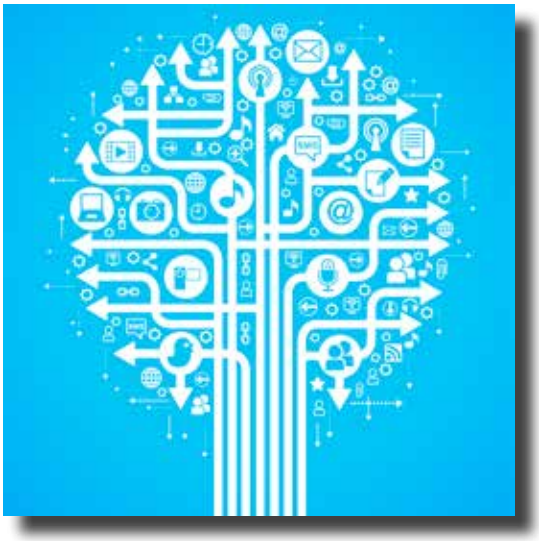
TWEETS, SNAPS AND POSTS

10 QUESTIONS ADDRESSING THE PROS AND CONS OF SOCIAL MEDIA USAGE FOR PUBLIC OFFICIALS

by Dan Wichmer and Cora Scott

One of the most intriguing aspects of modern public service is the instant access an official has to his or her citizenry, as well as people all over the world. This access is offered in seemingly benign packages such as Facebook, Twitter, Instagram, Vine, Snapchat, and "old-fashioned" mass-email messages. These social media tools, when used appropriately, allow an official to receive and solicit input from a much larger audience than the traditional business meeting or town hall meeting, and allow the official to broadcast information much faster and with less filtering than through traditional press releases, newspapers, or TV reports. However, inappropriate or careless use can lead to embarrassment, censure, fines, and lawsuits. This article will offer some general guidance on how to properly navigate the social media minefield, from a legal standpoint.



While it seems as though social media has been in use for a long time, well-established sites like Facebook and LinkedIn are all less than 12 years old, launching in 2003-2004[1]. YouTube launched in 2005, and Twitter is a relative "new kid in town," not launched until 2009[2]. New social media sites like Instagram, Vine, and Snapchat are growing in popularity, especially among younger users, as the "traditional" social media venues like Facebook and Twitter become populated by their parents and grandparents. By 2014, 85 percent of the world's population had access to the Internet, there were 200 million social media users in the U.S., and millions of people have "liked" a brand on Facebook[3]. Major retailers have begun to use traditional media to drive customers to their Facebook and Twitter streams[4] to take advantage of the easy access to potential customers. It is not surprising that a public official would be interested in utilizing the low-cost and immediate access to constituents that social media provides.

Research shows that social media users are more engaged citizens. Sixty-nine percent (69 percent) of social media users will volunteer for a community organization versus 49 percent for non-social media users.[5] Similarly, 57 percent of social media users participated in a community issue versus 43 percent of non-users[6]. Finally, 60 percent of all Americans believe the Internet has made it easier for them to be well-informed consumers, while 47 percent of all Americans believe that the Internet and social media has made them more active in the political sphere.[7]

Since social media is such a ubiquitous presence in many people's lives, anyone who wishes to communicate effectively with his or her constituents must be ready to use such tools. The fact that using them requires very little training is both a blessing and a curse. The closest analogy this writer can convey is that using social media without a guide is like watching one's child start to drive immediately after passing their driving test. Yes, the person has the right to drive, but do they have the ability to safely do so without additional instruction? Let me climb into the passenger's seat of your social media-mobile and attempt to provide some further instruction to keep you headed in the right direction in this new territory.

Question:

Is everything I write on social media governed by the Sunshine Law?

