



RISK MANAGEMENT INFORMATION
NFPA & DISCRETIONARY IMMUNITY
BUILD THE RECORD

The National Fire Protection Association (NFPA), a non-profit organization that develops life safety standards, recently produced fire-operating standards relating to staffing and deployment for both career fire departments (NFPA standard 1710) and volunteer fire departments (NFPA standard 1720). While such standards might suggest a one size fits all approach to fire department operations, the reality is that what works for one fire department might not work for all fire departments in all cities. The end result is that cities and their fire departments might face greater legal risks because they cannot or will not meet the NFPA standards.

Why are NFPA standards important?

Even though the NFPA standards are not mandated regulations, they do have the appearance of being generally accepted industry standards. From a liability standpoint, this means that they imply a performance norm to which a fire department can be held. Also, such standards can create a sense of obligation or duty with which a fire department might need to comply. The hitch is that many fire departments lack staff and financial resources necessary to implement the standards the NFPA have set. In such instances, discretionary immunity, with its recognition that local governments have to prioritize decisions and make the best use of resources, can help address the issue of risk.

What is discretionary immunity?

Minnesota Statute § 466.03, subd. 6, suggests that a city is immune from liability for; “any claim based upon the performance or failure to exercise or perform a discretionary function or duty whether or not the discretion is abused.” As a practical matter, the more you show you exercised your judgment or applied discretion, the more likely a court will be able to determine that immunity from liability exists.

Why does discretionary immunity exist?

Discretionary immunity exists because local governments must make decisions on how best to spend public money and to prioritize the use of limited financial, personnel, and other resources. Cities constantly make decisions about which services, programs, or facilities should be provided or which should be improved. Often, there are competing policy considerations surrounding such decisions. Therefore, immunity applies because a city often has to make decisions that involve the weighing of competing political, social, economic, and safety factors.

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

What is a discretionary function or duty?

While discretionary immunity probably does not protect operational or day-to-day decisions, it can provide protection for planning level, tactical, and allocation of resource decisions. These sorts of decisions can be made in such areas as land use, personnel, permits, street construction, as well as capital expenditures and use of staff and policies related to responses to emergencies.

One important aspect to consider is who is making the decision. Generally, the higher up you go the easier it is to prove that a decision was made at a planning or policy-making level. However, this is not to say that all decisions made by the city council, mayor, or city administrator are automatically entitled to discretionary immunity. Similarly, some decisions made by lower level employees may also be discretionary. The key principle is that discretionary immunity protects planning or policy level decisions.

Another aspect is whether or not a decision or policy involves weighing of social, political, safety, or economic considerations. A case in point might be a standard operating procedure or tactical operating guidelines used by a fire department. Many cities have such policies and they frequently involve weighing the above factors. For example, economic factors might include maintenance and availability of equipment or public safety budget. Political factors could include the expectations the community has for fire services. Safety consideration could include the response to the fire, personnel, and management of fire ground operations.

Does discretionary immunity need good records?

Discretionary immunity absolutely requires good record development and retention. Keeping records of policy and planning decisions not only helps to implement those policies and plans, but provide guidance and direction to employees, set levels of expectation for service, and help measure performance and effectiveness of that policy or plan.

Part of policy or planning should include developing records that show the weighing of social political, economic, and safety factors as a part of the decision making process. In addition, even if a city is not entirely immune from liability pursuant to discretionary immunity, the existence of and adherence to a policy helps to prove that the city exercised ordinary and reasonable care, and is therefore not liable.

As previously mentioned, the NFPA standards can create a certain level of expectation and duty for fire departments. Immunity furthers this by presupposing a duty exists and that there was a breach of that duty. However, if there is no duty and no evidence exists of a breach, then it would stand to reason that the city is not liable. If the city is not liable, there is no liability from which the city needs to be immune. This means that a city could have a successful result at trial if it has records showing it is not liable or negligent. One way to do this is to have a record showing that the city understands the NFPA standards exists, but that those standards cannot be implemented by the city because of certain social, political, economic, or safety factors.

What is the best way to create and preserve discretionary immunity records?

One way to show that a city council exercised discretion is through accurate and complete meeting minutes. If the city council ratifies or approves a plan or policy drafted or prepared by others (department head, city advisory board, etc.), the council meeting minutes should reflect that policy or plan development authority was delegated to the person or entity making the decision, and that the city council reviewed the decision that was made or recommended. Furthermore, the minutes should indicate that the entity responsible for the policy or plan weighed competing political, social, economic, and safety factors.

