

Social Media And The First Amendment, Missouri Sunshine Law, And Records Retention



“A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”¹ “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the internet’ in general, and social media in particular.”² The internet has changed the way people communicate with each other and how they conduct business, including local governments. While the internet has provided greater transparency and greater public participation, it has also generated a number of questions to consider when public officials and employees utilize this tool.

When the city uses the internet, including social media platforms such as Twitter, Facebook and Instagram, to post about official city business, has the city created a public forum?

It depends. A public forum means that the particular place, event or platform is open to all to present their views. If a forum is truly a public forum, the government generally cannot regulate the speech that takes place there or discriminate between the speakers based on their viewpoints. “To determine whether a public forum has been created, courts look ‘to the policy and practice of the government,’ as well as ‘the nature of the property and its compatibility with expressive activity to discern the government’s

intent.”³ “Opening an instrumentality of communication ‘for indiscriminate use by the general public creates a public forum.’⁴ In general, if the city is using social media platforms to disseminate information only, then more than likely the city has not created a public forum. However, if the city allows for interaction on the social media platform, then it may have created either a public forum or a limited public forum.

Can elected officials block accounts?

It depends. If the social media account is a personal account, as further explained below, then the elected official can more than likely block the account. However, if the account is a forum “public or otherwise – viewpoint discrimination is not

permitted by the government.⁵ Keep in mind that “[r]eplying, retweeting and liking are all expressive conduct that blocking inhibits. Replying and retweeting are messages that a user broadcasts, and, as such, undeniably are speech. Liking a tweet conveys approval or acknowledgment of a tweet and is, therefore, a symbolic message with expressive content.”⁶

Are elected officials’ personal social media platforms a public forum?

They could be. Courts have concluded that although forum analysis does not apply as a whole to the social media platform, it does apply to the “interactive space” in which other users may directly interact with the content of the message.⁷ The courts will look at “how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account.”⁸ If the elected official has a personal social media account where no government business is discussed, access to the account is limited and others view the account as a personal account, then more than likely the court would find that the personal account is a private account. As a practical matter, if the elected official wishes to communicate by social media to constituents about government business, then the elected official should create a separate social media account specifically for government business.

Note that on Jan. 27, 2021, the 8th Circuit Court of Appeals in *Campbell v. Reisch*, determined that Representative Reisch did not act under color of state law because she runs her Twitter account in a private capacity, namely, as a campaigner for political office.⁹ Running for public office is not a state action; it is a private activity. The Court did recognize that personal accounts can morph into public forums; however,



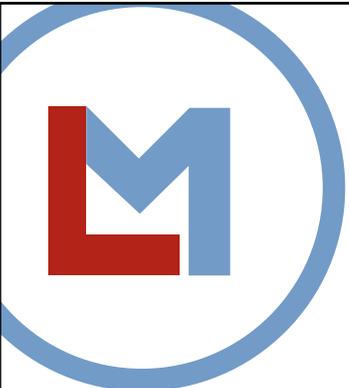
in this case, the Court determined that the tweets made after she was elected did not alter the account as such tweets were too similar to her pre-election tweets. Therefore, because the Court determined that the Twitter account was a private account, Representative Reisch could control who posts on her Twitter page.

If the elected official creates a social media account for government business, what does that mean?

It means that the elected official cannot engage in viewpoint discrimination that results in the intentional, targeted expulsion of individuals from the social media forum as it violates the Free Speech Clause of the First Amendment.

Can cities discipline employees for posts they make on social media?

Yes, but in order to determine whether an employee should be disciplined, the city would need to balance its interest as an employer to manage the affairs of the city against the first amendment rights of the employee. Specifically, “the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”¹⁰ In situations on whether to discipline an employee for posts made on social media, the city must balance the right of the employee to speak as a private citizen upon matters of public concern against the interest of the city in ensuring its efficient operation.¹¹ “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.”¹²



**MUNICIPALLY FOCUSED.
RESULTS ORIENTED.**

.....

A law firm dedicated
to the practice of
municipal law.

LAUBER MUNICIPAL LAW, LLC
Serving those who serve the public

816-525-7881
LauberMunicipalLaw.com

The choice of a lawyer is an important decision and should not be based solely on advertisements.