Answer:

No. The matters that are controlled by the Sunshine Law are any writings or videos that an official posts about their office (i.e., a councilmember commenting on proposed legislation or actions that the member wants the public body to take, such as terminating or disciplining staff.) The test of determining "public" versus "private" documents involves comparing the nature and purpose of a document with a government official's or agency's activities to determine whether the documents constitute a record of the "performance of official functions that are or should be carried out by a public official or employee," thereby making them public records[8]. To the extent that the post or message in question does not meet the test stated above, the message would be private and not subject to the Sunshine Law.

The above standard is the majority view of courts and agencies that have addressed the question. There are a minority of courts that still hold that if a public computer or cell-phone is used, or if public funds are paying for the computer or phone, then it is the public's property and the elected official has no ability to claim that he or she is entitled to claim privacy for any message or post originating from the device.[9] Even these decisions still recognize that not all messages are "public"[10].

Question:

If I post information about city

business on my personal Facebook account, is that post subject to a Sunshine Request?

Answer:

Yes. Any post that concerns a person's status as an elected official is subject to a Sunshine request regardless of whether the person tries to keep such post "private"[11]. It is irrelevant whether you post as "Alderman X" or "private citizen X". The content of the message controls.[12] For example, a councilperson posts under his personal Facebook account: "I am appalled by the city manager's conduct and I think she needs to be fired." Even if this post does not identify the councilperson as such or state that it is written in an official capacity, courts have held that since the content involved that person's office, the post was subject to a Sunshine request.

Question:

I have Facebook and Twitter accounts that show that at least a majority of my fellow elected officials have "friended," or follow me. Are there any Sunshine concerns having my fellow elected officials as friends or followers?

Answer:

Possibly. If an elected official posts about issues that the elected body may consider, or is considering, AND the other elected officials comment on the post, an un-posted "public meeting" probably has just occurred.13 Remember that 610.020 RSMo requires that any meeting of the public body requires a notice, given at least 24 hours in advance, of the time date and place of such meeting. A tentative agenda is also required. Once an elected body (or a majority thereof) engages in a discussion of public business without giving the requisite notice and agenda, a violation has occurred subjecting those involved to penalties under 610.027, RSMo.

Question:

If I do post information that I realize will create a "public record" under the Sunshine Law, what are my obligations?

Answer:

You must be able to produce the information if a request is made. You are also responsible for the cost of producing the information. Finally, you are obligated to keep the information for as long as is required under the Missouri Secretary of State's archiving schedule. This is a requirement imposed under Chapter 109, RSMo. NOTE: You cannot rely on the actual social media site to be your "archive." You are the person that must take the steps to keep and preserve the post(s). If you fail to do so, you face penalties under both the Sunshine Law and Chapter 109. This can be a very costly proposition for you.

Question:

During council or board meetings, I tweet and post my thoughts about the discussion taking place during the actual meeting. Sometimes, I answer questions that citizens pose back after I post, or other members of the council or board post replies to my comments while the meeting is occurring. Are these exchanges subject to the Sunshine Law?

Answer:

Yes. What is really taking place by your actions is public comment and debate among the elected body. This is no different than having an oral discussion at the meeting. The posts are subject to disclosure. More importantly, you are engaging in an unposted meeting in violation of 610.020, RSMo.

Question:

Are there any guidelines that I can review to help me in dealing with social media use as a public official?

Answer:

Yes. The Secretary of State has published guidelines that can be found at http://www.sos.mo.gov/archives/pubs/SocialMedia.pdf. Highlights of Policy:

1. Designate who is responsible for content;

2. Policy should outline ramifications for those who fail to follow policy;

3. Identify who owns the account and content;

4. Limit access;

5. Have a policy about forwarding 3rd party broadcasts;

6. Make sure confidentiality is addressed;

7. Understand copyright issues;

8. Have a disclaimer on opinions posted on the site;

9. Do not rely on third-party vendors to keep messages or archive. This is the responsibility of the agency with the account;

10. Have a plan in place to be able to archive and retrieve information in the event of a system crash, change in user terms by the provider or discontinuance of the media.

