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Presented To:
The County Commissioners' Association of Ohio

Legal Issues in Local Government's Use of Social Media

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Columbus, Ohio
August 10, 2011

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I. INTRODUCTION

- A. What is social media?
- B. Determine what your local government hopes to gain from using social media.
- C. How to address legal issues which arise out of the use of social media—use 20th Century case law to address 21st Century legal questions.

II. POTENTIAL LEGAL ISSUES

A. First Amendment of the Constitution

1. The Law: The U.S. Constitution’s First Amendment prohibits governmental entities from infringing on the general public’s right to freedom of speech.
 - a. Traditional public forum—places by which long tradition, have been devoted to public assembly and debate (ie. streets, sidewalks, and parks). Must show that there is a content-neutral prohibition which serves a compelling state interest and is narrowly tailored.
 - b. Designated public forum—government opens a traditionally non-public forum for public discourse (ie. public board meetings). Government restrictions must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication.
 - c. Non-public forum—places which are traditionally not held open to the public (ie. jails, public schools, military bases). Government may impose content-based restrictions if those restrictions are reasonable.
2. The Issue:
 - a. No issue if local governments that host social media sites do not open the sites up to posts from employees or third-parties.
 - b. Local governments host social media sites and allow third-parties to post on the site.
 - i. Can only censor posts pursuant to a content-neutral policy which is narrowly-tailored.
 - ii. The censoring serves a compelling governmental interest (ie. preserving the public peace).

- c. Local governments host social media sites and allow employees of the government to post on the site.
 - i. When evaluating whether the government's employee's post is protected by the First Amendment, consider the following question: Is the post regarding a topic of public concern?
 - (a) If yes, then the post *may be* constitutionally protected?
 - What are "topics of public concern?" Topics which speaks to an issue or provides information that enables the public to make informed decisions about the operations of their government, such as information regarding unsafe practices by the government, a governmental employee's unlawful activities or the government's failure to follow the law.
 - If the post is regarding a topic of public concern, then the governmental entity must evaluate whether that public concern outweighs its need to promote efficiencies in the public services it performs. For example, confidential information may be of public concern, but an employee does not have the right to divulge it.
 - (b) If the post is not regarding a topic of public concern, the speech is not constitutionally protected
 - What are "topics that are not of public concern?" Speech that owes its existence to the public employee's speech, such as personnel actions, speech that includes confidential information learned of because of the employment relationship. This is simply the government exercising control over its employees.
 - Is there an applicable Collective Bargaining Agreement ("CBA") or policy which addresses the posting and/or discipline for an inappropriate posting? Even though it may not be constitutionally protected, the post may be protected by some other means.
3. The ramifications of using interactive social media and how to avoid them
 - a. A disgruntled member of the general public makes negative posts on the government's website. The First Amendment may protect his or her post, and the government cannot legally remove that post.
 - i. Have a thorough social media policy in place that has been prominently displayed.

- ii. Have one person or a small group of knowledgeable people have access to censoring posts.
- b. An employee of the government posts information that is not constitutionally protected or protected by some other means (ie. CBA). Even though the government can remove that post, the post remains a public record.
 - i. Have a clear policy for employees so they have a clear understanding of what they can and cannot post. Have each employee sign off acknowledging receipt of the policy.
- c. A local government “tries out” the interactive aspect of social media, has too many negative or off-topic posts and decides to restrict the social media sites to posts only by the local governments.
 - i. Be sensitive to the timing that the government changes its social media site from an interactive to non-interactive site.
 - ii. Amend the local government’s policy to reflect the change in the purpose of the usage of the social media.
 - iii. In the meantime, respond to any negative or “unfavorable” posts by reiterating the purpose of the social media site and/or directly addressing the miss-information in another post.

B. Ohio Public Records Act (“OPRA”)

1. The Law: Requires public entities to make records kept by a public office available. Records are defined as “any documents, device, or item, regardless of physical form or characteristic [...] created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office.” O.R.C. §§ 149.011; 149.43
2. The Issues:
 - a. Are social media sites records? If so, are they kept by the public office?
 - b. Retention policies may not address records created by social media sites
 - c. Does the OPRA require the government to produce the exact post as it appears on the website, or is providing just the substance of the post sufficient?

3. Ramifications:
 - a. Local governments risk public records act violations, which can become very expensive.
 - b. Even if social media sites are not a public record, local governments involved in litigation may need to have access to social media sites.
4. How to avoid the ramifications:
 - a. Amend the record retention policy to reflect the transient nature of social media sites.
 - b. Archive websites as they change.
5. Remember: posts which are legally and properly deleted are still public records.

C. Ohio Open Meetings Act.

1. The Law: all meetings of a public body must be open to the public. “Meeting” is defined as any pre-arranged discussion of public business of a public body by a majority of its members. O.R.C. § 121.22.
2. The Issue: A majority of a public body’s members post on a local government’s social media site.
3. Ramifications:
 - a. Void any act that the public body takes regarding a matter that was improperly discussed.
 - b. Bad publicity.
4. Ways to avoid the ramifications:
 - a. Only have a minority of public body members (or better yet, have no members) post on the sites.
 - b. Don’t have any members post on sites on matters which may come before the public body.

III. POLICIES

- A. Stating the purpose of the use of the social media is most important.
- B. Checklist for what local governments should include in developing their social media polices which establish the sites themselves.
 - 1. State the purpose of the local government's use of the social media tool(s).
 - 2. State specifically which social media tools will be utilized.
 - 3. State who will be allowed to post.
 - 4. If the site will allow third-party posts, identify the subject matters/posts that the local government reserves the right to delete.
 - a. Spam or posts which include links to other sites.
 - b. Posts which are clearly off topic.
 - c. Posts which advocate illegal activity.
 - d. Posts which infringe on copyrights or trademarks.
 - e. Posts which contain obscene language or content.
 - f. Posts which contain confidential or non-public information.
 - g. Posts which solicit services or products.
 - 5. If the site will be open and closed at designated times for general public posts, state those dates and times.
 - 6. Designate one person/department responsible for maintaining the sites and establish how often the site will be maintained.
- C. Checklist for policy to post on the social media site for the general public.
 - 1. Inform the public that the site is routinely monitored (and actually routinely monitor the site).
 - 2. Inform the public of a timeframe for which all posts will be deleted.
 - 3. If the public is allowed to post, identify the subject matters/posts that the local government reserves the right to delete.

4. Emphasize that there is no privacy.
 5. Inform the public that their posts may constitute a public record and may be disclosed pursuant to public records request.
 6. “Opinions and comments expressed on social media sites do not reflect the opinions or positions of the [local government], its officers or employees.”
- D. Checklist for policy for employees of a local government who post on their employer’s website.
1. Clear statement as to what is and what is not permissible to post.
 2. Do not include a blanket statement prohibiting employees from posting.
 3. Explicitly prohibit the disclosure of confidential information.
 4. Violation of the policy may result in discipline, up to and including termination, subject to any relevant CBA or other applicable policies.

IV. OTHER KEY POINTS TO MAKE

- A. Have one person (or one department) responsible for the social media sites.
- B. Revisit the policies often (at least annually).