Cities can also discipline employees for (1) violating the employer's social media policy, as long as the social media policy does not prohibit protected activities, prohibit speech that is a matter of public concern, or prohibit political or other protected speech; and (2) excessive use of social media during work hours.

What should be included in a city social media policy?¹³

If a city is going to use social media as a platform to interact with the public, then the city should have a social media policy. Some things to consider when drafting a social media policy are:

- Include a purpose statement explaining the purpose of the city's social media platform (i.e., obtain and convey useful information in an expedient manner, etc.) and whether there are any limitations to the interactive component of the social media platform.
- Decide who has the authority to open a social media account on the city's behalf. This person, in most cases, must agree to some type of terms of use agreement in order to open the social media account.
- Appoint an administrator (or team) to oversee and supervise the social media platform. The administrator (or team members) needs to be trained in the terms of the policy and social media laws. Further, any usernames and

passwords should only be known by the administrator (or team members). Passwords should be updated when anyone who has access to the site leaves the city or no longer needs access.

- Identify the owner of the social media account and to whom its contents belong.
- Include a statement to address who is making the comments on behalf of the city, which department the person commenting works for, and provide context to images, audio and video, if necessary. If certain types of comments are not permitted, the policy should state what is not permitted. Be careful. It is probably safe to exclude discriminatory content, threats, content that violates copyright or trademark laws, and any content that violates federal, state or local laws.
- A disclaimer should be included that any comment posted by a member of the public is not the opinion of the government.
- A disclaimer should be included that any comment posted may be subject to disclosure under the Missouri Sunshine Law, as well as subject to Missouri Record Retention laws.
- A disclaimer that reserves the right of the administrator (or team member) to remove content that violates the policy or applicable law. If content is removed for violation of the policy or applicable law, then the city should follow the policy diligently.

Now is the time to build.

Missouri's municipalities and utilities are reevaluating capital improvement plans to advance critical infrastructure projects. Combining today's financial backing with design-build delivery makes now an opportune time to pursue your projects. To learn how to capitalize on the opportunities, listen to our webinar at burnsmcd.com/MML32021.

BURNS  **MCDONNELL**

CREATE AMAZING.

- Waiver of liability statement to protect the city from various types of lawsuits such as: defamation, invasion of privacy, breach of contract, violations of due process, etc.
- Lastly, make sure that the comment policy is posted to the social media site or a link to the policy is posted and an acknowledgement statement that the commenter understands and accepts the city's terms of use of the social media platform.

What should be included in an employee usage policy?¹⁴

Social media has become a way of life for most people. The city should have a social media policy that addresses employee usage. Some things that the employee usage policy should address are:

- Determine if social media in the workplace is allowed, prohibited or monitored;
- If social media is allowed, a statement that there is no expectation of privacy while using the city's internet or equipment;
- Personal Accounts – employees should not use their personal accounts to conduct city business (note: this should apply to elected officials as well). If an employee does use their personal accounts to conduct city business, then the records generated must be maintained pursuant to Missouri Record Retention laws, may be subject to Missouri's Sunshine Law, and are considered discoverable information in case of litigation. Further, employees who identify themselves as employees of a particular government should post a disclaimer that any postings or blogs are solely the opinions of the employee and not the employer;
- Include a confidentiality statement that employees are to protect confidential and sensitive government information;
- Avoid overbroad policies as such policies may prohibit employees from speaking on matters of public concern;¹⁵
- Consider whether employees may use city logos, uniforms or equipment in their private posts;
- Enforce social media policy consistently;
- Have social media administrator train employees on the policy; and
- Have employees sign an acknowledgment that they have read the employee usage policy and that they received training for the same.

Are the contents of a city Facebook page public records?

To understand how Missouri's Sunshine law affects Facebook accounts, one needs to understand how Facebook works. When you post a picture on Facebook, it is uploaded to Facebook's servers. Though you see it on your screen, the data is not stored on your computer. This is important because,



in Missouri, records are public if they are retained by a governmental body. In other states, the open records laws are largely based on the purpose of the record, not the possession of it. In Missouri, if you store a picture of your cat on your city computer, that picture is a public record and subject to the Sunshine Law.

The Sunshine Law does not require a city to retain records that are governed by Missouri's Record Retention law.¹⁶ Missouri's Records Retention law has a different definition of what is a record. Under that definition, a record is something "made or received pursuant to law or in connection with the transaction of official business."¹⁷ In addition, the Records Retention law does not carry a penalty for its violation.

