



IS SOCIAL MEDIA THE NEW TOWN SQUARE?

A PRIMER TO SOCIAL MEDIA AND THE LAW FOR LOCAL GOVERNMENTS

LOCAL GOVERNMENTS AND elected officials are turning more frequently to social media to communicate with their citizens, disseminate important community information, and receive citizen feedback. In fact, social media engagement is the preferred method of citizen engagement for many elected officials at every level of government because it is perceived to be cheaper, quicker, and more direct than the more traditional methods of citizen engagement.¹ Due to its vast benefits, social media presence is ubiquitous among elected officials and government, often down to the department level of local governments.² While local

governments and elected officials are quick to adopt social media as a communication and marketing tool, rarely is much thought given to the legal implications of engaging on social media. While the legal and policy issues presented by social media use are immense and complex, this primer is intended to serve as an introduction on the proper use, management, and regulation of social media by local governments and elected officials.

The Legal Basics

Just as with other forms of government speech, there are legal consequences and liability for the improper management, use, and regulation of social media by the government. While limited case law currently exists on the legal implications of social media use and regulation by local governments, courts across the country are beginning to weigh in. Just this year, the U.S. Supreme Court asserted that social media may be “the most important” modern forum “for the exchange of views” in its decision to extend First Amendment protections

to social media for the first time.³ Lower federal courts are deciding cases that address whether the government’s blocking of social media users violates the First Amendment.⁴ Meanwhile, the U.S. Department of Justice (DOJ) is enforcing accessibility requirements on local government social media use.⁵

While new legal issues concerning social media use and regulation are raised every day, there are generally three broad categories of legal issues created by social media use that local officials should be concerned with: First Amendment issues; open records and open meetings; and accessibility.

First Amendment Issues

Perhaps the most complex of all legal issues presented by government and

1 See Donald J. Trump (@realDonaldTrump) Twitter, (June 6, 2017 5:58 AM EST) (“The FAKE MSM is working so hard trying to get me not to use Social Media. They hate that I can get the honest and unfiltered message out.”); Heather Lutze, Learn How Governor John Hickenlooper Leverages the Power of Social Media Marketing – And You Can Too (part 1) Findability University (2012), www.findability.com/learn-how-governor-john-hickenlooper-leverages-the-power-of-social-media-marketing-and-you-can-too-part-one.html (last visited Aug 10, 2017)(Noting Gov. Hickenlooper’s use of Facebook and Foursquare).

2 See Denver Public Works (@DenPublicWorks) Twitter; Fort Collins Utilities (@FCUtilities) Twitter; Glendale Colorado Police Department (@Glendale_PD_CO) Twitter.

3 *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732, 198 L. Ed. 2d 273 (U.S. 2017).

4 *Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16CV932 (JCC/IDD), 2017 WL 3158389 (E.D. Va. July 25, 2017); See also *Complaint, Knight First Amendment Inst. at Columbia Univ. et al. v. Donald J. Trump et al.*, No. 1:17-cv-05205 (S.D.N.Y. July 11, 2017).

5 See Settlement Agreement Between the United States of America and the City of Cedar Rapids Iowa under the Americans with Disabilities Act, DJ # 204-27-41 (2015) available at www.cedar-rapids.org/document_center/BoardsCommissions/2015%20Settlement%20Agreement.pdf.

elected official social media use are those that implicate the First Amendment of the U.S. Constitution. Most social media is interactive, allowing citizens to comment, reply, "like," or otherwise interact with the government's or elected official's post. The First Amendment is implicated because that interaction may be considered "speech" protected from government interference.⁶ A common First Amendment social media issue experienced in practice is the decision on whether to delete rude, offensive, or irrelevant posts by citizens.⁷ An increasingly contentious First Amendment issue is whether an elected official can "block" citizens on social media.

Ultimately, the degree to which governments or elected officials may exercise editorial control over their social media accounts involves a close examination of public forum law, a topic that has been described "virtually impermeable to common sense" even before the Internet and social media came along.⁸ Public forum law categorizes forums into three categories: traditional public, designated public, and non-public.⁹ In addition, courts have recognized a sub-category of designated public forum: the limited public forum.¹⁰ The amount of control the government can exercise over speech depends on the forum type. Citizens receive the greatest First Amendment protection in a traditional or designated public forum, limited protection in a limited public forum, and no protection in a non-public forum.

