

THE LEGALITIES OF SOCIAL MEDIA

By Steven Mann



In today's world of technology and communications, communities are increasingly reaching their residents and marketing their services through social media. It has become common for cities, villages, and nearly all forms of local, state, and federal government to have an active presence on Facebook, Twitter, Instagram, LinkedIn, and other popular social media sites. This presence provides communities with an efficient and economical way to communicate with constituents, market events, operate transparently, and distribute important or urgent public service announcements. Maintaining a social media presence, however, may subject your community to unexpected consequences.

This article will explore certain legal requirements implicated by a governmental entity's use of social media. Use of social media can have unintended legal consequences: a duty to provide copies of social media communications in response to a request for records, a duty to retain posts or communications transmitted via social media, and a responsibility to ensure social media communications by members of the city or village council do not run afoul of the Open Meetings Act.



Social Media Communications Are Subject to FOIA

The Freedom of Information Act ("FOIA") subjects all "public records" to disclosure, unless specifically exempted by an express statutory exemption. As a self-proclaimed pro-disclosure statute, exemptions from disclosure under FOIA are construed narrowly. FOIA, although written decades before social media was even created, defines the term "public record" so broadly that it encompasses social media communications.

Under FOIA, a "public record" means a "writing" that is, among other things, "prepared, owned, used, in the possession of, or retained by a public body in the performance of an official [as opposed to personal] function." Likewise, the word "writing" is broadly defined to mean a "typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols..." Just as the courts have found that text messages satisfy the statutory definition of a "public record," electronic communications through social media also constitute public records under, and subject to, FOIA.

Retaining Social Media Communications

Perhaps more concerning is the fact that electronic communications through social media, like any other public record, must be retained by the public body pursuant to record retention laws. Public records of local government entities



actually belong to the State and may only be disposed of in accordance with a duly adopted record retention schedule. Failure to properly preserve public records can constitute a misdemeanor criminal act.

As you can imagine, retention of social media communications can present practical challenges, especially with social media messages or content which are only momentary or automatically deleted (i.e., Snapchat). Proper retention requires that the communications be preserved, either electronically or in paper format. Preserving Facebook, Instagram, Twitter, and LinkedIn communications generally requires archiving tools and a staff to store printed or digital copies, or engaging a company to provide social media archiving services. For Snapchat or other similar social media where the communication is ephemeral, a retention copy of the communication needs to be made before the content vanishes (i.e. prior to posting).

The Open Meetings Act

Social media communications can also present serious concerns with respect to open meeting requirements under the Open Meetings Act (“OMA”). As with FOIA, the OMA intends to promote accountability in government, and the Act is construed liberally in favor of openness. The OMA is written so broadly that it can apply to members of a governing body sharing views or exchanging ideas through social media communications.

Under the OMA, all meetings of a public body must be open to the public, and all deliberations of a public body must take place at an open meeting.

The courts have interpreted “deliberations” very broadly to mean simply “exchanging views” or “discussing” matters.



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The Michigan Court of Appeals recently applied these requirements to group emails between members of a publicly elected parks commission, finding that the email exchanges constituted private, closed meetings and impermissible deliberations in violation of the OMA. The facts of the case involved four parks commissioners exchanging numerous emails regarding matters which would soon come before the parks commission for consideration. The members actively engaged in thoughts and plans on how to handle the matters. At subsequent meetings, the matters were handled just as had

been discussed in the emails. The court found that the group emails constituted an unlawful “meeting” under the OMA and that the defendants had violated the OMA by “deliberating” outside of a meeting open to the public.

Although in this case the communications by the parks commissioners took place by email, had the communications been in some other electronic form, such as through social media posts or messages, the results would be the same. In order to comply with the OMA, the communications by the parks commissioners would have needed to take place at a meeting open to the public, following proper posting of public notice, and otherwise complying in all respects with the OMA.

Communities should recognize that record retention requirements extend not only to email and text messages but to all forms of electronic communications—including social media. Communities should consult with their legal counsel to adopt social media policies addressing all aspects of use of such services by the community, its employees, and members of its governing body. Public officials should tread cautiously when engaging in social media communications regarding public business to avoid any contravention of the OMA. 

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