

Chapter 8: Legal Considerations

**"We obtained legal advice right away.
As it turned out, the legal work was extensive."**

– COS Heather Fagan, Orlando FL

Important: This chapter does not offer legal advice, nor is it a comprehensive legal resource. Instead, it provides an overview of some of the legal issues you may wish to discuss during your consultations with counsel and provides useful resources.

Chapter Summary

If a public mass shooting takes place, some litigation may be inevitable. The grounds for lawsuits against cities following a public mass shooting may include negligence, code enforcement, access to information, and the role of off-duty police. As of this writing, courts have not held city governments or local law enforcement liable for injuries or deaths in connection with public mass shootings or the law enforcement response to such shootings, but the cost of responding to lawsuits is potentially high. In addition, cities must respond to public records requests from the media, potential litigants, and the public. There are steps you may consider taking, in consultation with counsel, to potentially reduce the city's legal risk.

During the **preparedness** phase, consult with your legal counsel to understand and minimize legal risks. Counsel should form a crisis team that includes the city's counsel, the city administrative officer (CAO), the Mayor's Chief of Staff (COS), and the city's Chief Financial Officer (CFO). This "C4" crisis team should meet for "extreme emergency" planning, as detailed below. They can ensure that the necessary agreements, protocols, and charitable entities are negotiated and in place and that all governing statutes relevant to an extreme emergency have been identified.

During the **response**, this C4 team should be called immediately. They can help you activate "mutual aid" (aka "interagency") agreements that will provide additional resources, guide the decision of whether to declare an emergency, and ensure the city's primary administrative functions are coordinated. They can also play a support role in establishing the victims' fund, managing the public record request process, and ensuring the city's response to the crisis complies with applicable law.

During the **recovery** phase, your counsel will oversee the resolution of any legal action filed after the shooting.



Preparedness

Assemble a Crisis Leadership Team ("C4")

Consult with your legal counsel to understand and minimize legal risks. Counsel should form a crisis team (*e.g.*, the city's legal counsel, the city administrative officer (CAO), the Mayor's Chief of Staff (COS), and the city's CFO, or the functional equivalents). The role of the "C4" team is to ensure that the city has mitigated areas of potential liability, and that the city's response to a mass shooting complies with applicable law and is coordinated across all agencies.



Best Practice Tip

Develop protocols to govern the operations of the coroner's office during a mass casualty event, the Family Reunification and Assistance Centers, and the victims' fund.

C4 Public Mass Shooting Preparedness Training

The C4 team should periodically conduct a practice exercise to ensure all agreements and protocols needed by the city in the event of a mass shooting have been identified, negotiated, and are in place. In the case of a small city, the C4 team may want to invite the county's chief administrative officer (CAO) to discuss how the county will be involved in the response.

The C4 team should begin assembling a file that contains, at a minimum:

- The names and contact information of key people and organizations that should be contacted immediately in case of a public mass shooting or similar extreme emergency. In addition to the obvious, the list should include the local U.S. attorney, the State's attorney general, the coroner, the senior operations official at the local trauma center, and the in-house counsel of local press outlets.
- Statutes and regulations that could be applicable on issues such as emergency declarations, victim compensation, police overtime, public record requests, code compliance, and deceased casualties who are unclaimed.
- Mutual aid agreements (aka interagency agreements) with surrounding communities, county and state law enforcement agencies, the FBI, trauma centers, etc., that govern mutual assistance in the event of an emergency.
- Protocols to govern the operations of the coroner's office during a mass casualty event, the Family Reunification and Assistance Centers, and the victims fund, among others.
- A draft executive order form.

The C4 team members should understand that they are always "on call" and should carry a cell phone at all times so that they can be reached immediately. See Chapter 1 on Communications for a best practice tip on preparing a "go bag."



C4 Internal Review

While courts have generally not held cities liable for the response to a mass shooting, the legal costs incurred from defending the city and/or law enforcement from claims brought by affected parties can be significant. Therefore, the C4 team should conduct an internal review to assess and minimize potential liability and consider other issues, summarized below, that could arise in the event of a mass shooting.

