

## **Social Media: Legal Risks for Municipalities**

Drafting Policies for Local Government Officials and Employees  
on Using Twitter, Facebook, Blogs and More

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# **Social Media: Legal Risks for Municipalities**

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# Overview

- Background
- Social Media Issues for City Governments
  - Document/Data Retention
  - Politics and Campaigning
  - Technical and Security Risks
  - Terms of Service
  - Social Media Insurance
  - First Amendment
  - Liability for Speech of Others: Section 230, Defamation
  - Copyright
  - Privacy
  - Discrimination
  - Employment Law Challenges
- Developing a Social Media Policy
- Best Practices and Recommendations

# Background

- Widespread use of social media tools by local governments:
  - 2012 Univ. of Tennessee [survey](#): “Does your city currently use social media to communicate with citizens?”
    - Yes: 70.2%
    - No: 29.6%
  - Which of the following website services does your agency or department permit the usage of in the workplace? (*Government Technology*, March 2012)

• Facebook	45%
• Google Plus	39%
• LinkedIn	59%
• MySpace	17%
• Twitter	41%
• YouTube	45%
• None of the above	27%

# Issues: Document/Data Retention

- Under public records laws, local govts' likely have an obligation to retain all "records" – including ephemeral electronic communications – which may include all Facebook, Twitter, etc. communications
- Recent court decisions holding Facebook and Twitter postings subject to discovery: *EEOC v. Simply Storage Management*, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind., May 11, 2010); *Robinson v. Jones Lang LaSalle Americas, Inc.*, No. 3:12-cv-00127-PK (D. Or. Aug. 29, 2012).
- City Council agenda management systems
- Storage:
  - Paperless vs. paper
  - Cloud vs. on-site
- State laws vary
  - Record Retention
  - Data Practices

# Political Campaigns

- Increasing use by candidates, cheap, timely
- Mudslingers or false accounts create issues amounting to “digital mud slinging”
- Maryland election board model for country
- Oregon Sec. of State:
  - “Public employees may not post to government twitter, facebook, etc. material that contains political advocacy. If a government agency interacts with candidates in new media (i.e., if a candidate left a comment on an agency facebook post), the agency must ensure that they treat all candidates equally and that any agency interaction remains impartial.”

# Technical & Security Risks

- Spyware/malware
- Anti-malware software programs
- Phishing scams
- Employee confidential information
- Personal vs. public
- Blocking sites or downloads (.exe files)
- Training, digital boot camp

# Terms-of-Service Issues

- Click-through user agreements were causing problems for state and local governments. . .
- NASCIO Model Facebook Agreement for state and local governments:
  - “Facebook has specifically agreed to modify the provisions of its terms and conditions to:
    - “Strike the indemnity clause except to the extent indemnity is allowed by a state’s constitution or law;
    - “Strike language requiring that legal disputes be venued in California courts and adjudicated under California law;
    - “Require that a public agency include language directing consumers to its official Web site prominently on any Facebook page; and,
    - “Encourage amicable resolution between public entities and Facebook over any disputes.
    - “The modifications will immediately apply to state and local government agencies already on Facebook”  
(<http://legalclips.nsba.org/?p=4244>)
- YouTube follows suit in January 2012 (NASCIO [press release](#))

# Social Media Insurance

- Social media liability coverage emerging as a way to address risks to city governments:
  - Chubb Insurance company offers “new products tailored to social media risks” [http://socialtimes.com/new-insurance-concerns-for-companies-social-media-brand-profile\\_b11515](http://socialtimes.com/new-insurance-concerns-for-companies-social-media-brand-profile_b11515)
  - “The Hartford CyberChoice 2.0sm to address growing liability risk of storing electronic data via web-based communities  
[http://www.hfpinsurance.com/servlet/Satellite?pagename=HFP/HLI03Article/HFP\\_Article&cid=1150848735670&c=HLI03Article&p=1201182671897](http://www.hfpinsurance.com/servlet/Satellite?pagename=HFP/HLI03Article/HFP_Article&cid=1150848735670&c=HLI03Article&p=1201182671897)

# Social Media Insurance

- “Do you Need Social Media Liability Insurance?”  
<http://www.retailonlineintegration.com/article/do-you-need-social-media-liability-insurance/1>
- “Insurance Coverage for Social Media Liability”  
[http://www.naplia.com/social\\_media/insurance.shtml](http://www.naplia.com/social_media/insurance.shtml)
- “Insurance Coverage for Social Media Liability: Is use of Social Media usage covered under my Professional Liability or Errors & Omissions policy? Employment Practices Liability Policy?”  
<http://gbwinsurance.wordpress.com/2010/10/01/social-media-liability-risks/>
- “State and Local Governments Concerned About Social Media Liability” <http://www.thetransitwire.com/2010/05/02/state-and-local-governments-concerned-about-social-media-liability/>

# First Amendment Issues

- Broadcast-only, or citizen interaction?
- Control over content vs. moderation of speech
- Public Forum Doctrine: Traditional, Designated, Non-public
  - *See Putnam Pit, Inc. v. City of Cookeville, TN*, 221 F.3d 834 (6<sup>th</sup> Cir. 2000)
  - Interactive electronic medium = “designated public forum” (probably). *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)
  - Strict scrutiny to the extent the state chooses to keep it open and to extent the participants are within the scope of the forum. Content-based, viewpoint-neutral restrictions *may* be permitted

