because this was not a declared disaster, the counties were informed early (by Wednesday of the first week, April 29th) that there would not be any state or federal reimbursement for expenses. However, county agencies were asked to continue to track the costs of the response. Thus, standard operational procedures were followed even though the final submission of information for reimbursement was not made. This made the return of the unused N95 masks of greater urgency since Lorrain County does not have the budget to replace the units in storage.

In Stark County, which did not have confirmed case of H1N1 until a month later, the county EMA initiated a limited activation of the county EOC with skeleton staffing. During the initial week it was open 24 hours a day, with the director and assistant director splitting 12 hour shifts. Initially, several of the local emergency response agencies attended the standard briefings at the EOC, listening to the State EOC briefings and holding a quick local briefing afterward. In addition to these standard briefings, the EMA staff communicated frequently with the three public health departments in the county. Stark County has a long history of cooperative interaction among the various health agencies and hospitals and the county EMA. They hold monthly meetings to share information and learn what is happening regarding health care in Stark County. These meetings and prior working relationships provided the basis for continued positive response during the novel H1N1 flu event.

Local pandemic planning requirements and associated exercise requirements supported by federal grant funds had been completed 18 months prior to the novel H1N1 epidemic. The applicable components of these plans were followed. One of the adjustments that caused some initial interference with smooth implementation was that the plans did not address a “minor epidemic” that was not accompanied by a high number of deaths nor initial rapid person to person spread. Thus, some of the more severe actions called for in the plans, such as instituting social distancing, quarantining of infected persons, etc., were not necessary. The exercises of these plans were held at the local/county level and proved helpful during the novel H1N1 flu as local health and emergency management personnel not only understood their tasks and responsibilities, but also understood what the other departments and agencies were doing. This led to trust and a cooperative working environment during the novel H1N1 flu event.

A shortcoming of these local exercises is that the state agencies, particularly the Department of Health, did not usually participate. Thus, when the novel H1N1 flu event occurred, there was some initial discomfort between local health departments and the state department of health. They had not really exercised together before.

Summation

This study of how emergency managers used the planning, regulations and agreements, legal aspects of emergency management, during the response to the novel H1N1 flu virus epidemic identified the use and usefulness of these aspects of

operational law. The presence of an all hazard Emergency Response Plan and Emergency Operations Plan provided an essential framework for the activation of the state EOC and guided the interactions among the various agencies. It was only when aspects of the operation went outside these established frameworks that some glitches in the response occurred. Thus, the study validates the use of operational law in emergency response; agencies actively use the plans and procedures that have been established. These documents provide guidance for standard activities and facilitate the effective working relationships among multiple response agencies.

The use of operational law was observed at the EOC on an ongoing basis. The Ohio EMA personnel followed established protocol and found that working within this framework provided organization and routine in a non-routine situation. The understanding of and working with these standard procedures facilitated efficient actions on the part of various personnel. The established procedures for interacting with local/county EMAs provided a framework for effective communication with the State EOC. The non-standard communication directly with the Ohio Department of Health DOC was not as efficient or effective and supports the beneficial nature of the use of operational law from a negative example; i.e. deviation from standard protocol hampers rather than benefits coordinated response.

County EMA personnel are comfortable working within the established protocols for emergency response and interaction with the state EMA. When the response deviated from this standard during the H1N1 pandemic event, county EMAs had reduced effectiveness and were not comfortable functioning in a manner inconsistent with operational law.

County departments and agencies, specifically public health and health care, local education districts, and county EMAs, have established working relationships as well as formal agreements. These provided the basis for local interaction and facilitated fairly smooth cooperative activities during the response. For the EMA personnel, the response to a health emergency was seen as a simple variation of the response to a disaster or emergency. For these individuals the existence and use of operational law provided a “normal” system of interaction and activity.

Thus, emergency managers’ use established response plans and emergency operations plans to structure their organization and activities during a declared disaster. This study confirms that operational law is, in fact, the foundation for organization and function during disaster response.

Using These Findings To Address Hazards And Disasters In The U.S.

This research demonstrates the importance of operation law and adhering to established protocol provides an important lesson for future disaster response. Regardless of the type of disaster, it is imperative to maintain the standard procedures of a centralized EOC with close coordination and interaction among all

departments and agencies active in the response. While Department Operations Centers (DOCs) are useful to coordinate in-house activities and ensure continuation of normal daily operations as well as allocating resources to address the disaster, this organization must not replace the function of the central state or local EOC. This is important in order to maintain standard communication among state agencies and between state and local agencies.

Additionally, tasks that need to be undertaken, usually identified as Missions, should be allocated in the standard procedures through the EOC with the appropriate agencies taking the responsibility of coordinating and fulfilling the mission and the reporting back to everyone concerning the status and completion during regular prescheduled briefings.

Thus, the basic finding for application is that it is important that emergency response and operations plans are scalable and that the response entities understand not only their own roles but that of other response entities working with them during an emergency. Adhering to the established plans and protocols, following operational law, will facilitate successful response whereas deviation will result in difficulties.

Pandemic flu or other illness requires ongoing emergency response that can last over a year. It is distinctive, widespread, individual and private health providers and hospitals serve as frontline responders in attempting to mitigate and control the hazard. Therefore, appropriate adjustments must be made to protocols, agreements, and procedures during the process when operational adaptation needs become evident.

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