Assess and Minimize Legal Risks

The C4 team's legal review should ensure city agencies, including law enforcement, have procedures in place to protect the city from potential liability. Previous claims against local governments or law enforcement after a mass casualty incident include:

- Failure to follow up on identified threats, assess threats, or activate an extreme risk protection order against a perpetrator.¹
- Failure to inspect a building or property where a mass shooting occurs such that victims are trapped inside or the event is more fatal than it would have been otherwise.²
- Failure to properly train law enforcement for active shooter events or provide the right equipment.³

Other areas of potential liability include code infractions involving the exits of buildings, the management of off-duty police officers, the response to public record requests, and the unofficial actions of well-meaning city employees who act in their individual capacity during a crisis and inadvertently create legal problems. The C4 team may recommend steps to remediate any liability identified, which should be implemented as quickly as possible.

Evaluate Agreements to Ensure Resource Needs are Met During a Shooting

Most cities have mutual aid agreements to ensure that additional emergency response resources, such as law enforcement and trauma care services, are available in the event of an emergency (see Chapter 4 for more on this topic). The C4 team should evaluate these agreements in view of projected resource needs during an extreme emergency and determine whether these agreements will meet the city's needs without posing undue legal risk. For example, the CFO of Orlando mentioned the value of negotiating an agreement with the city's private contractor that provides security for City Hall to also provide security for a Family Reunification Center or Assistance Center if either is established. Consider whether similar agreements (or lack thereof) expose the city to additional risk and how that risk can be properly managed.

Review Coroner Office Protocol

Notifying family members as soon as possible that their loved one is deceased is a top priority. However, existing regulations governing the responsibilities of the coroner's office could have the unintended effect of delaying death notifications. Your C4 team should meet with the coroner's office to develop a protocol that can speed the release of information in the case of a mass shooting, or to seek legislative change if necessary.



Best Practice Tip



Establish a 501(c)(3) charitable entity.

Orlando established a 501(3)(c) charitable entity well before the Pulse shooting. Orlando's attorney recommends every city, even small ones, establish such an entity.

Establish a 501(c)(3) Charitable Entity

Consider establishing a 501(c)(3) charitable entity as part of your preparedness planning. The cost is minimal (the cost of retaining tax counsel is an estimated \$5k). While formation is straight forward, the process can be time-consuming; it can take months to obtain the necessary IRS certification. Therefore, it's best to form the 501(c)(3) early in your planning and before an emergency. Once established, the 501(c)(3) entity can be quickly structured to receive donations for a victim's fund. Importantly, it can also be used for other important functions, such as to receive funds donated for the families of fallen officers, victims of natural disasters, and for city initiatives such as parks or events.

As a related matter, the City may wish to establish a separate bank account for the 501(c)(3) charitable entity. You should appoint an individual, perhaps from the C4 team, to serve on the 501(c)(3) board to handle financial matters, and if necessary, to structure the 501(c)(3) to accept donations for victims and their families (see Chapter 5).

Prepare for Public Records Requests

After a mass shooting incident, there will be extensive public records requests from the media and potential litigants. Therefore, the C4 team should review the state's public records statute. It should develop a protocol for handling public records requests after determining what the law requires, whether there are deadlines or penalties for failure to promptly respond, and whether deadlines may be suspended in the case of an extreme emergency. The team should evaluate the city's document destruction policy and ensure the systems used to maintain public documents are up to date and accessible. The city's staff should be briefed on the public record request protocol.

The C4 team should be familiar with the differences between the Federal Freedom of Information Act (FOIA) and the state public records law. FOIA applies only to federal records, such as law enforcement documents generated by the FBI, but there may be times when it is unclear whether FOIA or state law applies (*e.g.*, local law enforcement bodycam footage generated during response led by the FBI).



Issues unique to a mass shooting may require the C4 team's urgent attention. For example, sensitive items like photos of the dead and recordings (audio and video) of their deaths could be subject to public records requests. (It is generally desirable to withhold these records if the law permits, as their release risks traumatizing the families of the victims and the public). If state law would require the release of these records, the C4 team may consider advocating in advance for an amendment to the law to prevent the release. Additionally, victims' home addresses may need to be immediately sealed by the county's property assessor as soon as names are released in order to protect victims' privacy and shield them from the news media and from people who would seek to harm them.

Insurance: Consult with a Risk Management Expert

The C4 team should meet with an official from the city's risk management agency or office. In light of the complex liability issues, unusual risks, and potential for dramatic damages, risk management experts should proactively explore ways to mitigate potential liability in connection with a mass shooting. Their assessment should consider applicable state law governing sovereign liability and personal liability exposure for you and your staff. They should report their recommendations to you and the C4 team.