# Section 230

- Communications Decency Act, 47 U.S.C. s.230:
  - “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”
- Defamation (*Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006); *MCW, Inc. v. badbusinessbureau.com*, 2004 WL 833595, No. Civ.A.3:02-CV-2727-G, (N.D. Tex. April 19, 2004))
- Threats, other torts (*Delfino v. Agilent Technologies*, 145 Cal. App. 4th 790 (2006), cert denied, 128 S. Ct. 98 (2007))
- Dissemination of info. about minors
- Does *not* apply to intellectual property law (*Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751 (9th Cir. Mar. 29, 2007))

# Copyright

- Contributory copyright infringement
- 11<sup>th</sup> Amendment sovereign immunity?
  - *Chavez v. Arte Publico*, 204 F.3d 601 (5<sup>th</sup> Cir. 2001, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1998).
- Digital Millennium Copyright Act
  - “Notice and takedown”
  - Safe harbor prerequisites:
    - Register with Copyright Office
    - Adopt and publish copyright policy

# Privacy

- Possession of sensitive citizen information
  - Integration of online service with social media presents significant risk of damaging disclosure
  - Advanced services (location-based, etc.) may create unanticipated privacy issues
- Stored Communications Act (18 U.S.C. s.2701-2712)
  - “Electronic communications service” (i.e., ISP)
  - “Remote computing service”
- Computer Fraud and Abuse Act (18 U.S.C. s.1030)
  - Intentionally access a protected computer without authorization, password trafficking, etc.
- Congress set to revisit Electronic Communications Privacy Act in 2013. Stay tuned...

# Discrimination Issues

- Excessive reliance on social media for citizen engagement may result in disenfranchisement for certain population groups
- Do not assume Internet accessibility is universal
  - Low income households
  - Use of internet by minorities
  - Use of internet by elderly
- Americans with Disabilities Act (29 USC Section 794(d))
  - Local governments must provide individuals with disabilities with “equal access” to information posted on social networking sites (see <http://www.ada.gov/websites2.htm>)

# Employment Law - Candidates

- Use of Social Media to Investigate Candidates for Employment:
  - Reliability of online information
  - Notify candidate
  - What online information can be considered? (To “friend” or not to “friend”)
  - Discuss negative information with candidate
  - Be cautious of using information for hiring decision that may be deemed discriminatory
  - Document reasons for rejecting candidate, including social media information
- Multiple states enacted laws prohibiting employers from requesting online usernames and passwords of candidates and current employees:
  - California
  - Delaware
  - Illinois
  - Maryland
  - Michigan
  - New Jersey

# Employment Law – Current Employees

- Employment Decisions Based on Social Media Postings
  - Information gathered from social media that evidences misconduct may be a lawful basis for disciplinary action
  - Misconduct must have nexus to reputation of public body
  - Examples of misconduct:
    - Excessive use
    - Derogatory comments about employer, employee, citizens
    - Disclosing confidential information
    - Making false statements

# Social Media Policies

Having a formal social media policy in place – with clear identification of controls, procedures and responsibilities – not only reduces the likelihood of a problem, but also protects the local governments from liability in the event a problem does arise.

# Considerations in Developing Social Media Policy

Some elements of a successful social media policy:

- Specific descriptions of services, applications, equipment, technology
- Description of administrative control over communication (e.g., identified personnel, level of approval for Twitter communication, etc.)
- When personnel must identify themselves as speaking on behalf of the government
- Acceptable use in hiring and firing decisions

# Considerations in Developing Social Media Policy

- Emergency situations: what to do when rapid response outweighs the need for close administrative control
- Acceptable personal use, employee liability for content
- Knowing terms of use
- Create a time for development and periodic review

# Social Media Policy – Cautionary Note

- NLRB: social media policies can violate labor laws
  - Examples: discussion of workloads, job related matters on Facebook – a concerted activity and not a concerted activity
  - An employee fired due to specific complaints regarding employer, name calling, and related matters- not a “concerted activity” protected by union laws

# Best Practices & Recommendations

- Determine whether and how social media should be adopted by your local government
- Identify city objectives for social networks:
  - One-way broadcast, or citizen interaction?
  - Emergency communications?
- Identify potential uses, and users, and purpose
- Determine pitfalls and risk management needs
- Learn terms of use and requirements applicable to differing social media services; i.e., Facebook, LinkedIn, Twitter, etc.

# Best Practices & Recommendations

- City website – include social media aggregation site
- Identify who in the city government is responsible for oversight of computer and related equipment uses, administration and enforcement of policies
- Learn what other city governments are doing
- Know requirements and limitations under state law

# Best Practices & Recommendations

- Identify a team of personnel who will be responsible for initiating city government social media policies that apply to all personnel, as well as contracted service providers
- Establish a plan for adoption and how the policies will be made available to all personnel and others that may be subject to them

# Best Practices & Recommendations

- Establish periodic review/update/modification meetings by the appointed team
- Establish requirements for protection of city government, i.e., disclaimers, liability insurance, and enforcement requirements

# Summary & Conclusions

- Social Media provides a diverse, cheap and a speedy way to deliver information
- Significant legal issues are just beginning to emerge
- Best practice considerations encourage development of social media policy or policies regarding use of city government equipment, who may use city social media outlets, and other protections and obligations of personnel and city government
- Social media policies should not be considered static, but an ongoing process of periodic review, update, modification and education of city government personnel, elected officials and other persons who may create city government liability.

# Q&A

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