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DATE: March 13, 2020

TO: Interested Parties

FROM: Margaret C. Daun, Corporation Counsel  
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SUBJECT: Wisconsin Statute Section 99.04

*Who is in control of Milwaukee County's emergency management program when the Governor declares a state-wide emergency?*

Under state law, specifically Wis. Stat. § 323.14(1)(a)(2), a court would most likely conclude that the Milwaukee County Executive, or his/her designee once confirmed by Board, is the “county head of emergency management.” Today, in Milwaukee County, that person is Christine Westrich, Director, Office of Emergency Management, who was confirmed by the County Board.

Wis. Stat. § 323.14(1)(a)(2) provides that “[i]n counties having a county executive under s. 59.17, the county board shall designate the county executive or confirm his or her appointee as county head of emergency management.” (emphasis added). One of the duties of a county head of emergency management is to respond, on behalf of the county, to states of emergency declared by the Governor. Wis. Stat. § 323.15(4).

Unfortunately, this state law and Section 99.04 of the Milwaukee County Code of General Ordinances (“MCO”) conflict. MCO Section 99.04 states that the “sheriff shall assume control of the county emergency management program” when the Governor declares an emergency.

It is the opinion of the Office of Corporation Counsel (OCC) that a court, faced with this conflict, would review the legislative history and amendments to both the state statute and County ordinance, and conclude that (a) the state statute preempts the conflicting ordinance; and/or (b) the change to MCO § 99.04 to bring it into conformity with state statutes was inadvertently overlooked. Thus, the court would most likely determine that the Director of the Office of Emergency Management controls the emergency management program for Milwaukee County when the Governor declares a state-wide emergency.

In 2014, the County Board amended Chapter 99 of Milwaukee County Ordinances. Prior to those amendments, the relevant portions of the ordinance read as follows (emphasis added):

Section 99.02. - County emergency management director.

- (1) In accordance with ch. 166.03(4)(b), Wis. Stats., the *county executive shall hereby designate the sheriff* as the county emergency management director. In addition to the duties herein set forth, the sheriff shall coordinate and direct, all administrative and management functions of the county emergency management program in accordance with s. 59.031, Wis. Stats.
- (2) Duties of the county emergency management director.
  - (a) The county emergency management director shall perform all the duties enumerated in ch. 166, Wis. Stats.
- (3) The *sheriff* may appoint a county head of emergency management services who shall administer the county emergency management organization.
- (4) The head of emergency management service shall execute his/her duties in accordance with ss. 166.03(4) and 166.03(5)(a) through (d), Wis. Stats.

On January 31, 2015, the Milwaukee County Board of Supervisors adopted File No. 14-919 amending MCO Section 99.02.<sup>1</sup> The ordinance changes are as follows:

- (1) In accordance with ~~ch. 166.03(4)(b)~~s. 323.14(1)(a)2, Wis. Stats., the county executive ~~shall hereby designate the sheriff~~ is hereby designated as the county emergency management director. In addition to the duties herein set forth, the ~~sheriff~~ county executive shall coordinate and direct, all administrative and management functions of the county emergency management program in accordance with ~~s. 59.031~~ch. 323, Wis. Stats.
- (2) Duties of the county emergency management director.
  - (a) The county emergency management director shall perform all the duties enumerated in ~~ch. 166~~323, Wis. Stats.
- (3) The ~~sheriff~~ county executive may appoint a county head of emergency management services who shall administer the county emergency management organization.
- (4) The head of emergency management service shall execute his/her duties in accordance with ch. 323~~ss. 166.03(4) and 166.03(5)(a) through (d)~~, Wis. Stats.

The changes clearly indicate the Board's intent to allow the County Executive to designate someone other the Sheriff as the county head of emergency management. This person is now

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<sup>1</sup> <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=2073643&GUID=9E337FB7-4FEE-400B-A62C-B5C797AEBF1B>

Christine Westrich. She was appointed by the Executive on January 5, 2015 and confirmed by the Board February 5, 2015 (File No. 15-51).<sup>2</sup>

Section 99.02 (and 99.01) were updated to reflect the changes in state law, but also to renumber references in our ordinances from state statute chapter 166 to chapter 323. However, chapter 99 contains numerous overlooked corrections, where the word “sheriff” still inappropriately appears in some subsections, and where references to the now-inoperative “Wis. Stat. 166” remain.

Therefore, it is not reasonably disputable that it was a drafting oversight in 2015 when the amendment to Chapter 99 of the County’s Ordinances failed to substitute “the county emergency management director” for “sheriff” for every relevant occurrence in Chapter 99 and in section 99.04 specifically.

Regardless, state law and County Ordinance section 99.02(2)(a) authorize the county emergency management director “to perform all the duties enumerated in ch. 323, Wis. Stats.,” which includes responding on the county’s behalf under a state of emergency declared by the Governor (the current circumstances). MCO 99.04 references antiquated law, and any conflict between it and Wis. Stat. § 323.15 and MCO 99.02 would nearly certainly be resolved by a court in favor of finding that the Director of OEM acts as the head of the emergency management program when the Governor declares an emergency.

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<sup>2</sup> <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=2122569&GUID=F5CB6BF7-E003-414F-9632-7400BB01508C>