In addition to liability coverage, it's worth noting that a policy can provide coverage for services the city may need in an emergency. For example, one city's liability insurance provided coverage for the cost of engaging a crisis communications consultant (*e.g.*, a public relations expert with the appropriate expertise) during an emergency. As the need to manage large amounts of information can be overwhelming after a shooting, this coverage may benefit your city.

One additional point related to limiting liability: there is no guarantee that establishing a victims' fund will reduce the risk of a lawsuit against the city. However, because there *may* be a liability reduction component to such a fund, the city should take the lead establishing a victim's fund rather than waiting for another entity to establish one.

Consult with Experienced Legal Experts

The experience of others can help your C4 team assess the legal issues outlined above. After the Pulse shooting, the Orlando C4 team contacted the legal counsel of ten cities that had recently responded to a public mass shooting or mass casualty event to solicit their guidance.

Understand State Preemption Laws

Following the Tree of Life Shooting, Mayor Peduto urged the Pittsburgh City Council to pass local regulations relating to firearms. These actions were met with lawsuits that exposed the city and the mayor to liability. During the preparedness phase, your city's C4 team can review the state preemption laws to help you understand the limits to your ability to regulate firearms before or after a shooting.



Response

Contact the C4 Team

Involve your C4 team immediately. They should meet daily to ensure the city's primary administrative functions are coordinated, and that the city's response to the crisis complies with applicable law. They can help you activate mutual aid agreements to provide additional resources, advise on your decision of whether to declare an emergency, and help you implement applicable protocols. They can also play a support role in establishing the victims' fund, managing the public record request process, and managing outside counsel. Orlando City Counsel Mayanne Downs said her C4 team spoke at 6:30 every morning after the Pulse shooting to discuss urgent issues. This prescheduled call promoted efficiency and helped coordinate the response across city offices. As a result, the daily C4 call is now part of the city's standard emergency protocol.

Consider Whether to Make an Emergency Declaration

Consider whether to declare a local emergency or local disaster. According to Attorney Downs, there is no downside to making the declaration immediately. Declaring an emergency may protect the city from some of the legal risks described above and has the potential to defray costs relating to police overtime costs. The implications of the declaration vary state by state, but the declaration may authorize you to:⁴

- Activate local emergency response plans and mutual aid agreements with nearby jurisdictions, trauma centers, and the FBI.
- Activate local emergency operations center and national incident management system (NIMS).
- Suspend or temporarily waive union rules or other labor laws and deploy responders for longer work shifts.
- Activate immunities and liability protections for staff that respond.

Local declarations of emergency may require you to assess whether local emergency response resources would be exhausted before allowing the declaration of an emergency and/or requesting state aid. This determination can be made in consultation with your C4 team. You may also ask the governor to declare a statewide emergency if state resources are needed.

A state or federal emergency declaration for an incident that meets the criterion of a "major disaster" may provide access to federal funding, including SBA disaster loans and FEMA funding authorized by the Stafford Act.⁵ However, to be eligible for FEMA funding a city must provide evidence of extensive property damage, such as damage caused by fire or an explosion, or demonstrate exhaustion of local resources. See Appendix C on Funding Opportunities for more information.



Respond to Open Government and Public Record Requests

Your staff may need to assist with responding to public record requests from the media and potential litigants. One best practice is to post all public records relating to the shooting on a city website to reduce repetitive requests. Outside counsel may need to be retained during the response phase to form the policy for meeting the intense demand for information and to manage litigation, if any.

Mayors in Action: Public Records Requests

In Orlando, a dedicated staff responded to hundreds of requests, in consultation with the C4 team and coordinated with FBI. The city promoted transparency and reduced the impact of repetitive public record requests by hosting a webpage on which all public documents relating to Pulse Nightclub and the shooting were published and regularly updated. Instead of responding to individual requests, city staff directed inquiries to the website. The website also specified information that would not be released, usually for privacy or law enforcement reasons. A dedicated police official reviewed all law enforcement records before they were posted. The city also sought clarification from a court about the ability to release 911 calls and transcripts. The city released this information within one week of receiving a court order that clarified which calls and transcripts needed to be redacted to protect victims' personal information.



