

# LEGAL SERVICES

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## MEMORANDUM

February 10, 2020

**SUBJECT:** Cyber attack as a disaster  
(Work Order No. 31-LS1517)

**TO:** Representative DeLena Johnson  
Attn: Erick Cordero-Giorgana

**FROM:** Megan A. Wallace   
Director

You have asked whether the governor could declare an emergency for a cyber-attack or cyber-threat.

AS 26.23.020(c) provides that "[i]f the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency." AS 26.23.900(2) defines "disaster" as follows:

(2) "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, loss of life or property, or shortage of food, water, or fuel resulting from

(A) an incident such as storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, avalanche, snowstorm, prolonged extreme cold, drought, fire, flood, epidemic, explosion, or riot;

(B) the release of oil or a hazardous substance if the release requires prompt action to avert environmental danger or mitigate environmental damage;

(C) equipment failure if the failure is not a predictably frequent or recurring event or preventable by adequate equipment maintenance or operation;

(D) enemy or terrorist attack or a credible threat of imminent enemy or terrorist attack in or against the state that the adjutant general of the Department of Military and Veterans' Affairs or a designee of the adjutant general, in consultation with the commissioner of public safety or a designee of the commissioner of public safety, certifies to the governor has a high probability of occurring in the near future; the certification must meet the standards of AS 26.20.040(c); in this subparagraph, "attack" has the meaning given under AS 26.20.200; or

(E) an outbreak of disease or a credible threat of an imminent outbreak of disease that the commissioner of health and social services or a designee of the commissioner of health and social services certifies to the governor has a high probability of occurring in the near future; the certification must be based on specific information received from a local, state, federal, or international agency, or another source that the commissioner or the designee determines is reliable;

It is not clear, from the definition of "disaster" whether the governor may declare an emergency caused by a cyber-attack or cyber-threat. I assume that a cyber-attack or cyber-threat might cause "widespread or severe damage" as the result of "equipment failure,"<sup>1</sup> which would qualify as a "disaster" under AS 26.23.900(2)(C), but some caution is warranted.

The "disaster" definition was amended in 2000, through passage of sec. 6, ch. 4, SLA 2000. In that measure, the following changes were made to the "disaster" definition:

\* **Sec. 6.** AS 26.23.900(2) is amended to read:

(2) "disaster" means the occurrence or imminent threat of widespread or severe damage, injury, [OR] loss of life or property, or shortage of food, water, or fuel resulting from [A NATURAL OR MAN-MADE CAUSE, INCLUDING]

(A) an incident such as storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, avalanche, snowstorm, prolonged extreme cold, drought, fire, flood, [EARTHQUAKE, LANDSLIDE, MUDSLIDE, AVALANCHE, WIND-DRIVEN WATER, WEATHER CONDITION, TSUNAMI, VOLCANIC ACTIVITY,] epidemic, [AIR CONTAMINATION, BLIGHT, INFESTATION,] explosion, or riot [, OR SHORTAGE OF FOOD, WATER, FUEL, OR CLOTHING];

(B) the release of oil or a hazardous substance [,] if the release requires prompt action to avert environmental danger or mitigate environmental damage; or [AND]

(C) equipment failure [,] if the failure is not a predictably frequent or recurring event or preventable by adequate equipment maintenance or operation;

As you can see, the 2000 amendment removed the language from the definition regarding "man-made cause[s]" of disasters. These changes were debated and discussed at a time

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<sup>1</sup> There are a variety of ways that a cyber-attack could cause damage. Whether a cyber-attack poses a risk to hardware or equipment, or merely software or applications, is an extremely fact-based issue. Accordingly, the nature of the alleged attack would likely influence any determination as to whether a cyber-attack or cyber-threat qualifies as a disaster under existing law.

when there was a fear of Y2K failures. During the Senate Finance Committee meeting on March 15, 1999, the Director of Emergency Services for the Department of Military and Veterans Affairs, David Liebersback, advised that this new narrow definition would not include "manmade events" or "Y2K failures" and warned members:

Under the new definition in SB 101, which would narrow the event under which the Governor could declare a disaster, the state would be constrained to assist Alaskans when an unusual natural event occurred. In addition, the division would be unable to respond to manmade events unless they were the release of oil or hazardous substance or an equipment failure, but only if that failure was predictably frequent, or a reoccurring event, or was not preventable by adequate equipment maintenance or operation.

\* \* \*

He added other events that would not be covered. Any act as the result of terrorism, weapons of mass destruction, train or shipwrecks caused by human error and Y2K failures would also be disasters that the division would be unable to respond to under the new requirements of the bill. Department of Environmental Conservation respectfully cautioned the committee to carefully consider this new definition because it would be extremely difficult to define and list each possible event that may harm the people or property of the state.<sup>2</sup>

Accordingly, since "man-made" disasters were deliberately removed from the definition of "disaster" under AS 26.23.900, there is an open question as to whether cyber-attacks or cyber-threats are covered under the definition or subject to a disaster declaration.

However, other states have declared statewide emergencies following cyber-attacks. For example, in July 2019, the Louisiana Governor declared a disaster after a malware attack on a few north Louisiana school systems.<sup>3</sup> In addition, in March 2018, the Colorado Governor declared an emergency over a ransomware attack against the state's

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<sup>2</sup> March 15, 1999, SB 101, Senate Finance Committee Minutes, available at [http://www.akleg.gov/basis/Bill/Detail/21?Root=SB101#tab4\\_4](http://www.akleg.gov/basis/Bill/Detail/21?Root=SB101#tab4_4). There may have been other discussions regarding the changes to the "disaster" definition, but I did not have the time, given session workloads, to review all meeting minutes.

<sup>3</sup> See <https://statescoop.com/louisiana-declares-emergency-over-cyberattacks-targeting-schools/>; see also Stronger Together: State and Local Cybersecurity Collaboration, National Governors Association, available at <https://www.nga.org/center/publications/hsp-s-publications/stronger-together-state-and-local-cybersecurity-collaboration/>.

transportation department.<sup>4</sup> You should note, however, that the definition for "disaster" in those states differs from Alaska's definition.

For example, in Louisiana, "a 'disaster' means the result of a natural or *man-made event* which causes loss of life, injury, and property damage."<sup>5</sup> In Colorado, "'disaster' means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause *or cause of human origin*."<sup>6</sup> Based on the foregoing, with the absence of inclusion of "man-made" events in the definition of "disaster" under AS 26.23.900, there is a strong argument that cyber-attacks or cyber-threats are not subject to a disaster declaration. If the legislature wishes to include such events, the legislature might consider amending AS 26.23.900 to explicitly include those events.

If you have any questions, or if I can be of further assistance, please advise.

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<sup>4</sup> See <https://statescoop.com/emergency-declaration-louisiana-cyberattacks-improve-recovery-moodys/>.

<sup>5</sup> LA R.S. 29:723(2) (emphasis added).

<sup>6</sup> C.R.S.A. § 24-33.5-703 (emphasis added).