Interactive social media generally is understood to be a limited public forum.¹¹ In a limited public forum, the amount and manner of editorial control must be "reasonable in light of the purposes served by the forum" and viewpoint neutral.¹² Practically speaking, this means that it is extremely important that the local government or elected official clearly state the purpose of the forum, because the purpose establishes the standard by which any editorial decision will be judged.¹³

The foregoing issues focus on First Amendment free speech implications of government social media use. While beyond the scope of this article, it is equally important for local governments to understand how the First Amendment impacts the ability to discipline employees for their personal social media use.

Open Records and Open Meetings Issues

All local government-sponsored social media accounts are probably subject to the Colorado Open Records Act (CORA), because social media posts are likely to be considered "writings made, maintained, or kept" by a government entity.¹⁴ Similarly, the Colorado Open Meetings Law (OML) is fairly clear that a virtual meeting of a "local public body" on social media would be subject to its provisions so long as a quorum was present.¹⁵

Open records issues are more complex in connection with *personal* social media use by elected officials and government employees. The lines between personal and official use can become blurred when a person

discusses official business on a personal account. Generally, if posts or comments are an avenue for communication from the organization, then such posts and comments are likely considered public records, even on a private account. For example, if a public works director posts routes for snow plowing on his or her personal Facebook page, an argument can be made that these posts are subject to CORA. In the recent case of *Davison v. Loudoun County Board of Supervisors*, a federal court found that a personal Facebook page of a county chairwoman was "governmental" in nature because she posted under the "color of state law," thus subjecting the page to First Amendment protections and potential open records requests.¹⁶

Accessibility Issues

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 require that disabled individuals be given an equal opportunity to benefit from the programs, services, and activities offered by the government. The Department of Justice (DOJ) has taken the position that ADA accessibility requirements apply to websites, telephone access systems, and other "communication modalities of public accommodations." The DOJ recently has been actively affirming its position that the ADA and Section 504 require website and web-based content accessibility, including social media.¹⁷ At a minimum, local governments and elected officials should be prepared to offer their social media posts upon request in an alternative format that is accessible.

6 *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017)(finding that Facebook "likes" were speech potentially subject to First Amendment protection).

7 See e.g., *Davison v. Plowman*, No. 1:16CV180 (JCC/IDD), 2017 WL 1164480, at *5 (E.D. Va. Mar. 28, 2017).

8 See Lyrrisa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls*, 19 *Pub. Law* 2 (2011), available at scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1641&context=facultypub.

9 *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983).

10 *Id.* at 47.

11 See *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 611 (E.D. Va. 2017); Lidsky at 6.

12 *AM. Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

13 Note that some social media apps allow a high degree of editorial control (such as YouTube) while others offer very little (such as Twitter).

14 C.R.S. § 24-72-203(1)(a).

15 C.R.S. § 24-6-402(1)(b) (defining meeting as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication").

16 2017 WL 3158389, at *5.

17 See The United States' Findings and Conclusions Based on Its Investigation Under Title II of the Americans with Disabilities Act of the University of California at Berkeley, DJ No. 204-11-309 (Aug. 30, 2016) available at news.berkeley.edu/wp-content/uploads/2016/09/2016-08-30-UC-Berkeley-LOF.pdf; Settlement Agreement Between the United States of America and the City of Cedar Rapids Iowa under the Americans with Disabilities Act, DJ # 204-27-41 (2015) available at www.cedar-rapids.org/document_center/BoardsCommissions/2015%20Settlement%20Agreement.pdf.

More proactive governments can take steps toward ensuring that their web pages and social media content are compliant with DOJ criteria.¹⁸

Recommended Practices

Local governments that engage on social media should develop written social media policies. A good social media policy not only governs social media use by the organization, but provides guidelines for municipal

¹⁸ While no official DOJ rules exist on social media accessibility, the DOJ often takes the position that web content should be compliant with the Web Content Accessibility Guidelines (WCAG) 2.0's "Level AA Success Criteria" available at www.w3.org/TR/WCAG/.

employees, elected officials, and volunteers when their personal social media use references local government information. Developing a social media policy can seem like a daunting task, but with some careful consideration, it should not be. Communities that have effective written personnel policies addressing government communications and employee speech issues can be modified to incorporate social media use.

In addition, the Colorado Communication and Utilities Alliance (www.coloradocua.org),

which consists of the Communications Policy Section of CML and the Colorado Chapter of the National Association of Telecommunications Officers and Advisors, has assembled a *Social Media Guidebook* — a comprehensive guide to local government and elected official social media issues. The *Social Media Guidebook* includes an appendix of Colorado social media policies. With clearly defined social media policies, risks flowing from the legal issues highlighted in this article can be limited.