The website is still available for viewing. See, "Pulse Tragedy Public Records" at <https://www.orlando.gov/Our-Government/Departments-Offices/Executive-Offices/City-Clerk/Pulse-Tragedy-Public-Records>.

Establish a Victims' Fund

This topic is covered in the preparedness section above and, in greater depth, in Chapter 5 on Donations and Volunteer Management. However, it is worth noting here that your counsel should be involved in the establishment of the victims' fund. Once the city establishes a fund (using a pre-existing 501(c)(3) entity or in collaboration with another organization such as the National Compassion Fund), the best practice is to combine all victims' funds into one. This will help prevent fraud and ensure transparent and equitable distributions to the victims and their families. If other funds were established, your counsel can assist by contacting competing funds (ideally, within a week) to urge them to transfer funds they raise to the city's designated fund. Counsel can explain to these operators that they lack both the necessary 501(c)(3) status to accept tax-deductible charitable donations and a process for making the distributions.

Engage the Local Bar Association

Victims and their families will need legal services. You or your legal counsel should contact your local bar association. They can identify qualified attorneys willing to volunteer their time to help victims and family members handle the probate, immigration, and other legal issues triggered by the shooting. They can even find mediators to help resolve intrafamily disagreements that can arise.



Recovery

Litigation and Trial Considerations

Depending on circumstances unique to the shooting and to the city's response, lawsuits may be filed by victims, media outlets, or advocacy groups against the city, the venue, the police department, or you. Additionally, if the shooter is arrested and prosecuted, there could also be legal considerations relating to a trial. For example, an ongoing criminal case could limit what you can say about the attack. Your counsel will advise you on these legal matters and manage the services of outside counsel retained to defend the city.

Key Resources: Legal Summaries of Potential Claims Arising from Mass Shootings



American Bar Association, survey of legal actions and related issues stemming from a mass shooting:

https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/

Sherman Howard, Insurance Law Coverage of Mass Shootings:

<http://shermanhoward.com/wp-content/uploads/2019/07/Mass-Shootings-and-Insurance-Coverage.pdf>

Endnotes

¹ *Chen v. Cty. of Santa Barbara*, 2015 WL 1262150 (C.D. Cal. 2015) (alleging law enforcement “created a dangerous condition” by failing to reasonably investigate the shooter as part of “wellness check” despite being aware of his online postings and violent intentions).

https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/

² *E.g.*, Lawsuits were filed in connection with the Oakland ghost ship fire. The city ultimately settled with survivors, <https://www.mercurynews.com/2020/11/11/oakland-ends-ghost-ship-fire-lawsuit-paying-victims-33-million-for-deadliest-fire-in-citys-history/> (last visited July 18, 2021).

³ *E.g.*, Case against city arguing failure to properly train police officer, among other things, properly dismissed, <https://www.police1.com/legal/articles/appeals-court-court-was-right-to-dismiss-pulse-nightclub-victims-lawsuit-against-city-police-D7sKXU2LK7wunByK/> (last visited July 18, 2021).

⁴ ASS'N OF STATE AND TERRITORIAL HEALTH OFFICIALS, Emergency Declarations and Authorities Fact Sheet, ASTHO (2011), <https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Emergency-Declarations-and-Authorities-Fact-Sheet/> (last visited May 27, 2021).

⁵ CONGRESSIONAL RESEARCH SERVICE, Stafford Act Assistance and Acts of Terrorism, 2019, <https://fas.org/sgp/crs/homesecc/R44801.pdf>.



LEGAL CONSIDERATIONS CHECKLIST

Preparedness

- Establish a C4 team and ask them to engage in “extreme emergency” planning. They should ensure the necessary agreements, protocols, and funding entities are negotiated and in place, and that all governing statutes are identified.
- Assess need for enhanced liability protection.
- Understand the limits to regulatory action imposed by state laws.
- Establish a public records request strategy and, if needed, advocate for a change in state law if records that could cause trauma (such as photos or recordings of the dying or the dead) would need to be released.

Response

- Consider whether to declare a local or state emergency.
- Activate mutual aid/interagency agreements to meet additional resource needs.
- Respond to public record requests; consider posting public records online.
- Engage the local bar association to provide volunteer services for victims.

Recovery

- Work with city legal counsel and C4 team to manage litigation and trial issues.

