

Social Media Use and Public Outreach Policy Guidance

It is important to note that the law regarding social media is in the infancy stages of development, and there is little concrete legal guidance regarding what legal issues may impact public agencies specifically. Simply stated, the law has not yet caught up with how people are communicating through social media sites and so this is certainly new territory upon which the City should tread very carefully. The below comments and recommendations, therefore, are preliminary advice the firm has gathered with regard to how public agencies can protect themselves in an area of law as uncertain as this. Although little in terms of new law has emerged, we will continue to look into these issues on behalf of all of our clients, and will keep you informed regarding new issues and law as they arise.

IMPLEMENTATION. Although you mentioned that the City Council has already provided approval for joining social media sites, it may be prudent to ask the Council to adopt formal findings regarding the intent, purpose, and scope of the proposed uses of social media sites. This will help show that the sites are only intended for informational purposes rather than creating a forum for public comment (given that courts have not yet made a determination regarding what type of forum municipal users create by joining these sites). This will also help defend against any challenges to whether postings on the sites constitute legal notices, Public Records Act requests, etc.

OFFICIALS MUST AVOID INTERACTING WITH EACH OTHER ABOUT CITY BUSINESS. The Brown Act specifically prohibits members of a legislative body from communicating through technological devices in discussing, deliberating, or taking action on any item within the subject matter jurisdiction of the legislative body (See Gov Code Section 54952.2(b)(1)). This could happen on any social media site - even accidentally - if a majority of the legislative body posts comments on a City-related issue, even if they are just responding to a constituent's post. It would be prudent for City Council members to avoid making any comments at all on City social media sites or profiles.

AVOID TAKING FINAL POSITIONS ON ISSUES. For quasi-judicial decisions (e.g. specific land use applications), as opposed to legislative matters (e.g. City-wide laws), ethics laws can prohibit city decision makers from participating if they have demonstrated they are completely closed minded, with a preconceived and unalterable view of the outcome, and without regard to the evidence. City decision makers, staff and council members should avoid posting comments that could be interpreted as a final or definitive position on an issue if that issue could later come before them in a quasi-judicial proceeding.

AVOID CAMPAIGNING. The City's social media pages could be viewed as a city resource. City staff and City officials should keep campaign regulations in mind and avoid any type of campaigning on the City's pages.

CONSIDER THE PUBLIC RECORDS ACT AND RETENTION REQUIREMENTS. California law states that public records include any writing (which includes photos and other text) containing information relating to the conduct of the public's business that are prepared, owned, used, or retained by any city regardless of physical form or characteristics. While California courts have yet to determine whether public records retention laws apply to a public agency social networking site, the City may wish to do all that which its technological capacity permits

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in terms of maintaining the content of the social networking pages in accordance with records retention schedules. The City should also strongly consider posting a highly visible disclaimer on the social media page or profile stating that the pages or profiles of the social media users themselves may also be subject to disclosure under the Public Records Act, as well as informing all users that social media is not the official method of communicating with the City (and directing them to the appropriate method of official communication).

FIRST AMENDMENT CONCERNS. There are several First Amendment concerns that may come into play when the City uses a social media site. This is the area of law which creates issues which I would be most worried about, but this also happens to be the area where guidance seems to be the most lacking. Social media sites like Facebook, for example, require that every user sign a Statement of Rights and Responsibilities where users agree not to post unauthorized communications. Facebook's statement prohibits commercial communications, bullying, intimidating, or otherwise harassing other users, or posting any content that is hateful, threatening, pornographic, or contains nudity or gratuitous violence, or doing anything unlawful, misleading, malicious, or discriminatory. It's not clear whether Facebook, other social network sites, or the City can apply such rules to the City's page because the First Amendment may prevent content regulation if courts ultimately treat the City's page as a public forum.

To avoid First Amendment issues, the City may elect not to allow any comments or pictures to be posted at all unless by the City itself. If the City wishes to allow comments and pictures, it should probably not regulate user comments or posts on its page, or consult with legal counsel before removing a comment or post.

DISPLAY OFFICIAL WAYS FOR COMMUNICATING WITH THE CITY. The City and council members should definitely create a disclaimer on its social media pages that posting comments is not the official way to communicate concerns to the City, and in no way should the member expect it to convey notice to the City or act as a substitute for public comment at City meetings. The City should also display the official ways for users to contact the City, such as during public comment at City Council meetings, general contact information for the City Hall, calling 911 for an emergency, etc.

IMPLEMENT STANDARDS FOR STAFF REGULATING THE CITY'S PAGES. To avoid potential employment issues for staff members regulating the City's page, the City should have those staff members sign an acknowledgment form that sets forth the procedures and standards for regulating the City's pages, and forbids staff members from spending excessive time on the City's pages or from posting any personal comments during working hours.