



MEMORANDUM

TO: City of Rolling Hills Estates' Elected and Appointed Officials
FROM: Donald M. Davis, City Attorney
DATE: December 1, 2016
RE: **Best Practices For Use of Social Media by City Officials**

Overview

Many public agencies and their elected and appointed officials regularly utilize social media to communicate and engage with residents, local businesses, community groups, and constituents. The advantages of using social media for political purposes are immense. It gives a public official the unprecedented ability to regularly communicate in real time, for free, with a limitless number of constituents and potential voters. But, those same advantages can also pose risks.

Critics and commentators often tend to be the closest followers of social media, making on-line commentary subject to close public scrutiny. Careless use of social media may create numerous political and administrative problems, and even lead to potential litigation. Remember, anything you say can and will be held against you. And, while the Internet has a short attention span, its memory is long. Once something is posted on social media, you cannot take it back. Therefore, it is extremely important to think twice before engaging in social media that could implicate City business.

There Is No Expectation Of Privacy On The Internet

Many social media sites, such as Facebook and Twitter, offer different levels of privacy settings, with the default being that all content is publicly accessible. But, even when privacy settings are in place, there is never a guarantee that a post online will be private or remain with an intended limited audience. Indeed, a theme being repeated in appellate decisions across the country is that users have no expectation of privacy in any social media website. To the contrary, many courts routinely conclude that using social media is the opposite of expecting privacy.

Public Records Act Considerations

Another emerging legal issue in California relates to the question of whether communications by public officials retained only on personal electronic devices and private accounts are subject to disclosure under the California Public Records Act ("PRA").¹ Although no case has specifically addressed the issue of content posted on social media, the California Supreme Court is currently considering a similar issue. In *Smith v. City of San Jose*, a trial court decision interpreting the definition of a "public record" resulted in an order that city officials provide private text messages, voicemails, emails and other electronic communications on their personal digital assistant devices ("PDAs") about city business in response to a resident's records request made under the PRA. The Court of Appeal reversed and found that the PRA does not require public agencies to produce communications sent or received by public officials and employees on their exclusively private electronic devices using their private accounts. The California

¹ The Public Records Act is codified in Government Code sections 6250 – 6276.48.

Supreme Court's review of this Court of Appeal decision is expected to be released in early 2017. Should the Supreme Court conclude that the trial court was correct, it will likely pave the way for potential PRA requests for social media content posted by City officials and employees related to City business on both public and private accounts.

Factors that could contribute to a finding by a California court that the "personal" social media page of an elected or appointed official is a public record may include:

- Were public resources used to create the social media page?
- Is there a definable, well-publicized use for the site (i.e., acting as a candidate, purely personal use, or a separate business use)?
- Do users visit the site based on the official's personal or official contacts?
- Is the page being used for any official purpose?

Also keep in mind that the *City of San Jose* case does not address the issue of discovery of social media posts in litigation where requesting parties have much broader access to documents, information and materials relevant to the issues presented in the litigation.

In order to minimize potential disclosure of electronic communications under the PRA, consider the following:

- Do not solicit "friends" or use contacts gained through your duties as an elected or appointed official.
- Do not reference your social media page at public meetings or in any official City documents.
- Do not access your social media page from City-provided computers or electronic devices.
- Do not use your social media page to gain, post, or disseminate information about official City business.
- Do not use personal devices or accounts to store City-related business documents or emails.

Brown Act Considerations

Many public officials use blogs, Facebook, and other social media outlets to connect with constituents and to promote political agendas. While this may be a reasonable and tempting use of social media, public officials should be mindful of potential issues arising under the Ralph M. Brown Act ("Brown Act").²

Under the Brown Act, a lawful meeting requires public notice and access. A quorum of the governing body, including the City Council, and City commissions, boards or standing committees may not meet to discuss official business unless the rules of the Brown Act are met. A "serial meeting" is a series of communications that individually do not include a quorum but collectively result in a quorum. Such a serial meeting can take the form of a "daisy chain" where officials of a legislative body pass on information and communications from one member to the next until a quorum is involved, or a "hub and spoke," where one person acts as the center and communicates with a quorum of members of the legislative body.

Brown Act traps due to email communications between officials are commonplace, but what happens if officials engage with each other on social media? California courts have not definitively ruled on the

² The Ralph M. Brown Act is codified in Government Code sections 54950 – 54963.

issue of cyberspace communications and the Brown Act, but presumably, the above-mentioned serial meeting rules would apply.

