



Social Media and Public Agencies: Legal Issues

www.ca-ilg.org/SocialMediaLegalIssues

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- "Local Agency Website Transparency Opportunities" available at: www.ca-ilg.org/WebsiteTransparency
- "Meetings and Technology: Finding the Right Balance" available at: www.ca-ilg.org/technology-and-meetings
- "Taking the Bite Out of Blogs: Ethics in Cyberspace" available at: www.ca-ilg.org/dealing-blogsphere

Introduction

Social media has transformed communication through Internet technologies that allow users to communicate directly with each other. A key consequence of this is that traditional institutions (for example, the mainstream media, corporations and public agencies) no longer play a controlling role in information flows.

This shift in the balance of power is illustrated by such phenomena as the viral "United Breaks Guitars" video on YouTube.¹ Millions viewed with the airline traveler's consumer complaint delivered by song. The post resonated with every consumer that identified with the frustration of not having companies take responsibility for their actions.

Another implication of social media is that conversations are occurring in different places and among different people. No longer is the concept of a "community" something that is defined by location.²

There are a number of implications—both positive and negative—for public officials. The legal issues represent one such set of implications. Issues to be aware of include:

- 1) First Amendment issues relating to government restrictions on speech,
- 2) Use of public resource issues,
- 3) Employee use of social media, both on behalf of the agency and personally,
- 4) Other employment-related social media issues,
- 5) Open meeting law issues,
- 6) Public records retention and disclosure issues,
- 7) Procurement, gift and contract issues, and
- 8) Equal access/Section 508 (disability access) issues.

In some cases, the task for agency attorneys is to determine what the law requires in a given situation. When that is the case, this paper identifies the law that exists on the point and how some agencies have approached the issue. In other cases, the task is to assess the agency's practices against local requirements. In such instances, this paper merely endeavors to flag the issue as one that needs to be analyzed.

First Amendment Issues

Public Forum Issues for Blogs, Facebook and Interactive Sites

One motivation for public agencies to use social media is that they can be effective mechanisms for sharing important information. However, part of their popularity lies in their interactive capabilities: indeed, the ability to get feedback and energize online communities is one of the emerging powers of Web 2.0 applications.³

Thus, while a public agency can control what its part of the conversation says, there are limited options for managing what others might say. Moreover, trying to so do may risk litigation under the civil rights laws.⁴

The degree to which public agencies can control what gets posted on a website, blog or social media site turns on what courts call a "public forum" analysis. The first question is what kind of public forum has a public agency created? There are three possible answers:

- 1) A traditional public forum,
- 2) A designated public forum, and
- 3) A nonpublic forum.⁵

"Traditional public forums" are places like streets, sidewalks, and parks which have been by tradition or public agency action been devoted to assembly and debate. A nonpublic forum is a place that is not by tradition or designation a forum for members of the public to communicate with each other.

A "*designated public forum*" involves a situation in which a public agency intentionally opens a nonpublic forum for public discourse. There is a subcategory of a designated public forum that is called a "*limited public forum*" that refers to a type of nonpublic forum that the public agencies have intentionally opened to certain groups or to certain topics.⁶

What Is Social Media?

Social media integrates technology, social interaction and content creation to collaboratively create online information.

Through social media, people or groups can create, organize, edit, comment on, combine and share content. In the process, this can help public agencies better achieve their communications and public engagement goals.

Some of the most commonly-used types of social media by public agencies include:

- [Blogs](#) (example: WordPress)
- [Social Networks](#) (example: Facebook)
- [Microblogs](#) (example: Twitter)
- [Wikis](#) (example: Wikipedia)
- [Video](#) (example: YouTube)
- [Podcasts](#)
- [Discussion Forums](#)
- [RSS Feeds](#)
- [Photo Sharing](#) (example: Flickr)

Source: www.howto.gov/social-media

Public agency meetings are considered limited public forums. Courts have upheld rules of decorum when necessary to prevent a speaker from disrupting a meeting in a way that prevents or impedes the accomplishment of the meeting's purpose.⁷

A threshold issue is whether a public agency has opened its website or other communications vehicle to others to post materials of their choosing. If not, then the website is not a public forum and the agency does not violate First Amendment rights when it excludes content.⁸

If a public agency does allow others to post materials of their choosing on a website, blog or social media site, then a credible argument can be made that the agency has created a designated public forum. This would mean that the agency cannot exclude (or delete) material based on its content unless that restriction served a compelling state interest that is narrowly tailored to achieving that interest.⁹ Even if the agency created only a "limited public forum" for certain groups or to certain topics, it cannot delete posts simply because they are critical of the agency, its officials or employees or the agency otherwise dislikes what the posts say.

Strategies to Minimize First Amendment Missteps

Social media site settings are another opportunity to minimize missteps. On Facebook, for example, a public agency has choices on how to set its page up. On a "fan page," an agency may select settings so that only authorized staff can start a new topic. This helps limit topics to ones that are related to agency business.

There is, however, no way to turn off "comments" on a Facebook wall page - even if one restricts the other settings.¹⁰ You can delete any comment on a page, remove someone who "likes" your page¹¹ and can permanently ban someone from the page¹² if you feel that is necessary.

Although factually and technically a public agency could take these actions to "control" comments posted, the question is under what circumstances it would be lawful to do so.

A potential example is deleting comments because they contain profanity. The United States Supreme Court has recognized that some forms of profanity are protected speech.¹³ Even though a public agency might properly ban profanity on certain communications media (as happened in the case involving George Carlin's words that can't be used on the radio),¹⁴ the court has also

Accidental Tweets by Authorized Employees

Inappropriate social media postings can come from employees as well as those outside the organization.

In 2011, an employee of the American Red Cross accidentally posted a tweet from the @RedCross Twitter account which was meant to be posted from the employee's personal Twitter account.

The tweet suggested that @RedCross was drinking beer. The Red Cross responded within an hour by deleting the post and following-up with a tweet humorously acknowledging the rogue tweet.

What could have been a public relations disaster ended up being positive publicity when the brewery mentioned in the tweet encouraged their Twitter followers to donate to the Red Cross.

Source:

<http://redcrosschat.org/2011/02/16/twitter-faux-pas/>

concluded that the Internet is different than television or the radio.¹⁵

Note that Facebook offers a tool that allows page administrators to block postings and comments that contain profanity¹⁶ but the terms of use do not seem to specifically prohibit profanity. They do prohibit “content that is “hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.” Also prohibited is bullying, intimidating or harassing any user.¹⁷

Given the limitations on how a social media page can be set up, it’s important to consider other strategies. One is to adopt a social medial policy. Such policies, among other things, provide an opportunity to define and limit the scope of its own and others’ activities as they relate to the agency’s social media site.