If a city puts content on Facebook, the original content is still held by the city, so it is a record both under the Sunshine Law and the Records Retention law. The Facebook page itself is not in the possession of the city, so it is not subject to the Sunshine Law. But since it was created to transact public business, it is subject to the Records Retention law. Likewise, comments posted on a city's Facebook page by the general public have never been in the possession of the city. But, they may be considered the transaction of public business.

Capturing Facebook pages, indeed any internet page is problematic. Facebook provides an "Archive" feature that saves material, but still, such material is retained on the Facebook servers. It is possible to manually download pages, comments and images. However, content is constantly changing. If someone posts a comment, they may take it down shortly thereafter. There is software that can constantly archive material, but it can make having a Facebook page prohibitively expensive for small cities.

Can comments be deleted from a city Facebook page? Must they be archived?

It depends on how the page was created and what rules it operates under. The safest advice is not to allow any public comments on a city page. In this way, the page remains an instrument purely for speech by the city and is not a public forum. If comments are allowed, then rules can be established as to what sort of comments are allowed. These must not discriminate between viewpoints. So you could not have a rule that prohibits saying bad things about the city. However, you



can limit the comments to certain topics. You should also have a policy about how long such comments will be retained on the page.

The Missouri Secretary of State takes the position that all postings on government-created sites are public records and therefore should be retained.¹⁸ Therefore, under that analysis, the comments should be retained. As discussed above this can be difficult. If as the Secretary of State recommends, posts are archived locally, then they clearly are subject to the Sunshine Law.

If comments are going to be allowed, the city should establish rules of conduct. What can and cannot be said, again, without discriminating based on viewpoint. Without such a policy, there is very little ability to regulate the comments. Specific and direct threats against person and property can be removed. But comments that are less specific generally cannot. Obscene language can be removed, but since most social media providers already prohibit that, the best course of action is to report the comment to them.

Are Zoom meetings public records, and must they be recorded?

In the last year, more and more public bodies have turned to holding virtual meetings using software such as Zoom, Facebook Live, Go-to-Meeting or Microsoft Teams. Each of these applications have the ability to record the meeting. Some, such as Facebook Live, may be recording it without your knowledge. Under the Sunshine Law, if such meetings are recorded and saved by the city, they may be requested to be disclosed.¹⁹ However the Sunshine Law never requires a city to create a record, so the Sunshine Law does not require such meetings to be recorded. Likewise, the Records Retention law does not require a record to be created, but if it is it should be retained.

Can the public record electronic meetings?

Most applications allow the host (that is the city) to decide if participants can use the record feature on the application. The

Sunshine Law specifically provides that “A public body shall allow for the recording by audiotape, videotape, or other electronic means of any open meeting.”²⁰ Although this has never been applied to this sort of recording, reading the statute literally and construing it in favor of openness, such recording should be allowed upon request. 🌿

Jennifer Baird is a partner with Lauber Municipal Law, LLC, and practices in the areas of general municipal law, personnel, planning and development, and economic development. She serves as the city attorney for multiple Missouri cities. Jennifer can be reached at (816) 525-7881, or via email at jbaird@laubermunicipal.com.

Nathan Nickolaus is an attorney with Lauber Municipal Law, LLC. Mr. Nickolaus received his B.A., 1985, from Westminster College and J.D., 1988, from the University of Missouri-Columbia, and a Masters of Public Administration from Indiana State University in 2016. He is the former city counselor for Jefferson City. He is the former general counsel for the Missouri Department of Economic Development. He is a 2012 recipient of the Lou Czech Award.

Endnotes: Due to print space restrictions, endnotes are available by request. Contact MML at (573) 635-9134 or info@mocities.com to request this article with full endnotes.

MGI MUNICIPAL GOVERNANCE INSTITUTE

EXPAND YOUR HORIZON
NEW!
ADVANCED CERTIFICATION

Building on the foundation of the popular Certified Municipal Official program, MML's Municipal Governance Institute has created an entirely new advanced curriculum. The advanced program offers increased challenges and rewards, requiring the completion of study in 14 core areas. Each custom-crafted module is tailored to assist Missouri local officials in their mission to better serve their communities.

Missouri Municipal League | For full details and enrollment form visit:
www.mocities.com