MILLER CANFIELD

The Legalities of Social Media

Steven Mann and Ronald Liscombe
February 21, 2023

[This article originally appeared in the January/February 2023 edition of The Review, the official magazine of the Michigan Municipal League, republished with permission.]

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, lnstagram, 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, such as creating a duty to provide copies of social media communications in response to a request for records, creating a duty to retain posts or communications transmitted via social media, and establishing a responsibility to ensure social media communications by members of the city or village council do not run afoul of the Open Meetings Act.[1] This article will explore certain legal requirements implicated by a governmental entity's use of social media.

Social Media Communications Are Subject to FOIA

The Freedom of Information Act[2] (FOIA) subjects all "public records" to disclosure unless specifically exempted by an express statutory exemption.[3] 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."[4] 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 ..."[5] Just as the courts have found that text messages can satisfy the statutory definition of a "public record,"[6] electronic communications through social media can 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.[7] 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.[8] Failure to properly preserve public records can constitute a misdemeanor criminal act.[9]

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 is lost (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).[10] As with FOIA, the OMA is intended to promote accountability in government, and the act is construed liberally in favor of openness.[11] 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.[12] The courts have interpreted "deliberations" very broadly to mean simply "exchanging views" or "discussing" matters."[13]

The Michigan Court of Appeals has 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.[14]

The facts of the case involved four members of a public body, constituting a quorum, exchanging numerous emails regarding matters which would soon come before the body for consideration.[15] 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 public body members 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 these public body members 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.

Municipalities should recognize that record retention requirements extend not only to email and text messages but to all forms of electronic communications—including social media. Municipal officials should consult with their legal counsel to adopt social media policies addressing all aspects of use of such services by the municipality, 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.

[1] Although this article focuses exclusively on the Open Meetings Act, Freedom of Information Act, and record retention considerations, the use of social media can also implicate other legal concerns.

[2] Act 442. Public Acts of Michigan. 1976. as amended

[3] *Swickward v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991)

[4] MCL 15.232(e)

Continued

[5] MCL 15.232(h)

[6] *Flagg v City of Detroit*. 252 F.R.D. 346 (ED. Mich. 2008)

[7] Although, depending on the content. it is possible that some communications may constitute non-record materials under the record retention schedules which would avoid retention obligations and permit their disposal.

[8] See Section 11(2) of the Michigan Historical Center Act. Act 470, Public Acts of Michigan, 2016: MCL 399.811(2)

[9] MCL 750.491

[10] Act 267, Public Acts of Michigan, 1976, as amended

[11] See *Wexford County Prosecutor v Pranger*, 83 Mich App 197 (1978)

[12] MCL 15.263

[13] See *Hoff v Spoelstra*, (2008 WL 2668298) (Mich App July 8. 2008): *Ryant v Cleveland Twp.*, 239 Mich App 430 (2000). *Swickward v Wayne County Medical Examiner*, 438 Mich 536, 544 (1991)

[14] See *Markel v Mackley*. (2016 WL 6495941) (Mich App Nov. 1, 2016)

[15] Even though the emails were exchanged among a quorum of the parks commission members in this case, take note that in certain circumstances the OMR can be implicated by actions involving less than a quorum of a public body. See, e.g., *Booth Newspapers, Inc. v Wyoming City Council*, 168 Mich App 459 (1988).