

Cyber update: Free speech, FOAA and website privacy policies

Social media are effective and inexpensive ways for municipalities to inform citizens. However, this is written communication. Legal requirements must be followed.

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Municipalities are increasingly using digital tools to engage with the public. Social media and websites are perhaps the most common tools used by municipalities to develop their internet presence. However, municipalities use them in very different ways. Some municipalities use social media simply to provide timely updates about storm closures, municipal events, or other similar notifications. Others use social media more interactively to exchange information with the public, which can result in a site being used as a channel for reporting complaints or discussion of other substantive issues.

Municipalities need to be aware that these different uses have different legal implications. This article highlights some of the key issues municipalities must consider for social media and websites. Although there is no one-size-fits-all approach to using these tools, there are steps that municipalities can take to ensure that growing their online presence remains compliant and manageable.

Free speech considerations

Many municipalities have a social media presence on Facebook or other platforms, and some have adopted policies that allow public comment on their websites. According to one court, a social media page “is a public-facing platform through which public figures and organizations may engage with their audience or constituency.”

Are municipalities free to moderate any comments on social media (for example, by deleting comments

critical of local officials) at their unfettered discretion? The law is not well settled, but according to one court (*Davison v. Loudoun Cty Bd. of Supervisors*, 2016 WL 4801617 (E.D. Va. Sept. 14, 2016), the answer to that question is “no” – care must be used. Once local government adopts a social media comment policy, it “is bound to abide by its terms.”

A particular social media website may be deemed to create a “metaphysical” limited public forum, and thus the removal of comments critical of the government entity operating the web-site may be content based censorship in violation of the First Amendment. Once government officials “suppress comments in violation of” an applicable social media policy, “their actions implicate the commenters’ First Amendment rights.” The First Amendment may apply to municipal social media websites, particularly those that allow public comments, just as it does to speech in other contexts.

Freedom of Access Act

Municipalities must also be aware that communications posted on a municipal website or social media site may qualify as public records and that it is the *content* – not the *format* – of the communications that govern their status. There is no special exclusion under the public records law for communications that are posted on social media or other electronic platforms. Maine’s Freedom of Access Act (“FOAA”) extends broadly to “any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained.” (1 M.R.S.A. § 402(3)). Municipalities may not ignore their

obligations under FOAA simply because a communication is transmitted via social media, rather than another format.

In general, if a post on a municipal site is sent or received in connection with municipal business, then the post likely will qualify as a public record. Where municipal internet sites are established primarily to engage with the public on municipal issues, the result is that communications on those sites may qualify as public records more often than not. Municipalities should keep in mind that public records laws are liberally construed by the courts in favor of public disclosure.

Most social media sites are hosted by third-party providers such as Facebook and Twitter. Like everyone else, municipalities are subject to each provider’s terms of service and have limited control over how posted content is maintained. As a result, municipalities usually will not be able to satisfy their FOAA obligations by relying on the service terms of the providers hosting their sites. Municipalities have an independent obligation to ensure that their data retention policies comply with the FOAA. The same generally holds true with respect to municipal websites, although municipalities have control over their own websites.

How long do municipalities need to retain communications that appear on their sites? The answer is that it depends on the content of the communications. The first step is to determine whether the site contains the only copy of the public record. If what is posted on a site is a duplicate copy of material that is already being retained in another format, then the post does not need to be retained any longer

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than is necessary. This may be the case for much of the content that municipalities put on their websites, because websites often serve as an alternative repository for information that is already available to the public and that is stored elsewhere in a different format.

On the other hand, if a site contains the only record copy of the communication, the next step is to determine what retention schedule should apply given the communication's content. This can be a difficult task, because content on a social media site can vary widely, particularly where a municipality has made its site interactive with the public. As a general rule, municipalities should apply the same retention principles to social media posts that they would apply if the posts were in a physical form or in email. Municipalities may find it helpful to refer to the retention schedules for state and local government records published by the Maine State Archives for guidance. For example, posts that contain complaints or substantive requests for advice would likely have a longer retention period than communications that request or convey only basic information and that otherwise

have only short-term value. Transitory correspondence that falls in this latter category would likely not need to be retained for longer than sixty days.

Website privacy policies

Turning to websites specifically, every municipal website should include a publicly accessible privacy policy. A privacy policy is a statement that addresses significant data collection and use practices. Most commercial websites now post some sort of privacy

policy, most often at a link labeled with the word "privacy" found at the bottom of the home page of the website. Many, but not all, municipal websites in Maine also include a privacy policy. All should, because privacy policies are not optional.

Under Maine's notice of information practices law (Title 1, Chapter 14A), municipalities must include notice of their information practices on their websites. The notice must inform the public about what personal informa-

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tion is being collected by the website, how it is used, the circumstances under which it may be disclosed, the extent to which users have a choice of whether to provide personal information and the consequences of not doing so, how to access and correct personal information, and what security measures are taken to prevent improper use or unauthorized access to that information. A policy must be tailored to each municipality's data collection practices.

The law on privacy policies boils down to requiring that municipalities "say what they do and do what they say – to conspicuously post a privacy policy and to comply with it" – per the California Attorney General's Office, which has spent a great deal of time discussing privacy issues with Silicon Valley.

Final thoughts: Do's and don'ts

Digital technology makes it easier than ever for municipalities to engage

with the public. Municipalities must recognize that as they increase their interaction with the public online, they may increase their legal obligations. Municipalities therefore need to be proactive in how they manage their online presence.

First and foremost, municipalities must adopt and implement adequate policies. This includes, in addition to a website privacy policy, a technology policy that addresses social media. The policy should explain that communications posted to municipal sites are sub

ject to the FOAA. It should also clarify which employees have the authority to post and monitor material on behalf of the municipality; doing so not only makes it easier for a municipality to maintain a consistent "voice," it also helps to focus the content of posted material, which in turn can make the content easier to manage as a public record.

To alleviate potential headaches, the policy should also limit the scope of permissible content and clarify that social media sites are not to be used

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by the public for official communications with the municipality, filing complaints, providing required notices, or other similar communications for which a proper channel already exists. Municipalities might also consider explaining that any communications posted to a site are for informational purposes only and that the communications will be deemed to be, at most, transitory correspondence. The policy should also clarify what content is not allowed, for example, content that is typically unrelated or that discriminatory, and further explain that such content may be removed (hidden from view, but not deleted).

With adequate policies in place, municipalities should consider the following:

Do's

- Use social media as a duplicate channel of communication to the extent possible, so that information that is posted on social media is retained in another form.
- Advise municipal employees and officials against conducting public business on private social media accounts and that doing so will subject

those accounts to public records laws.

- Include a statement on the social media site itself that mirrors the social media policy and that clearly explains the purpose of the site and the scope of permissible content.

Don'ts

- Do not allow municipal employees or officials to make personal use of municipal social media sites.
- Do not authorize or use private

social media groups for municipal employees and officials to conduct municipal business.

- Do not use social media for communications that contain or disclose confidential information.

Although there is no one-size-fits-all approach in this constantly evolving area, following these steps will help make sure that the management of municipal spaces online remains just that: manageable. n

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