For example, the City of Seattle’s *social media* policy says:

- 1) Users and visitors to social media sites shall be notified that the intended purpose of the site is to serve as a mechanism for communication between City departments and members of the public. City of Seattle social media site articles and comments containing any of the following forms of content shall not be allowed:
 - a. Comments not topically related to the particular social medium article being commented upon;
 - b. Comments in support of or opposition to political campaigns or ballot measures;
 - c. Profane language or content;
 - d. Content that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation;
 - e. Sexual content or links to sexual content;
 - f. Solicitations of commerce;
 - g. Conduct or encouragement of illegal activity;
 - h. Information that may tend to compromise the safety or security of the public or public systems; or

Do’s and Don’ts

Do adopt and publicize a social media policy that limits the purpose of the site to serve as a mechanism for communication between the agency and the public.

Do define what kinds of content fall outside that purpose (including commercial, campaign, discriminatory or profane postings) and include a warning that content outside the purpose are subject to removal.

Do advise staff that they may not delete postings simply because they may be critical of the agency or agency officials.

Do respond with a sense of common humanity and humor if the agency makes a mistake in a social media post.

- i. Content that violates a legal ownership interest of any other party.

These guidelines must be displayed to users or made available by hyperlink. Any content removed based on these guidelines must be retained, including the time, date and identity of the poster when available (see the City of Seattle [Twitter](#), [Facebook](#) and [CityLink](#) standards).¹⁸

The policy reserves the city's right to restrict or remove any content that is deemed in violation of its policy or any applicable law; it also indicates its goal of approaching the use of social media tools as consistently as possible, enterprise wide.¹⁹ Seattle also has a specific *Facebook* policy.²⁰ That policy requires its staff to post the following warning on its pages:

Comments posted to this page will be monitored. Under the City of Seattle blogging policy, the City reserves the right to remove inappropriate comments including those that have obscene language or sexual content, threaten or defame any person or organization, violate the legal ownership interest of another party, support or oppose political candidates or ballot propositions, promote illegal activity, promote commercial services or products or are not topically related to the particular posting.

The State of Utah's social media policy²¹ gives the following direction to its staff regarding moderating comments:

In some social media formats such as Facebook, Blogs, Twitter responses, etc., you may encounter comments which cause your concern as a moderator or responsible party. If user content is positive or negative and in context to the conversation, then the content should be allowed to remain, regardless of whether it is favorable or unfavorable to the State. If the content is ugly, offensive, denigrating and completely out of context, then the content should be rejected and removed.

Note the use of the word "and" instead of "or" in the last sentence. The content has to be ugly, offensive, denigrating AND completely out of context in order to be rejected.

Bottom Line

In short, if an agency participates in social media, it's safe to assume that inappropriate posts will occur ("trolls" whose goal it is to disrupt discussions and elicit emotional responses abound on the Internet, just as gadflies seem to flock to public agency public comment periods at meetings). The legally conservative response is to not delete such posts. Correct any misinformation in an even-toned manner and let others evaluate the information as presented.

Do's and Don'ts

Do take advantage of social media site options specifically designed for government.

Do address campaign advocacy in the agency's social media policy by prohibiting it and publicizing the prohibition.

Do provide employees responsible for managing the agency's social media activities clear guidelines.

Do periodically remind (through AB 1234 training and other mechanisms) local officials and staff of the prohibitions against personal and political use of public resources.

Use-of-Public-Resources Issues and Social Media

Public officials are aware of the restrictions of using public resources for either personal or political purposes.²² State law says that elected officials and staff may not use public resources for personal or campaign purposes (or other purposes not authorized by law).²³

Personal Activities

"Personal purpose" means those activities which are for personal enjoyment, private gain or advantage, or an outside endeavor not related to the public's business. "Personal purpose" does not include the incidental and minimal use of public resources, such as an occasional telephone call.²⁴

This section suggests that an occasional personal "tweet" or visit to one's personal Facebook page on agency time might not be a violation of the law. Employees should be reminded, however, that it's important to keep in mind public perceptions (and the "public" includes one's friends and family). It should never appear public servants are spending their time at work doing anything other than the public's business.

And, of course, YouTube makes it possible for the public to record, post and publicize public servants' actions while on duty on the internet. The admonition "don't do anything you don't want to read about on the front page of the newspaper" needs to be updated to include "Don't do anything you don't want to see posted on YouTube." As part of the public agency's overall social media or ethics training, it may be helpful to remind employees of this new reality.

Political Activities

Campaign activities and agency use of social media also present issues. Social media tends to be a hotbed of political expression. According to the Pew Internet and American Life study,²⁵ the internet is now roughly equal to newspapers and nearly twice as important as radio as a source of election news and information.

FPPC Tackles Internet Political Activity

The Fair Political Practices Commission is considering how to achieve greater transparency in paid online communications involving social media.

"Traditional" campaign media like slate mailers, direct mail flyers and advertisements - all must include disclosures of their source and financing. This traditional media has increasingly been supplemented, if not supplanted, by communications through social media (for example, email, tweets, websites and YouTube videos).

In 2010, the FPPC created a subcommittee to brief the full commission about the current state of the disclosure of the sources and financing of Internet political activity; whether voters are subject to false or misleading information regarding the source and funding of Internet political activities; the need, if any, to enhance and protect political activity on the Internet; and the need, if any, for legislative or regulatory actions.

The 2010 subcommittee report is available at:

www.fppc.ca.gov/agendas/08-10/SubCommReport.pdf .

In the fall of 2013, the FPPC adopted a new regulation (18421.5) that requires political committees to include paid Internet communications on their Form 460 activity reports.¹

Not surprisingly, political advisers and consultants have noticed this phenomenon. As a result, local agencies should be alert to activities occurring which make it appear that the agency is using public resources for political activities, whether candidate campaigns or ballot measure advocacy.²⁶

For example, a potential concern is paid political advertising appearing adjacent to a public agency's Facebook page: page visitors may not necessarily be aware that the public agency doesn't control a social media provider's advertising placements. One step is to investigate whether a given social media provider makes options available that limit adjacent political advertising.

Just as candidates and others sometimes try to use public comment periods to air their views and positions, one can also imagine scenarios in which candidates for local office might want to post content on the agency's Facebook page or some similar venue. For this reason, Seattle and West Hollywood have social media policies that prohibit comments in support of or opposition to political campaigns or ballot measures.²⁷

The strongest position from which to enforce such a policy is for a public agency not to post content relating to candidate or ballot measure advocacy on the agency's site (including not becoming a fan of candidate or ballot measure advocacy sites). Of course, the usual restrictions on using public resources for campaign activities also apply when posting content to the agency's website or social media outlets.²⁸

Restrictions on Employee Postings and Tweets

Another issue for local agencies to be aware of as they contemplate the world of Web 2.0 is the degree to which employees can speak their minds on the Internet. In a 2009 Deloitte LLP Survey on Ethics in the Workplace, 74 percent of those responding employees readily agreed that use of social media can harm their employers' reputation.²⁹

Employers have adopted a number of policies to guide (or restrict) employees' use of social media. Perhaps the most succinct come from the "Gruntled Employees" (www.gruntledemployees.com) blog:

- **Blogging Policy:** Be professional.³⁰

Do's and Don'ts

Do advise employees that social media activities can form the basis of adverse employment activities (for example, conduct unbecoming an officer).

