

Legal Issues Associated with Municipal Government Use of Social Media



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What is Social Media?

- Online tools that enable collaborative or shared communications among:
 - Communities with similar interests
 - Individuals, groups and organizations
- Most common government social media tools: Facebook, Twitter, YouTube, blogs.

Common Government Uses of Social Media



- Disseminate time-sensitive or emergency information.
- Promote government-sponsored events and services.
- Encourage and facilitate public engagement on specific topics or decision-making.
- Direct traffic to government websites.

Potential Legal Issues



- **First Amendment**

- Permissible restrictions on user-generated content.

- **Open Meeting Laws**

- When do officials' social media interactions constitute "meetings"?

- **Records Retention/Disclosure**

- Are postings on municipal social media sites subject to public record laws?
 - Retention of records
 - Disclosure of records

- **Privacy**

- Government use of social media and the privacy ecosystem.

First Amendment



- Managing user-generated content on social media sites:
 - Traditional Public Forum Analysis:
 - Public Forum
 - Streets, parks, town squares, etc.
 - Limited (Designated) Public Forum
 - Non-Public forum specifically designated by government as open to specific topics.
 - Social media site where government permits posting of public comment arguably a limited public forum.
 - Non-Public Forum
 - Jails, military bases.

Legal Standard for Content-Based Restrictions



- Cannot restrict content unless restriction is
 - Narrowly tailored to achieve
 - Compelling government interest

Approaches for Managing User-Generated Content



- Create policy that articulates clear municipal business purpose for social media use:
 - Prohibit specific content as unrelated to purpose and topics of discussion.
 - Do **not** prohibit comments that criticize officials or disagree with agency posting, article or proposed policies or regulations. OR
 - Permit all comments and have moderator post corrections or point out inaccuracies. OR
 - Limit use of social media tools where posting comments can be disabled.

Example: Seattle



- **Seattle General Social Media Policy**
 - **Purpose:**
 - To disseminate time-sensitive information to the public; and
 - Promote and market government services and activities.
 - **Reserves right to restrict content that:**
 - Not topically related to posting being commented on; or
 - Promotes discrimination or political/campaign candidate; encourages illegal activity; compromises public safety or security; is profane; violates legal ownership interest; or solicits commerce.

Example: Seattle Facebook Policy



- **Purpose:** To promote communication between public and departments on specified topics.
- Each agency has discretion to turn on wall comments.
 - Recommends turning off wall comments.
 - If turned on, comments monitored for inappropriate content.

Example: Seattle Twitter Policy



- **Purpose:**

- Emergency communications
- Promote city-sponsored events
- Drive traffic to city website
- Respond to constituents per required protocols

Example: Seattle Blogging Policy



- **Purpose:** To enable City official publication of articles related to governance and facilitate related public discussion.
 - Acknowledges creating limited public forum.
- Authorized moderator assigned by department/agency.
- Reservation of right to remove/restrict content.
- Identify author of comment

Open Meetings



- **Purpose of Open Meeting Statutes:**
 - To notify and inform public of official decision-making.
 - To engage public in deliberative processes.
- Courts generally adopt broad definition of “meeting” to effectuate underlying policy.

What is a Meeting?



- “Gathering” of two or more of same body to discuss matter on which formal action is foreseeable (FL).
- Communications among decision-makers or intermediaries to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the legislative body (CA; WA).
 - Cannot use technology to evade physical presence.
 - Serial e-mails violate open meeting law (CA; NV).
 - Facebook discussion by Commission members on matters for foreseeable official action violate open meeting law (FL).



Social Media & Open Meeting Laws: Strategies

- Create policy that reflects state open meeting law including court and AG interpretations.
- As a general rule public officials should refrain from discussing matters on social media sites that are or could come before the body on which they sit for official action.
- Discourage officials from “friending” each other.
- Officials should avoid discussions over e-mail or text message.

What is a Public Record for Purpose of Record Retention?



- Defined by state law
 - **FL:** All “material” made or received in connection with the transaction of business by any agency.
 - Can include a city’s Facebook page.
 - Could include a city’s Facebook “friends” information.
 - **CA:** ...[A] writing ... or other information in the custody of a public officer and is kept either (1) because required by law or (2) necessary or convenient to the discharge of the public officer’s duties and made or retained to preserve its informational content for future reference.

Record Retention and Disclosure Statutes: Issues for Social Media



- Content posted to third party social media sites:
 - Post is no longer displayed on site and has been deleted.
 - Facebook’s Terms of Use states that postings occur to the Facebook platform.
 - Are the postings in the custody of public officials or Facebook for purposes of record retention and disclosure obligations?
 - Are communications between a “fan” of a government Facebook page and one or more “friends” (who may not realize that they can be “seen” by others) on a topic of discussion on the government page covered by record retention and disclosure laws?

Strategies for Addressing Record Retention and Disclosure Obligations



- Exclude social media content from definition of a public record by highlighting custody, retention and control factors.
- Post warning that content on social media sites may be subject to public records and disclosure laws, including information made available through a user's privacy settings on their own pages.
- Make social media content available in offline formats for people who lack online access.

Example: Seattle



- Social media policies treat all content maintained in social media format related to city business, including a list of subscribers and posted communications, as a public record subject to state retention and disclosure requirements.
- Requires preservation of records in appropriate formats for each of the tools used (Facebook, Twitter, etc.) for disclosure.

Privacy



- **Issues:**

- Are individuals' postings on government social media sites subject to retention and disclosure requirements?
 - Who owns/maintains postings?
 - Sensitive information/queries.
- Do agency privacy settings require consent to disclose personal information as a condition of accessing government information?
- Use of Cookies:
 - By government site.
 - By third party social media site.

Strategies for Addressing Privacy Issues



- **Municipal Privacy Policy:**

- Disclose tracking, retention, sharing and use, including information directly or indirectly collected and retained and uses.
- Policy should be consistent with public record retention and disclosure policies/practices.
- Disclose that user generated content or other information could be subject to public records, retention and disclosure laws.

- **Third Party Social Media Privacy Policy:**

- Disclose that user generated content or other information is subject to social media site's privacy policy.
 - Provide link to social media site privacy policy.

Strategies for Addressing Privacy Issues (Cont'd)



- **Cookies:**

- If possible, negotiate Terms of Service with social media site to prohibit or restrict cookie use.
- Alternatively, disclose third party cookie use in agency privacy policy.
- Disclose agency cookie use, if any.

- **Privacy Settings:**

- Consider setting privacy settings so anyone can view information and not just agency “friends.”

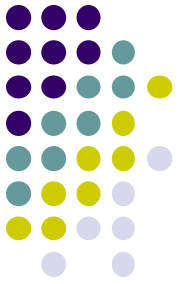
- **Personal Information:**

- Discourage users from disclosing personal information (phone number, address, date of birth).

Example: Seattle



- Addresses collection use and security of information collected on City website or accessed through the site.
 - Passive collection of information (e.g., IP address, type of browser)
 - Information provided by user survey in responses, online transactions, etc.
- Notice of state public records law and disclosure requirements.



Thank You.