Question:

Are there guidelines for e-mail and electronic document management published by the Secretary of State?

Answer:

Yes. See http://sos.mo.gov/records/recmgmt/E-MailGuidelines.pdf. This document provides tremendous information on types of electronic documents and their treatment under the applicable state law. This should be required reading.

Question:

I have been informed that I, in my capacity as an elected official, have been sued for voting in favor of an ordinance that a citizen's group claims violates their civil rights. I have also been told that I need to produce all documents that reference the subject of the lawsuit. I think I may have posted information on my Facebook and Twitter accounts about the issue. What do I need to do?

Answer:

First, take immediate action to preserve the documents. Once a party reasonably anticipates litigation, it has duty to suspend, as to documents that may be relevant to anticipated litigation, any routine document purging system that might be in effect, and the failure to do so constitutes spoliation. Such a party has a duty to put in place a litigation hold to ensure the preservation of relevant documents; the failure to do this constitutes spoliation. A document retention policy adopted or utilized to justify the destruction of relevant evidence is not a valid document retention policy and implementing such a policy in advance of reasonably foreseeable litigation would not be proper and could constitute spoliation.

It is critical that you plan, in advance, to have a document retention system in place for your social media. While this issue has not been heavily litigated, those courts that have addressed the matter have imposed serious sanctions, ranging from monetary penalties to default judgment against the party that failed to retain the required electronic communications. Please consult with your attorney for a more in-depth discussion of this aspect of the law.

Question:

What is "spoliation"?

Answer:

Spoliation is the destruction of evidence. Destruction of electronic documents can occur in two general ways: 1) actively deleting or altering records and 2) allowing electronic information to be deleted through lapse of time via a records retention policy.

Counsel is advised that the key elements in avoiding spoliation issues are making sure that clients have a clearly established record retention policy and to make sure to institute a litigation hold with the client or issue preservation notices to parties with relevant information as soon as litigation appears likely. Instigating a litigation hold as soon as litigation appears likely is especially important today where one study of sanctions for e-discovery noted, "In the 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve electronic information, which was the sole basis for sanctions in 90 cases."

Question:

Is using social media to conduct public business worth the risk?

Answer:

That is a question each person should address with their city attorney and city clerk as these two individuals will be the ones who are tasked with making sure their bosses do not violate the law. As demonstrated above, only the particular elected official will be able to determine if the benefits outweigh the risks. Just keep in mind the old adage, "caveat emptor," or "let the buyer beware," when taking the social media plunge.❑

Dan Wichmer is the city attorney for the city of Springfield, Missouri. **Cora Scott** is the director of public information for the City. Contact the city of Springfield at www.springfieldmo.gov or (417) 864-1000.

(Endnotes)

1 See, Dr. Anthony Curtis – The Brief History of Social Media, 2013. http://www2.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html

2 Id.

3 Id.

4 Id.

5 Quarterly Allstate and National Journal Heartland Monitor Poll, June 13, 2012.

6 Id.

7 Id.

8 Pulaski County v. Arkansas Democrat-Gazette, Inc., 260 S.W.3d 718 (Ark. 2007).

9 Detroit Free Press v. City of Detroit, 2008 WL 701227 (Mich.Cir.Ct. Jan. 25, 2008).

10 Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v. University of Michigan, 753 N.W.2d 28 (Mich. 2008).

11 Wick Communications Co. v. Montrose County Bd. Of Commissioners, 81 P. 3d 360 (Co. 2003).

12 Bent v. State, 46 So.3d 1047 (Fla.App. 4 Dist.,2010); Easton Area School Dist. v. Baxter, 35 A.3d 1259(Pa. Cmwlth.2012); Schill v. Wisconsin Rapids School Dist., 327 Wis.2d 572, 786 N.W.2d 177 (WI. 2010).

13 Kansas City Star Co. v. Shields, 771 S.W.2d 101 (Mo. App. 1989)(public body conducting business).