



Electronic Communications and the Law of Transparency

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Presentation Overview

- Introduction and exploration of liability risks and “best practices” in the areas of electronic communications: email, social media, etc.
- We’ll touch on some “hot topics” as well as some perennial challenges.
- Presentation is a training resource only. It is not intended to address or provide legal advice on any specific, pending issue. In the event of any conflict between my presentation and the advice of your entity’s attorney, the advice of your attorney prevails!
- Also, the focus of this presentation is state and federal law; your entity may have its own rules and policies that apply to matters discussed in this presentation.

Background – Open Meetings Law

- The Colorado Open Meetings Law (OML) “openness” requirement applies when three or more members of a “local public body” (or a quorum, if fewer) meet to discuss public business:

“All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.”

- The OML requires such discussions occur at a meeting that is open to the public.
- And, if action will be taken or a quorum will be present, there must be timely notice—agenda posted at least 24 hours in advance.
- A “meeting” includes any kind of gathering convened to discuss public business, in person, by phone, **electronically**, or by other means of communication.

Electronic Communications – A Scenario

“Town Trustee Nile is unable to attend the Town Board meeting next week at which the Board will hold a public hearing on a controversial building project. When the meeting packet is sent to the Trustees, he reviews the staff report on the project and becomes concerned that the developer is requesting an exception from the Town’s height limit, to add two extra stories to the building. Over the weekend he emails Trustee Tami to tell her she should vote no because the building is too tall and inconsistent with the master plan. Tami responds to Nile and copies in Trustee Bruce, telling them that a taller building would allow for additional affordable units. Bruce responds to Tami, copying Nile, telling them that more density would be good for downtown, and he supports the height exception.

Concerns?

Transparency and Email

- Emails: “If elected officials exchange email to discuss pending legislation or other public business among themselves, the electronic mail is subject to the [OML];” i.e., to the “openness” requirement.
- Email communication between elected officials “that does not relate to the merits or substance of pending legislation or other public business...shall not be considered a ‘meeting.’” Safe harbors (“non-meetings”) under House Bill 21-1025:
 - “Scheduling and availability”
 - Email sent for purpose of forwarding information (FYIs)
 - Responding to an inquiry from an individual who is not a member of the body
 - Posing a question for later discussion by the body

Transparency and Email

- While House Bill 21-1025 brings clarity re: certain non-meetings, it also confirms what the OML intends: Discussion of the “merits or substance”—that is, “the essence”—of a matter of public business is subject to the OML’s openness requirement:

“‘Merits or substance’ means any discussion, debate, or exchange of ideas, either generally or specifically, related to the essence of any public policy proposition, specific proposal, or any other matter being considered by the governing entity.’”

- For city councils/town boards, the “openness” rule of the OML is a “rule of three.”
 - So, what about one-on-one electronic communications?
- And what about text messages?

Transparency and Email

- Separate from OML “openness” requirements, are emails you send or receive in your capacity as a public official considered public records? Generally, yes, if the email concerns your job as an elected or appointed official and/or discussion of public funds.

Under the Colorado Open Records Act (CORA) “public records” include “digitally stored data, including without limitation electronic messages” and include “the correspondence of elected officials,” subject to certain exceptions.

- For meetings and records purposes, the ownership of the device used for email is not dispositive. Rather, the rules are content-driven.
- See Handout and this CIRSA article: <https://www.cirsa.org/news/how-the-colorado-open-meetings-law-applies-to-elected-officials-email/>).

Email Suggestions

Okay to Do

- Have a one-on-one discussion with another council/board member.
- Respond to constituent emails consistent with “role discipline.”
- Correspond directly with City/Town staff.
- Email other council/board members concerning scheduling and availability, or posing a question for later discussion, or sharing “FYI” only information. But such communications must not morph into a discussion of the merits or substance of any public business.
- Copy other council/board members on an email, subject to the same limitation.
- Do use your City/Town-assigned email address and device, if applicable.

Don'ts

- Do not use email to discuss merits or substance of any matter of public business among a quorum or more than two members (whichever is less), whether simultaneous and/or serial or not.
- Do not use email as a substitute for open public meeting discourse.
- Do not use email as a substitute for taking any official action.
- Do not “reply to all” on emails sent to more than two council/board members, excepting only emails that clearly have no policy purpose (e.g., “FYI” emails).
- Do not send messages that discuss both personal matters and public business.
- **Most importantly, do not use email to discuss pending quasi-judicial matters.**

Even More Suggestions!