Do advise employees that the same restrictions on employee activities that occur with respect to traditional communications channels (for example, restrictions against sexual harassment and discrimination) also apply to social media channels.

Don't take adverse employment actions in response to an employee's exercise of protected activity (for example, speech concerning public concern, whistle-blowing and participating in union activities) via social media sites (just as an agency shouldn't take adverse action based on the employee's protected expression through other channels).

- **Twitter Policy:** Be professional, kind, discreet, authentic. Represent us well. Remember that you can't control it once you hit "Tweet."³¹

Some public agencies have found it helpful to adopt more extensive policies and guidelines: samples can be found at www.ca-ilg.org/socialmediapolicies.

There is legitimate room for debate on whether additional guidance will help avoid embarrassing posts. The Deloitte study notes that nearly half of the respondents said that their employers' policies don't change their behavior in cyberspace. It may be useful, however, to remind employees that standards for employee conduct (for example, conduct unbecoming a police officer) also apply in cyberspace.

Whether or not policies help, it's important for public employers to keep in mind that public agencies may not restrict their employees' First Amendment rights to comment on matters of public interest.³² In fashioning the law in this area, courts have endeavored to strike a balance between the interests of employees as citizens and the interests of public agency employers in efficiently providing public services through their employees.³³

Public agencies find themselves litigating these issues when an employee claims that an agency "retaliated" (typically by firing or adverse employment action) against the employee for the employee's exercise of his or her First Amendment rights.

In evaluating such claims, the courts ask a series of questions.³⁴ The first and perhaps most important relates to the nature of the topic that the employee spoke (or tweeted) about. The question is whether the employee's speech involved issues of "public concern" relating to matters of political, social or other concern to the community.³⁵ Analysis of public concern is not an exact science.³⁶ One test is whether the information shared by an employee helps community members make informed decisions about the operation of their government.³⁷

"Unlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern."³⁸ Furthermore, "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern."³⁹ Note that the whistleblower protection laws also protect employees who express concern about these kinds of issues.⁴⁰

What are *not* issues of public concern? Individual personnel disputes and grievances that are not relevant to the evaluating public agency performance.⁴¹

Other Employment-Related Social Media Issues

A number of employers use Internet research and social media to find and screen potential employees. One thing for employers to keep in mind is that information (both positive and negative) posted on social media sites can be misleading or downright false. A good practice is to verify information received through social media to maximize the likelihood that agencies are acting on reliable information when making hiring decisions.

In addition, the same requirements relating to fairness (non-discrimination) and privacy (for example, credit checks), apply to online activities. For example, those engaged in hiring activities should be reminded that adverse employment decisions based on religion, race or sexual orientation are just as unlawful if the information is acquired through social media as through other means.

Beginning in 2013, California employers face limitations on accessing employees' (or prospective employees') personal social media activities. Employers may not require or request an employee's or job candidate's social media username or password. Also prohibited is requesting someone to access personal social media in the employer's presence or divulge personal social media.⁴²

Another good practice is to be clear on what social media strategies the agency supports as an appropriate and helpful use of public resources on agency time versus what activities are personal in nature. An agency's discussions relating to social media use can be a useful opportunity to remind employees and officials about proscriptions against personal use of public resources, whether such use involves personal internet surfing or personal use of social networking sites.⁴³

Open Meeting Laws

For some, the Internet is the ultimate meeting place. Everything is fairly public (the qualifier "fairly" has to be inserted because the extensive use of pseudonyms that make it difficult sometimes to determine who is doing the speaking; see also sidebar on page 14 regarding the digital divide).

Unlawful Meetings via Technology

That having been said, conversations on the Internet among public officials can constitute an unlawful "meeting" within the meaning of open meeting laws. For example, California's open meeting law prohibits decision-makers from:

Using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item of business that is within the subject matter jurisdiction of the legislative body.⁴⁴

The Attorney General has opined that this section prohibits officials from using email to develop

Dos and Don'ts

Do consider something like Twitter for periodic, brief updates on issues of interest from the agency.

Do advise members of decision-making bodies that texting, tweeting and other forms of communications on issues within an agency's subject matter jurisdiction can present open meeting law and common law bias issues both before and during meetings.

Do consider how social media and the internet can foster public engagement in the agency's decision-making process.

(Governing Body Members) **Don't** engage in discussions on issues within an agency's subject matter jurisdiction on fellow decision-makers' blogs, Facebook pages and other social media outlets.

a collective concurrence as to an action to be taken, even if the emails are posted on the Internet and distributed at the next public meeting of the body.⁴⁵ This is consistent with the open meeting law's underlying purpose of requiring that people be able to observe decision-maker deliberations.⁴⁶

Electronic Postings of Agendas

The question arises whether simply posting an agenda on a website or through social media satisfies open meeting agenda posting requirements. The answer is no. California law has been amended to *add* a requirement that agendas must be posted on a local agency's website, if the agency has one.⁴⁷ However, the original language that an agenda should be posted in a location that is freely accessible to the public remains.

The Attorney General has opined that posting agendas to electronic kiosks that are accessible 24/7 is an acceptable alternative in lieu of a paper posting,⁴⁸ the concern would be that the Internet may not meet the requirement that agendas be posted in a location that is "freely" accessible to members of the public.⁴⁹

Thus, while an agency must post agendas and supporting materials on one's website and may do so through social media outlets, a paper copy (or its equivalent) must still be posted.

Online Teleconferencing?

Finally, the only reference in California's open meeting law relating to the use of technology to have meetings relates to teleconferencing. For purposes of the Brown Act, "teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video or both.⁵⁰ Special posting requirements apply⁵¹ and each teleconference location must be accessible to the public.⁵² The public must have the opportunity to address decision-makers at each location.⁵³

These requirements can be satisfied using webcams and other technologies allow decision-makers to be connected through either audio or video (for example, through Skype, Google+ or similar online video-conferencing applications).

However, the typewritten modes of communication (the communication that predominates on blogs, Facebook, LinkedIn and similar social media sites) tends not to involve audio or video. Communications among a quorum of governing body members using these channels therefore would not satisfy California's open meeting requirements. Moreover, text-based communications tend to occur sequentially over time as opposed to simultaneously. Nor do text-based Internet communications typically involve allowing the public to be present with decision-makers at the teleconference location as required under California's exception for teleconferencing.

