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PERSPECTIVE

Public drone use raises legal concerns

By Greg Rolan

During a recent meeting with a school district client, they casually mentioned that they were using a “drone.” Surprised, I asked, “Why... to mercilessly bomb al-Qaida strongholds with Graham crackers?” Ignoring my attempt at humor, my client explained that a staff member was using a personal drone to photograph a construction project. Then it dawned on me that many other government agencies, including law enforcement and fire protection, have been using drones for some time. But a public school? Sure, this marvelous technology could be incorporated into a science or vocational curriculum, but what else? Together, we considered how drones could be used for surveillance, coaching, workplace safety and infrastructure assessments. School employees using drones, what could possibly go wrong? *Plenty.*

Drones are regulated by the Federal Aviation Administration, and the California Legislature is passing its own laws concerning drones. Drone use poses multiple novel risk management issues and may create catastrophic exposure under various legal theories. If school districts are going to use drones, they must recognize the burdens.

The Evolving Legal Landscape

The FAA regulates airspace and oversees government ownership and operation of drones. The FAA categorizes drones into three groups: public, commercial and recreational. Any public user must submit a public declaration letter, stating that the drone is a public aircraft to be used for a government function, to receive a certificate of authorization. The COA allows drone use only for the limited purposes, activities, locations and times specified in the COA. Many COAs prohibit drone use over densely populated areas. A district that fails to obtain a COA for any staff or student using a drone in an official capacity may be subject to a regulatory violation.

School districts may also contract with commercial users. The FAA regulates commercial drones as “civil aircraft operation,” while commercial authorization is obtained through a different process known as a “section 333 exemption.” Government entities contracting with commercial operators who have a section 333

exemption can eliminate the need for a COA. However, this does not eliminate liability. In February, the FAA announced proposed regulations for commercial drones. Notably, they include that the drone must be only operated during daytime, below 500 feet, and always within the operator’s sight line. Although only proposed regulations, the guidelines begin to establish the “standard of care” for drone use.

Drones are also subject to local regulation that does not conflict with federal requirements. California law is focused on privacy. Recently, Gov. Jerry Brown signed a law that made it an invasion of privacy to use a drone to obtain an image of a person engaged in a familial activity. On Aug. 24, the Legislature passed a bill prohibiting flying a drone below 350 feet over personal residences. More state and local regulation is on the horizon.

21st Century Risk Management Precedents

Drones can be a risk management nightmare. Setting aside the regulatory compliance issues, drones have seven times the general aviation accident rate and 353 times the commercial aviation accident rate. Drones also present aviation risks such as stationary object crashes, midair collisions or falling debris caused by system malfunction, pilot error or force majeure. These accidents may harm operators, observers, bystanders and event attendees, as well as property. The risk probabilities are contingent upon the weather, population, use, frequency, operator training and competence, and drone assembly and maintenance.

However, districts are also at risk for novel techno-injuries. Drones can be used to obtain unauthorized photographs, commit either intentional or inadvertent trespass (crashes or airspace), and collect electronic information. This not only raises privacy concerns, but also may subject a district to liability for data breach. Furthermore, the images, recordings and information collected will likely be public records subject to disclosure under the California Public Records Act. Accordingly, districts must address cyber security, record retention, compliance and personnel issues.

Causes of Action... Old and New

The foregoing risks provide enterprising plaintiff’s counsel with many opportu-



The New York Times

nities. Drone accidents give rise to claims for personal injury and property damage based on negligent use, operation, supervision, training, hiring, maintenance, etc. Unlawful government photography can not only create tort liability for invasion of privacy, but also create Fourth Amendment search and seizure issues implicating state and federal civil rights statutes. Drone accidents and flyovers may constitute civil or criminal trespass, as well as give rise to products liability, data breach/hacking and Public Records Act concerns.

It is critical to understand that any exposure will be magnified if the entity has violated FAA regulations, has no policy, or fails to follow internal policy. Where there’s an underlying risk to a public entity, there may be a risk to an elected official or public officer. Of particular concern may be a cause of action somehow involving drone use under circumstances where an elected body knowingly sanctioned use outside of the COA or section 333 exemption.

What Does the Future Hold?

Drones and other forms of automated robotics are the wave of the future. Technology has allowed us to improve our efficiency in both the public and private sector. If schools are going to embrace drones’ promise, they must prepare for the possibility that their drone use may create legal problems.

School districts must dutifully comply with state and local regulations, which are intended to make drone use safe, controlled and for the collective good. Strict adherence to these guidelines is

the first step toward sound drone usage.

Elected officials should begin a public discourse to determine community sentiments. While some communities may be enamored with drone benefits, others are terrified of potential privacy intrusions. Transparent discussions will allow elected officials to determine the community’s appetite for risk and determine whether continued risk assessment is warranted.

Next, the legislative body should create a drone use policy. This policy should be developed based on the functions or activities needed and should include (but not be limited to) legal compliance methodology, purchasing standards, operational guidelines, privacy policies, data security, personnel classifications and expertise required, and approved contract language for third-party drone operators. Finally, districts should explore insurance coverage options.

Forward thinking entities should begin this process. Public schools should not let these opportunities pass. The future is now!



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