- In an arena where transparency expectations are HIGH and claims, disputes, and lawsuits are COMMON, an old saw is worth remembering:

“As a public official, don’t say in an email (or other electronic communication):

- What you wouldn’t say in a public meeting
- What you wouldn’t want to read in the news
- What you wouldn’t want read back to you in a deposition!”

- Keep in mind the policy and purpose statement of the OML:

“It is declared to be a matter of statewide concern and the policy of this state that the **formation** of public policy is public business and may not be conducted in secret.”

Using Social Media?



Florida Man Arrested for Making Racially-Motivated Threats in Interference with Election in Charlottesville and Cyberstalking

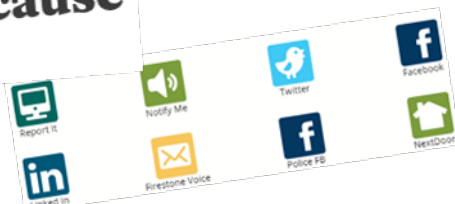
Escondido Mayor Sued for Blocking Profile on Facebook
Mayor Sam Abed is one of dozens of politicians found to be blocking profiles on their social media accounts, according to records obtained by NBC 7 Investigates.

Federal Court: Public Officials Cannot Block Social Media Users Because of Their Criticism



E-mail threat to hunt down Youngstown council members with AR-15 rifle

An Alarming threat against Youngstown city council members sent through e-mail states, "Today I will be taking my AR-15 and hunting down as many council members I possibly can."



Durham man charged with harassing and cyberstalking Raleigh City Council member

Can Elected Officials Censor Their Critics on Social Media?

Nebraska man pleads guilty to threatening election worker

A Nebraska man pleaded guilty Thursday to issuing threats against an election official via Instagram.

NYC council members 'doxxed' by anti-cop activists before budget vote

Idaho extremists target judges, prosecutors, health workers in doxxing campaigns

Idaho activists have shared photos and home addresses in effort to interfere with court, child protection cases

Social Media – A Scenario

“Councilmembers Linda, Jill and Greg are Facebook friends on their personal accounts. They also use Facebook to follow the local “Oh Oh,” a community page where citizens post all manner of comments on all manner of topics. In following one thread about Council’s upcoming vote on an ordinance placing strict limits on short-term rentals, Councilmember Jill jumps into the fray, posting a comment that short-term rentals promote tourism and raise City revenues. Councilmembers Jill and Greg jump in too, adding their own comments that studies show short-term rentals don’t pay for their impacts and eliminate workforce housing. Greg also DMs his allies on Council telling them they need to help tamp down Jill’s errant remarks. Greg’s allies then also post comments about the problems in allowing short-term rentals.

Issues?

Social Media – OML & CORA

- **OML:** If elected or appointed officials use social media to discuss public business, could that trigger the “openness” requirement of the OML?
 - The OML “openness” requirement addresses email by name but does not mention social media. Is social media a gathering, convened to discuss public business, electronically?
 - Does it matter for OML purposes or is it, “So what, the discussion’s open anyway”?
- **CORA:** Town-sponsored social media posts are public records subject to CORA as those are “writings” that are “made, maintained or kept” by the public entity.
 - As public officials, your posts about public business on personal accounts may likewise be subject to CORA.

Social Media – Another Scenario

“The Mayor of Appleton maintains a Mayor’s twitter account, where he identifies himself as such and uses the account to make announcements on Town events, etc. In a recent tweet he announced that the Town Board reappointed the Town Attorney to another term and provided a link to the Town’s press release. Soon thereafter the replies start, including a rant from a frequent critic of the Town, saying the Town Attorney is “a corrupt tyrant” and “an incompetent idiot who is a fool, and has one for a client.” The critic keeps at it with a dozen similar tweets that same week. Concluding that these tweets are contributing nothing, and potential defamatory, the Mayor changes his account settings to block the critic’s account.

Issues?

Social Media – First Amendment

- While we don't yet have appellate decisions directly on point from the United States Supreme Court or the 10th Circuit Court of Appeals, decisions elsewhere have held that elected officials' social media pages can be subject to First Amendment principles and limitations on restriction of First Amendment rights.
- Under these cases, use of a social media account can create a "public forum" for First Amendment purposes.
- And under these cases, if the social media account is determined to be a government account, the elected official cannot block private citizens after their posting of critical content (impermissible content-based regulation). *Knight First Amend. Institute v. Trump*, 928 F.3d 226 (2nd Cir. 2019), *cert granted, judgment vacated*, 141 S.Ct. 1220 (2021).