For example, three Councilmembers may not meet for dinner at a local restaurant to discuss City business. Likewise, if one member were to post a comment on his or her personal Facebook page about an on-going City project, and several other members commented (or perhaps even “Liked”) the comment, has the Brown Act been violated? Arguably, yes. Despite the fact that the online comments were publicly available, the simple fact that three of the five members have discussed or deliberated on official business could arguably constitute a “meeting” under the Brown Act without the requisite notice. Although the Brown Act does not expressly prohibit elected and appointed officials from publishing their own comments and opinions, public officials should limit any online contact with other elected and appointed officials.

The Political Reform Act: Avoiding The Appearance Of Conflicts And Bias

The conduct of public officials is governed by numerous state and federal laws, which include the duty to make decisions motivated by the public good, not personal interests, duties of loyalty and fairness (i.e., the avoidance of conflicts of interest), and the duty to treat all members of the public in a fair and unbiased manner. Citizens have the right to a fair and unbiased decision-maker. Accordingly, public officials must make decisions free from personal bias. Examples of personal bias might include a personal, but not necessarily financial interest in the outcome of a decision, strong dislike of an applicant, or a strong attachment or loyalty to a an applicant or other party involved in a matter. Similarly, public officials are prohibited from making decisions based on campaign contribution bias. Likewise, public officials are prohibited from using public resources for private or political purposes.

In *Nasha, LLC v. City of Los Angeles*,³ a local developer sued to overturn a Planning Commission’s adverse decision with respect to a proposed development project based on potential bias on the part of one member of the Planning Commission. The commissioner had written a public article critical of the proposed project. The court concluded that the article gave rise to an unacceptable probability of actual bias and was sufficient to preclude that commissioner from serving as a reasonably impartial, noninvolved reviewer on the commission when it adjudicated the proposed project. Accordingly, the court required the decision against the project be vacated. Although this case did not specifically deal with publishing critical statements on the Internet, the principles established by the case would certainly apply in the on-line context.

Online commentary or discussions about pending issues, business, legislation, or upcoming decisions before the body on which the elected or appointed official serves can lead to claims of bias, due process violations, conflicts of interest, and unfair decision-making.

Best Practices For Use Of Social Media By Public Officials

Remember that City policies, such as those pertaining to harassment, discrimination, retaliation, courteous treatment of others, confidentiality, electronic communications and social media apply to on-line conduct by City officials, regardless of whether the online conduct occurs on a City-issued or private device.

³ 125 Cal.App.4th 470 (2004).

Understand that as a public official, the line between “personal” and “official” is not always clear, particularly to members of the public who are likely to “friend” or “follow” you on social media. If you have a professional profile, keep it that way. Don’t identify yourself as an elected or appointed official affiliated with the City, then post inappropriate photos, offensive memes, or other content that members of the community or the media can access. Remember, anything you say or post online could end up in the newspaper or be reposted on another website.

Elected and appointed officials should not post official information about the City or City business on their personal sites in order to avoid bias questions and create unforeseen liability issues. Remember that public perception on social media is reality, and your critics will be your closest followers. If you are perceived to have a conflict of interest, such as prejudging pending matters, or being biased towards certain projects or points of view, your online comments could form the basis of a bias claim or a complaint to an ethics enforcement agency. For example, if a resident saw a post on social media which he or she interpreted as a potential violation of the Political Reform Act,⁴ such as a financial conflict of interest or improper or personal use of campaign contributions, the resident could file a complaint with the California Fair Political Practices Commission. Complaints related to false or misleading campaign materials or violations of the Elections Code, Penal Code, or other laws or local ordinances can be made to the District Attorney, Attorney General or other enforcement agencies.

Personal social media accounts should not be tied to the City or established using a City-affiliated email address. This will help clarify that the individual is not speaking officially on behalf of the City. Elected and appointed officials who use social media should reveal that they are an elected official and include a statement that any opinions they post are their own, not those of the City. They should also be mindful of the need to abide by privacy and confidentiality laws and avoid sharing non-public information. Additionally, officials need to follow the City’s policy related to the use of City electronic communications systems and the City’s policy on social media.

Conclusion

City officials who choose to engage in social media must be mindful of all obligations under the Public Records Act, the Brown Act, Political Reform Act, Elections Code and other laws governing the conduct of public officials. Remember, you serve the public, you represent the City, and someone is always watching. Before posting, always consider whether your conduct will inspire public confidence and what the public perception might be.

If you have any questions regarding this memo or the applicable City Policies regarding use of social media, please contact Alexa Davis at 310-377-1577 (ext. 111) or alexad@ci.rolling-hills-estates.ca.us. If necessary, Alexa will refer your question to our office.

⁴ The Political Reform Act is codified at Government Code sections 81000 to 91014.