Using Technology to Foster Public Engagement

A key purpose of California's open meeting law is to foster public participation in the decision-making process.⁵⁴ There are ways that Web 2.0 technology can support this goal, including the law's requirement that the public have an opportunity to address decision-makers prior to an item

being decided.⁵⁵ Such technologies supplement, but do not supplant, the requirement that communications opportunities also be offered at meetings.

For example, local agencies and individual decision-makers can offer residents the opportunity to weigh in on issues pending decision through web forums and similar mechanisms, in addition to at meetings. Of course, whenever and however public input is solicited, it is important to show that decision-makers received and considered such input when making a decision. As discussed previously, it's also important to understand the First Amendment implications to creating such forums.

Public Records/Disclosure Issues

Another question is whether public agency postings on third-party social media sites are public records for purposes of records retention or records production requirements.

Records Retention

In California, records retention is governed by a separate statute than public records production. Local agencies generally must retain public records for a minimum of two years, although some records may be destroyed sooner.⁵⁶ Most local agencies adopt record retention schedules as part of their records management system. The Secretary of State provides local agencies with record management guidelines.⁵⁷

There is no definition of the “public records” subject to state records retention statutes.⁵⁸ The California Attorney General says that a “public record” for purposes of records retention laws is “a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer’s duties and was made or retained for the purpose of preserving its informational content for future reference.”⁵⁹

Under this definition, local agency officials retain some discretion concerning what agency records must be kept pursuant to state records retention laws. Similarly, the Public Records Act allows for local agency discretion concerning what preliminary drafts, notes or interagency or intra-agency memoranda are retained in the ordinary course of business.⁶⁰

Do's and Don'ts

Do address social media content in one's records retention policies as not a public record to be retained.

Do use privacy settings that allow the public to access information on the agency's page without having to become a fan or friend.

Do think of social media as a way of driving people to the agency's website for substantive information as opposed to social media being a place where important public information is posted.

Do post a caution to those who might want to become friends or fans of an agency page that their information may become a disclosable public record.

Do endeavor to make information made available online also available through alternative channels.

Do harmonize the agency's posture on records production and retention with the agency's posted privacy policies so as not to inadvertently send mixed messages.

Do encourage visitors to social media sites to review the site's privacy policy.

It would seem that California local agencies can make a strong argument that social media site content is not 1) “kept”, 2) required to be kept by law, and 3) is not necessary to be kept in discharge of a public official’s duties or made/retained for the purposes of preserving content for future reference. Stating as much in their records retention schedules would seem to be sufficient.

On the other hand, if a public agency is using social media for public input (for example, to solicit public input on planning issues), the agency will want to capture the input provided for the administrative record.

Records Production

The second question is whether content posted on third-party social media sites are public records which an agency is obliged to produce in response to a California Public Records Act request.

In some ways, analyzing the status of content a public agency may post on social media sites may seem a bit paradoxical. The key purpose of California’s Public Records Act is to provide the public with access to information that enables them to monitor the functioning of the government;⁶¹ a similar purpose may be ascribed to state constitutional requirements that public official and public agency writings be open to public scrutiny.⁶² Using social media to share information with the public accomplishes that very purpose, without putting the public to the trouble of making records requests and asking for copies of requested documents.

Of course, not everyone has access to the Internet and it is conceivable that someone who doesn’t would ask a public agency to provide a copy of posted information on third party social media sites. This may not be a big deal if the post still is displayed on the social media site, but what if it has been deleted? Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.⁶³ This makes it unlikely an agency will have to recreate

Agency Postings Are Public Records in Florida

In 2009, the Florida Attorney General determined that a city Facebook page falls within Florida’s definition of public records which includes all “material” “made or received . . . in connection with the transaction of official business by any agency.” The AG concluded that the city therefore needed to include such information in its retention policies.

Another issue the AG addressed is whether the city’s Facebook friends’ information might become a public record. The AG said it couldn’t reach a “categorical” conclusion, but suggested that the city include a warning regarding the application of Florida’s public records laws. This is the warning the city uses:

Disclosure

The City of Coral Springs Facebook Fan page is informational only. Should you require a response from the City or wish to request City services, you must go to coralsprings.org/help

Under Florida law, all content on the City’s Facebook page is subject to the public records law, Chapter 119, Florida Statutes. By becoming a fan of the City of Coral Springs and/or posting on the City’s wall, your information will be a matter of public record. The City is required to retain this information in accordance with the State of Florida retention schedule. This may include information on your own Facebook page. All comments will be maintained for a minimum of 30 days after a forum has ended.

In the city attorney’s analysis of the AG opinion, he noted that there is an ancillary issue whether the city has the technological capability to retain Facebook content. He also noted that, under an AG opinion interpreting Florida law, it may be Facebook that is responsible for retaining the content.

These materials are available at www.ca-ilg.org/socialmediaFloridalaw.

or archive its postings on social media sites. Another concern that has been expressed is what if the agency can see information on agency “friends” sites that others cannot? If the agency receives a request for information on an agency’s “friend’s” page, what would an agency’s legal obligations be in these situations?

Access to Technology in California

A June 2013 study by the Public Policy Institute of California reveals interesting trends:

- 82 percent of Californians have access to the Internet at home (69 percent have broadband access);
- Californians in the San Francisco Bay Area, Orange County, and San Diego are more likely to have broadband internet at home than those in the Inland Empire, Los Angeles, or the Central Valley;
- Latinos are less likely to use information technology than whites, blacks, and Asian Pacific Islanders;
- Internet access at home decreases with age; and
- Access varies by income and education as well.

See www.ppic.org/content/pubs/survey/S_613MBS.pdf

Under the Public Records Act, “public records” include “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.”⁶⁴ Records include records in any media, including electronic media, in which public agencies may store such records.⁶⁵

The challenge is that agency posts on social media may not, strictly speaking, be held in the possession of public agencies. For example, although Facebook’s terms of use indicate that users “own” their information,⁶⁶ the terms of use also explain that postings occur to the Facebook “platform”⁶⁷ and that such postings give Facebook a non-exclusive and transferable license to that content.⁶⁸ The company also reserves the right to make Facebook inaccessible to someone who violates its terms of use.⁶⁹ The company also explains that deleting content occurs in a manner similar to emptying the recycle bin on a computer--removed content may persist in Facebook’s backup copies for a reasonable period of time (but will not be available to others).⁷⁰

There are a variety of cases that indicate that the status of public records is tied to writings that are maintained or in the possession of public agencies.⁷¹ (Although being in the possession of a public agency does not in and of itself make a writing a public record.⁷²) Although postings on social media sites are “prepared,” “owned” and “used” by local agencies, they are not arguably retained by the agency (particularly if the agency’s retention and/or social media policy exclude them from retention schedules).

However, there are two trial court decisions that have taken a more expansive view of the records subject to disclosure under the Public Records Act, one decision holding that emails sent and received on officials personal (non-agency) email accounts are subject to disclosure.⁷³ In terms of the agency having to disclose information to which it has access through the equivalent of fans or friending, such information arguably does not relate to the “conduct of the public’s

business.” Moreover, there is a privacy argument that people shouldn’t have to consent to disclosure of personal information in order to obtain public agency information (for example, if a site user otherwise only makes certain information accessible to those they select--in Facebook parlance, to “friends”).

To err on the side of caution, a public agency may want to use a variation on the warning used on the Florida city’s page (see sidebar on page 13):

This [insert agency name]’s page is for general public information only. Should you require a response from the agency or wish to request agency services, you must go to [insert name of agency website, if appropriate] or call the agency at [insert telephone number].

Please also be aware that, under certain circumstance, content appearing on this page may be subject to California’s public records laws and subject to disclosure by the agency if requested. This may include information about you that you make available through your privacy settings on this site on your own pages.

Social media mavens may have a different theory, but it may be wise—both operationally and legally--to set the agency’s privacy settings to “public” as opposed to “friends” or “friends of friends” so that everyone can see content the agency posts. This avoids putting people in the position of potentially having to reveal personal information (that they prefer to only reveal to “real” friends) in order to access the agency’s content.

Alternatively, one can err on the side of caution and take steps to preserve postings on social media as public records. This is how the City of Palo Alto’s social media policy⁷⁴ addresses this issue:

- 1) The City’s social media sites are subject to the California Public Records Act and Proposition 59, amending Article 1, Section 3 of the California Constitution. Any content maintained in a social media format that is related to City business, including a list of subscribers and posted communication (with certain exceptions), is a public record. The Department maintaining the site is responsible for responding completely and accurately to any public records request for public records on social media; provided, however, such requests shall be handled in collaboration with the City Attorney’s Office. Content related to City business shall be maintained in an accessible format and so that it can be produced in response to a request (see the City’s Twitter, Facebook and Video Posting standards). Wherever possible, such sites shall clearly indicate that any articles and any other content posted or submitted for posting may be or are subject to public disclosure upon request. Users shall be notified that public disclosure requests must be directed to the relevant department’s director or designee.
- 2) California law and relevant City records retention schedules apply to social media formats and social media content. Unless otherwise addressed in a specific social media standards document, the department maintaining a site shall preserve records required to be maintained pursuant to a relevant records retention schedule for the required retention period on a City server in a format that preserves the integrity of the original record and

is easily accessible. Appropriate retention formats for specific social media tools are detailed in the City's Twitter, Facebook and Video Posting standards.

If a local agency decides to preserve postings on social media as public records, the agency should develop a strategy for capturing and archiving social media content. The National Archives and Records Administration (NARA) *Guidance on Managing Records in Web 2.0/Social Media Platforms* for federal agencies suggests several strategies including:

- Using web crawling and software to store content or take snapshots of record content
- Using web capture tools to create local versions of sites and migrate content to other formats
- Using platform specific application programming interfaces (API) to pull record content as identified in the schedule⁷⁵

In addition, keep in mind that not all members of a community have access to the internet or the same quality internet (see sidebar on page 14 on the digital divide). Adopt a practice of endeavoring to make the information one makes available through the internet available through other means. Below is an excerpt, for example, of the federal government's social media policy.⁷⁶

1. **Requirement:** Agencies are required to provide members of the public who do not have internet connectivity with timely and equitable access to information, for example, by providing hard copies of reports and forms. For the most part, using social media technologies as an exclusive channel for information distribution would prevent users without internet access from receiving such information. In addition, some social media services require high speed internet access and high bandwidth to be effectively utilized, which may not be available in rural areas or may be unaffordable. In general, this requirement is no different for social media implementations than it is for other electronic service offerings. Programs must simply make alternative, non-electronic, forms of information dissemination available upon request. Resources: OMB Circular A-130 section 8 (See a5(d)) and Appendix IV

Privacy Policies

The overlay of public records and retention requirements creates interesting issues relating to privacy policies posted on sites. Such policies became mandatory for commercial sites in 2004 after the state enacted the California Online Privacy Protection Act of 2003.⁷⁷ That act requires commercial websites and online service providers that collect personal information (as defined, which includes such information as names and email addresses⁷⁸) on California consumers to conspicuously post and comply with a privacy policy. Even though the requirement applies to commercial sites and services,⁷⁹ privacy policies have become a standard element of most websites, including public agency websites.

As a result, it seems important to make sure that the agency's privacy policy on its site is consistent with the agency's analysis of and approach to public records retention and production.

For purposes of using third party social media applications, another issue for public agencies is alerting the public that the information they are sharing is subject to the social media site's privacy policies (in addition to the public agency's analysis of its obligations under the Public Records Act and the agency's own privacy practices).⁸⁰ A good practice is to provide a link to the site's policy, as well as any information about the public agency's policy.

Procurement, Gift and Contract Issues

Procurement Issues

Most social media sites are offered for free and the agency's process for selecting one kind of social media outlet may or may not involve a comparative analysis of terms or capabilities. Public agencies (particularly larger ones with more complex procurement regulations) will want to make sure that the decision to use any given social media service complies with the agency's rules.

Gift Issues

When the federal government started examining social media issues, there was a concern that accepting free services might run afoul of some agencies' gift rules. In California, the Political Reform Act defines a "gift" as "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status."⁸¹

The Fair Political Practices Commission's regulations relating to gifts to public agencies⁸² tie to this definition of gift.⁸³

One would assume that a free service that is not tied to official status would fall outside the Political Reform Act's definition of gifts. However, the regulations interpreting the act define "payment" as including the provision of goods or services to an agency,⁸⁴ although the regulation only applies to a payment "that is otherwise a gift to a public official."⁸⁵ As long as the agency is accessing social media services that are free or offered at the same rates to everyone, it would seem that such services would not be reportable⁸⁶ as a gift to the agency.

Indemnification and Other Terms of Use Issues

Most online sites require users to agree to terms of service that include such provisions as:

1. **Indemnification and Defense.** When a public agency creates an account on a social media site, it typically must agree not to sue the site, nor allow the site to be included in suits against the agency. Many sites also require the account owner to pay the site's legal costs arising from such suits.
2. **Applicable Law and Venue.** Most terms of service also assert that a certain state's laws (usually California, but not necessarily always) apply to the terms of use and that the state's courts will adjudicate disputes.

The terms of service represent a binding contract; public agencies should assure that they have taken the steps necessary to bind the agency to such an agreement.⁸⁷

Some companies are willing to negotiate on the substantive provisions in the terms of use, but they may be hesitant to negotiate separate agreements with dozens of different agencies. After individual negotiations with the National Association of State Chief Information Officers (NASCIO) Social Media Workgroup, Facebook and YouTube have revised their general terms of use agreements to address legal issues unique to official state and local government agency use, particularly related to indemnification, jurisdiction, and venue.⁸⁸

Equal Access/Section 508 Issues

California and the federal government have each committed to make their electronic and information technology accessible to people with disabilities.⁸⁹ The requirement applies to those who receive funding from these entities.

Among other things, this means using code that works with readers and other such devices that makes information available on the internet to those with disabilities. The goal is to make sure that disabled employees and members of the public access to information that is comparable to the access available to others.

Some social sites are automatically accessible because they are primarily text (for example, blogs). Others have taken steps to address this issue (see, for example, Facebook's instructions on accessing its site with screen readers at www.facebook.com/help/141636465971794/). The concern is that some multimedia sites may not provide the opportunity to include transcripts or captioning. The federal government is working on this issue, but local agencies using social media may want to make sure the social media tools they use are Section 508 compliant. In addition, a good practice is to post information on Section 508 compliant sites (such as one's own website), so people with disabilities always have an accessible version of the content, and that the official version of content is located on a government website.

Conclusion

Social media offers a variety of tools to connect with the public. As with any communications tool, the key is to think about how the tool fits in with an overall strategy and what resources will be needed to use the tool effectively. It is also important to understand what role the law plays in their use so no missteps occur.

About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities. ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

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The Institute welcomes feedback on this resource:

- Email: ethicsmailbox@ca-ilg.org | Subject: *Social Media and Public Agencies: Legal Issues*
- Mail: 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

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References and Resources for Further Information

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

¹ The first in the “United Breaks Guitars Series” series is available <http://www.youtube.com/watch?v=5YGc4zOqozo>. As of this writing, it has been viewed over 13.5 million times.

² See, for example, the first two definitions of the word “community” on Dictionary.com:

1. A social group of any size whose members reside in a specific locality, share government, and often have a common cultural and historical heritage.
2. A locality inhabited by such a group.

³ See, for example, Charlene Li and Josh Bernoff, *Groundswell: Winning in a World Transformed by Social Technologies* (Harvard Press: 2008).

⁴ Typically such suits are brought under 42 USC § 1983, the Civil Rights Act of 1871, which provides individuals a way to seek redress of claimed deprivations of constitutionally protected rights.

⁵ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁶ *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007).

⁷ *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990) (upholding presiding official's ejection of a person who was disrupting a public meeting and rejecting First Amendment challenge). See also *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (reaffirming the standard outlined by the court in the *City of Norwalk* case, while reversing the lower court summary judgment in favor of the city). See also *Acosta v. City of Costa Mesa*, 694 F.3d 960 (9th Cir. 2012) (finding city's rules of decorum prohibiting “insolent” conduct unconstitutionally overbroad as unnecessarily sweeping substantial amount of non-disruptive, protected speech and conduct).

⁸ See *Vargas v. City of Salinas*, 46 Cal.4th 1, 37 n. 18 (2009) (finding city had no obligation to provide those with a different point of view access to the city's website), citing *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204-206 (2003); *Arkansas Educ. TV. v. Forbes*, 523 U.S. 666, 673-677 (1998); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *Clark v. Burleigh*, 4 Cal.4th 474, 482-491 (1992) See also *Sutcliffe v. Epping School Dist.*, 584 F.3d 314, 334-335, (1st Cir. 2009) (noting that it is possible there may be cases in which a government entity might open its website to private speech in such a way that its decisions on which links to allow on its website would be more aptly analyzed as government regulation of private speech); *Hogan v. Township of Haddon*, 278 Fed.Appx. 98, 101-02 (3d Cir 2008) (rejecting elected official's claim that she had a First Amendment right to publish articles in the town

newsletter and to post on the town's website and cable channel because these communications vehicles were local government-owned and sponsored, and as such are not public or limited public forums); *Page v. Lexington County School Dist. One*, 531 F.3d 275, 284-85 (4th Cir. 2008) (rejecting claims that links to other websites did not vitiate school district's retention of complete control over its website or create a limited public forum, but noting that had a linked website somehow transformed the website into a type of "chat room" or "bulletin board" in which private viewers could express opinions or post information, the issue would, of course, be different).

⁹ *Perry Educ. Ass'n*, 460 U.S. at 45.

¹⁰ Page administrators can proactively block comments or postings that contain certain words or phrases from being published on their page through the use of Facebook's moderation blacklist tool. See <http://www.facebook.com/help/131671940241729/>.

¹¹ See Facebook Help Center topic "How do I remove someone who is connected to my Page?" at <http://www.facebook.com/help/?help/?faq=16082#!/help/222702104422027>.

¹² See Facebook Help Center topic "How do I ban someone from my page?" at <http://www.facebook.com/help/www/185897171460026?rdrc#!/help/www/185897171460026>.

¹³ *Cohen v. California*, 403 U.S. 15 (1971) (finding that a state may not, consistently with the First and Fourteenth Amendments, make the simple public display a single four-letter expletive a criminal offense).

¹⁴ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) (emphasizing the sometimes captive nature of the audience for broadcast media).

¹⁵ *Reno v. ACLU*, 521 U.S. 844 (1997) (finding that case law provides no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet).

¹⁶ Page administrators can block comments containing profanity from being published to their page through the use of Facebook's profanity blacklist tool. See <http://www.facebook.com/help/131671940241729/>.

¹⁷ See Facebook Terms of Use, Section 3 (Safety), items 6 and 7, available at www.facebook.com/legal/terms.

¹⁸ Seattle Social Media Policy, Section 8, available at <http://www.seattle.gov/pan/SocialMediaPolicy.htm>.

¹⁹ Seattle Social Media Policy, Sections 9 and 10, available at <http://www.seattle.gov/pan/SocialMediaPolicy.htm>.

²⁰ Available at http://www.seattle.gov/pan/SocialMedia_Facebook.htm.

²¹ Available at <http://www.utahta.wikispaces.net/file/view/State+of+Utah+Social+Media+Guidelines+9.29.pdf>.

²² See *Stanson v. Mott*, 17 Cal. 3d 206, 210-11 (referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). See also *People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983); Cal. Gov't Code § 8314.

²³ Cal. Gov't Code § 8314(a).

²⁴ Cal. Gov't Code § 8314(b)(1).

²⁵ Smith, Aaron, *The Internet's Role in Campaign 2010* (Mar. 17, 2011), available at <http://pewinternet.org/Reports/2011/The-Internet-and-Campaign-2010.aspx>.

²⁶ See *Stanson v. Mott*, 17 Cal. 3d 206, 210-11 (referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). See also *People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983); Cal. Gov't Code § 8314.

²⁷ Seattle Social Media Policy, Section 8(b), available at <http://www.seattle.gov/pan/SocialMediaPolicy.htm>. West Hollywood Social Media Policy, Section 4.9.2, available at <http://www.weho.org/Modules/ShowDocument.aspx?documentid=10054>.

²⁸ See *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). *Stanson v. Mott*, 17 Cal. 3d 206 (1976). See also *People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983). But see *DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236 (2010) (majority found that sending an editorial against a ballot measure via email on one's lunch hour constituted advocacy, but involved a minimal use of public resources—note dissenting opinion disagreeing with majority's minimal-use-of-public-resources conclusion).

²⁹ http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf

³⁰ http://www.gruntledemployees.com/gruntled_employees/2007/02/a_twoword_corpo.html

³¹ <http://jayshep.com/a-twitterable-twitter-policy-updated/>

³² *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir.2009); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568(1968).

³³ *Pickering*, 391 U.S. at 568.

³⁴ See *Desrochers v. City of San Bernardino*, 572 F.3d 703, 708-09 (9th Cir. 2009), The questions probe whether

- (1) The employee spoke on a matter of public concern;
- (2) The employee spoke as a private citizen or public employee;
- (3) The employee's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) The public agency had an adequate justification for treating the employee differently from other members of the general public; and
- (5) The public agency would have taken the adverse employment action even absent the protected speech.

The first two prongs of this inquiry address whether the speech should be protected under the First Amendment, while the last three address whether that protected speech caused some retaliatory response. *Huppert v. City of Pittsburg*, 574 F.3d 696, 703 (9th Cir. 2009).

³⁵ *Gibson v. Office of Atty. Gen., State of Cal.*, 561 F.3d 920, 925 (9th Cir. 2009) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

³⁶ *Weeks v. Bayer*, 246 F.3d 1231, 1234 (9th Cir. 2001).

³⁷ *Desrochers*, 572 F.3d at 710.

³⁸ *Thomas v. City of Beaverton*, 379 F.3d 802, 809 (9th Cir.2004).

³⁹ *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir.1995).

⁴⁰ Cal. Gov't Code §§ 8547-8547.12.

⁴¹ See *Connick v. Myers*, 461 U.S. 138, 146 (1983).

⁴² Cal. Lab. Code § 980; A.B. 1844, 2011-2012 Sess. (Cal. 2012) effective Jan, 1, 2013, adding Chapter 2.5, commencing with Section 980, to Part 3 of Division 2 of the California Labor Code, (Labor Code does not define "employer" under this section of the code though based on legislative history it is likely that this law is intended to affect both public and private employers. See S. Floor Analyses of A.B. 1844, 2011-2012 Sess. (Cal. 2012), Aug. 29, 2012, available at <http://leginfo.legislature.ca.gov/>).

⁴³ See Cal. Gov't Code § 8314.

⁴⁴ Cal. Gov't Code § 54952.2(b).

⁴⁵ 84 Ops. Cal. Att'y Gen. 30 (2001) available at <http://ag.ca.gov/opinions/pdfs/00-906.pdf>. See also *Wood v. Battle Ground School District*, 107 Wash. App. 550 (2001) (email exchange among school board members amounted to illegal meeting under Washington's open meetings law).

⁴⁶ *Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors*, 129 Cal. App. 4th 205 (2d Dist. 2005).

⁴⁷ Cal. Gov't Code § 54954.2(a)(1) ("The agenda . . . shall be posted in a location that is freely accessible to members of the public and on the local agency's Internet Web site, if the local agency has one.").

⁴⁸ 88 Ops. Cal. Att'y Gen. . 218 (2005).

⁴⁹ *Id.*

⁵⁰ Cal. Gov't Code § 54953(b)(4).

⁵¹ Cal. Gov't Code § 54953(b)(3) ("If the legislative body of a local agency elects to use teleconferencing, it shall post agendas at all teleconference locations . . .").

⁵² Cal. Gov't Code § 54953(b)(3) ("Each teleconference local shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. ").

⁵³ Cal. Gov't Code § 54953(b)(3) ("The agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.")

⁵⁴ *Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors*, 129 Cal. App. 4th 205 (2d Dist. 2005).

⁵⁵ Cal. Gov't Code § 54954.3(a) ("Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any items of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda . . .").

⁵⁶ Cal. Gov't Code § 34090(d). Note that in California, the Public Records Act is not a records retention statute. See *Los Angeles Police Dept. v. Superior Court*, 65 Cal. App. 3d 661 (1977).

⁵⁷ The Secretary of State's Local Government Records Management Guidelines may be viewed at <http://www.sos.ca.gov/archives/local-gov-program/pdf/records-management-8.pdf>

⁵⁸ 64 Cal. Ops. Att’y Gen. 317 (1981).

⁵⁹ 64 Cal. Ops. Att’y Gen. 317 (1981).

⁶⁰ Cal. Gov’t Code § 6254 (a).

⁶¹ *U.S. Dept. of Justice v. Reporters Com. for Freedom of Press*, 489 U.S. 749 (1989); *CBS, Inc. v. Block*, 42 Cal.3d 646 (1986); *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991). Note that California’s Public Records Act provides for two types of access. One is a right to inspect public records. See Cal. Gov’t Code § 6253(a). The other is a right to prompt availability of copies of those records. See Cal. Gov’t Code § 6253(b).

⁶² See Cal. Const., art. I, § 3(b)(1) (“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”).

⁶³ Cal. Gov’t Code § 6253.9(c).

⁶⁴ Cal. Gov’t Code § 6252(e).

⁶⁵ The definition of “writings” includes any “transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.” Cal. Gov’t Code § 6252(g). Note too that some provisions of the Act deal explicitly with electronic records.

⁶⁶ See December 11, 2012 Facebook Terms of Use Policy, #2:

2. Sharing Your Content and Information

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
3. When you use an application, the application may ask for your permission to access your content and information as well as content and information that others have shared with you. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, including how you can control what information other people may share with applications, read our Data Use Policy and Platform Page.)
4. When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).
5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

⁶⁷ See Facebook Terms of Use, #18 (Definitions):

18. Definitions

1. By "Facebook" we mean the features and services we make available, including through (a) our website at www.facebook.com and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; (c) social plugins such as the Like button, the Share button and other similar offerings and (d) other media, software (such as a toolbar), devices, or networks now existing or later developed.
2. By "Platform" we mean a set of APIs and services (such as content) that enable others, including application developers and website operators, to retrieve data from Facebook or provide data to us.

3. By "information" we mean facts and other information about you, including actions taken by users and non-users who interact with Facebook.
4. By "content" we mean anything you or other users post on Facebook that would not be included in the definition of information.
5. By "data" or "user data" or "user's data" we mean any data, including a user's content or information that you or third parties can retrieve from Facebook or provide to Facebook through Platform.
6. By "post" we mean post on Facebook or otherwise make available by using Facebook.
7. By "use" we mean use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.
8. By "active registered user" we mean a user who has logged into Facebook at least once in the previous 30 days.
9. By "application" we mean any application or website that uses or accesses Platform, as well as anything else that receives or has received data from us. If you no longer access Platform but have not deleted all data from us, the term application will apply until you delete the data.

⁶⁸ See Facebook Terms of Use, #2(1) (above).

⁶⁹ See Facebook Terms of Use, #15 (Termination) (“ If you violate the letter or spirit of this Statement, or otherwise create possible legal exposure for us, we can stop providing all or part of Facebook to you.”)

⁷⁰ See Facebook Terms of Use, #2(2) (above).

⁷¹ See *Gilbert v. City of San Jose*, 114 Cal. App. 4th 606, 610 (6th Dist. 2003) (noting the Public Records Act “provides for the inspection of public records *maintained* by state and local agencies” and noting the Records Act’s purpose was “to give the public access to information in possession of public agencies . . .”), citing *California State University, Fresno Association, Inc. v. Superior Court*, 90 Cal. App. 4th 810, 822 (5th Dist. 2001), and *CBS, Inc. v. Block*, 42 Cal.3d 646 (1986). This language is quoted in *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 750 (3d Dist., 2006) and *Versaci v. Superior Court*, 127 Cal. App. 4th 805, 813 (4th Dist., 2005).

⁷² See *Braun v. City of Taft*, 154 Cal. App. 3d 332, 340 (1984) (“The mere custody of a writing by a public agency does not make it a public record, but if a record is kept by an officer because it is necessary or convenient to the discharge of his official duty, it is a public record.”), also quoted in *California State University v. Superior Court*, 90 Cal. App. 4th at 810.

⁷³ See *Smith v. City of San Jose*, No. 1-09-CV-150427 (March 19, 2013) (finding that emails sent from an official’s personal email account are “retained” by public agency because they are retained by public officials; in addition, such emails are also “prepared” and “used” by such officials); *Tracy Press, Inc. v. Superior Court of San Joaquin County (City of Tracy)*, 164 Cal. App. 4th 1290, 80 Cal. Rptr. 3d 464 (2008) (the trial court finding that emails sent by public officials from their personal email accounts are not public records subject to disclosure, the appellate court dismissed on technical grounds, but recognized that the question of whether the emails sent from the city council member’s private email account are public records is a novel question they would not address in the appeal).

⁷⁴ Available at <http://www.cityofpaloalto.org/civicax/filebank/documents/21779>.

⁷⁵ NARA Bulletin, Guidance on Managing Records in Web 2.0/Social Media Platforms (Oct. 20, 2010)(available at: <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>).

⁷⁶ See General Services Administration, Social Media Handbook, Chapter 8, available at <http://www.gsa.gov/graphics/staffoffices/socialmediahandbook.pdf>

⁷⁷ See Cal. Bus. & Prof. Code §§ 22575-22579.

⁷⁸ Cal. Bus. & Prof. Code § 22577. The full definition reads:

For the purposes of this chapter, the following definitions apply:

(a) The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

- (1) A first and last name.
- (2) A home or other physical address, including street name and name of a city or town.
- (3) An e-mail address.
- (4) A telephone number.
- (5) A social security number.
- (6) Any other identifier that permits the physical or online contacting of a specific individual.

(7) Information concerning a user that the Web site or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described in this subdivision.

⁷⁹ Cal. Bus. & Prof. Code § 22577. The full definition reads:

(c) The term "operator" means any person or entity that owns a Web site located on the Internet or an online service that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the Web site or online service if the Web site or online service is operated for commercial purposes. It does not include any third party that operates, hosts, or manages, but does not own, a Web site or online service on the owner's behalf or by processing information on behalf of the owner.

(d) The term "consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.

⁸⁰ For more on the Online Privacy Protection Act and best practice recommendations on online and off-line privacy policies, see our Recommended Practices on California Information-Sharing Disclosures and Privacy Policy Statements, available at www.privacy.ca.gov (specifically at http://www.privacy.ca.gov/business/info_sharing.pdf).

⁸¹ See Cal. Gov't Code § 82028. See also Cal. Gov't Code § 82044 ("Payment" means a payment, distribution, transfer, loan, advance, deposit, gift or rendering of money, property, services or anything else of value, whether tangible or intangible.)

⁸² See 2 Cal. Code of Regs. § 18944.

⁸³ See 2 Cal. Code of Regs. § 18944(c) ("A payment, that is otherwise a gift to a public official, as defined in Section 82028, shall be considered a gift to the public official's agency and not a gift to the public official if all of the following requirements are met . . .").

⁸⁴ See 2 Cal. Code of Regs. § 18944(b)(1).

⁸⁵ See 2 Cal. Code of Regs. § 18944(c). The full language reads: "A payment, that is otherwise a gift to a public official, as defined in Section 82028, shall be considered a gift to the public official's agency and not a gift to the public official if all the following requirements are met: . . .").

⁸⁶ See 2 Cal. Code of Regs. § 18944(c)(3) (requiring agencies to report gifts received within 30 days of receipt).

⁸⁷ In fact, the City of Palo Alto's Social Media Policy contains "A Note about Indemnity" alerting users to this issue, available at <http://www.cityofpaloalto.org/civicax/filebank/documents/21779>.

⁸⁸ Press Release, National Association of State Chief Information Officers, NASCIO and Attorneys General Negotiate Model Facebook Agreement for State Government Use (Jan. 5, 2011), available at <http://www.nascio.org/newsroom/pressRelease.cfm?id=93>. (Facebook Government Terms can be found at https://www.facebook.com/terms_pages_gov.php); Press Release, National Association of State Chief Information Officers, YouTube Agrees to Modified Terms of Service after Negotiations with NASCIO (Jan. 17, 2012), available at <http://www.nascio.org/newsroom/pressRelease.cfm?id=119>.

⁸⁹ See 29 U.S.C. § 794d (often known as "Section 508" for its number in the Rehabilitation Act). The procurement standards from Section 508 of the Rehabilitation Act are referred to in [California Government Code Section 11135-11139.8](#), which provides protection from discrimination from any program or activity that is conducted, funded directly by, or receives any financial assistance from the state. This section brings into state law the protection of [Title II](#) of the ADA which ensures accessibility to government programs and also requires state government to follow accessibility requirements standards of [Section 508](#) of the Rehabilitation Act, which ensures the accessibility of electronic and information technology. For more information on these issues, see <http://www.disabilityaccessinfo.ca.gov>.