If the council does not need to ratify or approve a final plan or policy, a discretionary immunity record could show that the council delegated planning or policy development to the decision-making person, department, or board. Such action should be reflected in minutes and should clearly indicate that council expectations include weighing of competing interests in the creating, development, or changing of plans and policies.

Decisions protected by discretionary immunity statute may sometime be made by city administration staff, department heads, or other to whom policy or planning development authority has been granted. In such instances, the person exercising discretion must be the one to create the immunity record. This might include correspondence or memoranda indicating who directed them or, if not explicitly directed by another, why planning or policy development is within the authority given to them by their position or job description. Notes regarding the decision making process should be kept, which can also be used in introducing the plan or policy or in a preamble to the policy itself.

Fire department and public safety immunity records will likely include incident or response reports. In cases of substantial damages or injuries or the fire decision maker believes that someone may second guess a tactical decision made by them, a supplemental report should be prepared as soon as possible. This report can set forth the political, social, economic, or safety factors that were weighed as well as the time parameters for deliberation and decision making. Sometimes, the actual decisions have to be made quickly. However, after the incident or emergency, the decision maker can document specifically the competing considerations that went into their decision at the time the decision was made.

Mike Ehlert 04/04

**City of Good Records
Fire Department**

MEMO

To: John Smith, Fire Chief
Date: 2/2/2005
Re: **NFPA Standards and City Resources**

The National Fire Protection Association (NFPA), a non-profit organization that develops life safety standards, developed fire-operating standards relating to staffing and deployment for fire departments in 2001. These standards are not law but they are considered to be generally accepted industry standards.

NFPA Standard 1710 applies to career fire departments and requires departments to respond to every fire with a minimum of 4 firefighters. The standard also sets a response time requirement of 5 minutes for 90% of the calls.

Presently, the City of Good Records has 10 firefighters in its career fire department. It has been our policy to respond to calls with 3 firefighters. With 10 firefighters, we have been able to have a schedule of 3 firefighters working with 3 other firefighters on-call, with 4 firefighters off. Given the city's resources, the city has been able to maintain a good level of fire protection services for our citizens. Based upon my training and experience, the city's present level of service seems appropriate for the size of the city, its building stock and land uses.

In order to meet this NFPA standard for responding with 4 firefighters to every call, the fire department would need to hire 3 more firefighters so that 4 would be working, 4 on-call and 5 would be off. There also would be a potential cost of overtime for the on-call firefighters and the costs to train and equip the additional firefighters.

I estimate that this would be an additional cost to the city of \$150,000 for wages and benefits for the new firefighters plus \$25,000 for training and equipment.

Recommendation:

I recommend the City of Good Records maintain its present staffing level for its firefighters and continue its policy of responding to fire calls with 3 firefighters.

Resolution No. _____

Resolution Adopting a Policy regarding the Number of Firefighters in the Fire Department and the Department's Response Policy

BE IT RESOLVED by the City Council of the City of Good Records, Minnesota, as follows:

Section 1. Background.

- 1.01. The City of Good Records has a career fire department that has 10 firefighters.
- 1.02. The Fire Department has a policy of responding to a fire call with 3 firefighters.
- 1.03. The National Fire Protection Association (NFPA) issued standards relating to the deployment of firefighters in 2001.
- 1.04. NFPA Standard 1710 applies to career departments and states that 4 firefighters should respond to every fire call.
- 1.05. The Fire Chief has investigated this issue and has determined that in order for the city to comply with this standard, it would need to hire 3 additional firefighters and there would also be additional costs for overtime, training, and equipment. He estimates the additional costs to the city as \$150,000 for wages and benefits, plus \$25,000 for overtime, training and equipment.
- 1.06. Based upon his experience, training, and observations, the Fire Chief has recommended the city maintain its 3-firefighter response policy.

Section 2. Council Action.

- 2.01. The City Council finds that the additional costs of responding to fires with 4 firefighters are significant and the city would have to cut other services to meet the NFPA Standard.
- 2.02. The City Council also finds that its current response policy has provided a good level of fire protection for our citizens and is appropriate for the size of the city, its building stock, and land uses.
- 2.03. After weighing the political, economic, and safety factors involved in how the fire department responds, the council finds that given the city's limited resources, it will maintain its present number of firefighters and its policy of responding with 3 firefighters for a fire call.

Adopted by the City Council of the City of Good Records, Minnesota, on _____, 2004.

Jean Jones, Mayor

ATTEST:

Rob Anderson, City Clerk