Social Media – First Amendment

- Some factors used thus far by the courts in reviewing whether a public official's social media profile is a public forum for First Amendment purposes:
 - Public title used?
 - Is the page categorized as that of a government official?
 - What contact information, addresses, logos are used?
 - Are posts commonly addressed to constituents/public business?
 - Are posts made on behalf of the entity or the council/board as a whole?
 - Is the site encouraged/used for conversations with constituents or outreach about public business?
 - Does the content posted have a strong tendency toward matters related to the person's public office?

Social Media – First Amendment

- Under these cases, if platform is used to exercise government power or fulfill some function/goal of government, then it is governmental in nature. And as such, e.g., it is a First Amendment violation for an elected official to block a person from her Facebook page for posting accusatory comments. *Davison v. Randall*, 2019 WL 114012 (4th Cir. 2019).
- When First Amendment protections apply, violations of those protections → claims for money damages.
- Certain speech is not protected—e.g., illegal activity, pornographic, “true threats”—but such exceptions are narrow.
- And, “Of course, not every social media account operated by a public official is a government account...[it] will in most instances be a fact-specific inquiry.”

Social Media – And Wait, There's More!

- What about House Bill 23-1306, signed by Governor Polis on June 5, 2023?

“A local elected official may permanently or temporarily restrict or bar an individual from using the private social media that is administered by the local elected official or their designee for any reason, including bullying, harassment, or intimidation, in the elected official’s sole discretion.”

“Private Social Media” means “social media that is not supported by the resources of a local government and is not required by state or local law, ordinance, or regulation to be created or maintained by a local elected official.”

- Does House Bill 23-1306 eliminate your risk of First Amendment liability for blocking someone from your private social media account?

Social Media – House Bill 23-1306



Social Media – House Bill 23-1306

- The standards under House Bill 23-1306 are essentially **Resource Based**: If the site “is not supported” by local government and “not required” by local law, then HB 23-1306 says its okay to restrict or bar (block) an individual.
- But to date the standards courts have been developing/using for application of First Amendment protections have been largely **Content Based**. What if an elected official invites and engages in discussion of public affairs on their private social media (as defined by House Bill 23-1306)?
- **Be cautious! State statute ≠ federal law. Who will clarify? The U.S. Supreme Court, perhaps.**
(<https://imla.org/2023/04/supreme-court-grants-important-first-amendment-social-media-cases/>)
- In short: “This area of the law...is unsettled and currently pending before the United States Supreme Court.[...] I also want to make sure that elected officials don’t view the presence of this statute as a safe harbor for the activity allowed under this law due to ongoing litigation.” See House Bill 23-1306 signing statement at <https://drive.google.com/file/d/1ObeTx6eP15FBHlfNSVOhWhss-mT0dkCN/view>.

Incivility on Social Media

- There are some other things you can do (and that others could do) to deal with incivility on social media—that don't involve the same levels of risk and uncertainty. Among others:
 - Keep it light
 - Let it roll. There are 500 million tweets and 10 billion Facebook messages sent every day (*Source: Social Shepard, Wishpond 2023*)
 - Cut the switch
 - Keep the personal personal
 - Leave to law enforcement
 - Public officials can be the targets of some beyond the pale social media traffic. While most of it is protected speech, some crosses the line and can violate criminal laws (e.g., harassment, stalking, retaliation against public official, doxxing).
 - In the face of “true threats”, criminal conduct or doxxing, reporting to and intervention by others can be an appropriate course.

Concluding Thoughts

- We are awash in electronic communication!
- While you are under constant pressure to keep up, the law is still catching up. There are unsettled questions about how the Law of Transparency applies to your use of electronic communications.
- But from a risk management perspective, siding on the side of caution and transparency will reduce your risk.
- If you are uncertain about appropriate practices as a public official, you are not alone! Seek assistance and advice. Ask questions and consider how your own use of electronic communications affects you, your council/board, your entity and others.
- Use electronically communications wisely to further success, for yourself and your City or Town!



THANK YOU

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For more information about CIRSA, visit:

www.cirsa.org

About CIRSA (Colorado Intergovernmental Risk Sharing Agency)

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created by intergovernmental agreement of our members
- Total membership today stands at over 280 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty coverages tailored to the needs of Colorado public entities
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities