LEGAL AFFAIRS

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FOR THE RECORDS

FACING FACTS CAN HELP CITIES MANAGE SOCIAL MEDIA.

WHEN WE THINK about it, the term "public records" still conjures an image of rows of file cabinets filled to overflowing with manila folders. But today, the term may just as well include the people you friend or link online, your comment on a website, or your four-word tweet during a public meeting.

Like it or not, social media use by public officials and staff, when it relates to the conduct of government, may create public records subject to both retention and production requirements. In Washington, a "public record" includes "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3). The Secretary of State's office, which oversees records retention requirements for Washington public entities, says this includes social media. The opinions of the Washington Supreme Court suggest the same. Those who know the already wide scope of the Public Records Act—and its potential to generate lengthy and expensive litigation—may cringe at the prospect of retaining, reviewing, and producing social media and other electronic content.

Social media are socially redeeming, however, and they're not going away. So if you've been intending to tackle these issues for the first time or want to revisit them because your planning department is now hooked on Snapchat, let's take a moment to debunk some myths about electronic public records.

Myth 1: There is no way to control social media use by public officials and staff.

This is a daunting task, but it can be done. The best approach involves collaboration between legal and technical staff to create a workable, documented policy on the use of social media. Evaluate those types of social media that actually enhance the business of your municipality, and identify those types of social media that are better limited to personal use on personal time (e.g., sending short video clips back and forth). Solicit input from those most likely to use social media platforms. Then establish appropriate limitations on use, including such considerations as whether comments should be enabled and what types of content should never be posted. Also, make sure the difference between official public use and campaign use is crystal clear.

Myth 2: Anytime you receive a public records request, you should assume it encompasses all forms of electronic records.

A requester has the right to seek public records that include social media or other electronic content but may not want those types of records—and may not even realize they are encompassed within a broadly

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Get in the Game

You aren't obligated to use social media for public business. Some entities, especially smaller ones with fewer resources, still follow this approach, convincing themselves that "the only way to win is not to play."

But let's face facts: hoping that elected officials won't use social media is like hoping your teenager won't send text messages. Conducting public business without this tool isn't realistic, and using social media effectively can tremendously enhance the quality of government. Just look at the evidence, and start playing ball.

- A modern city hall couldn't even function without e-mail and websites.
- Facebook sends volumes of public service information out to citizens with particular interests.
- Blogging allows staff and officials to engage constituents directly and, under the right circumstances, to hear back from them.
- Twitter circulates emergency response information in real time.

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written request. Take the time to review a request and then call, write to, or e-mail the requester to confirm what he or she is looking for. Include a discussion of how long it will reasonably take to conduct a broader search, and offer to work with requesters to prioritize what type of records they are most interested in.

Myth 3: If you provide one requester records in electronic form, you have to do so for every requester.
You cannot distinguish between requesters under the Public Records Act. This does not mean, however, that requesters cannot distinguish between themselves. The fact that one requester may want to receive copies of archived Facebook posts with accompanying metadata does not mean that other requesters will not be happy with a PDF, a printout, or even just a link to a website. Again, talk to the requester and document your communications when you provide the records in the agreed-upon format.

Myth 4: If I use social media in the course of my public employment, I don't need to retain content not stored on my server.
This seems fair and logical, but it's contrary to retention requirements for public records. In other words, if you use it, don't lose it (until the applicable retention period has expired). Build a retention plan into your social media policy.

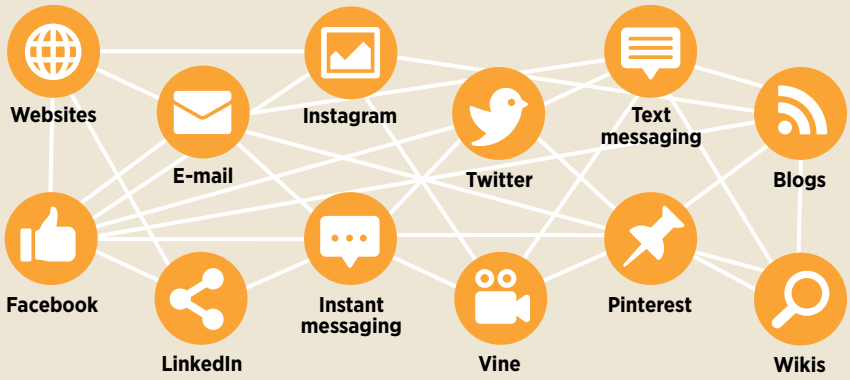
Myth 5: In response to any request for electronic records, you must provide metadata.
If a requester wants metadata and asks for it clearly and specifically, the requester is entitled to it under the Washington Supreme Court's decision in *O'Neill v. City of Shoreline*. Absent such a request, metadata need not be provided. Keep in mind, however, that even though you do not need to produce metadata unless asked for it, you do you need to *retain* metadata through the end of the applicable retention period set by the state archivist (determined largely by the content of the record rather than by its form).

Myth 6: Printing out a copy is as good as saving the original.
This used to be true. In fact, state regulations purported to authorize this practice as sufficient compliance with statutory retention requirements. The Washington Supreme Court definitively rejected this concept in *O'Neill*, holding that deleting the original electronic version of an e-mail subject to a pending public records request could violate the Public Records Act. The same rule could be applied to social media.

Myth 7: If it's on my home computer or personal device, it's not a public record.
The courts began to reject this concept more than 10 years ago, yet the idea persists. If you are using a personal computer or personal *continued* →

Platform Tennis

Things change fast in our digital world: just ask those agencies that drafted a MySpace policy 10 years ago. The best approach to using and regulating social media in the public sector is to treat them as a broad concept rather than a collection of specific programs or technologies. Who knows which of these current mainstays will be in or out 10 years from now?



If you are using a personal computer or personal device to conduct public business, you are potentially creating content subject to a records request.

device to conduct public business, you are potentially creating content that is subject to retention requirements and production (or at least identification) in response to a public records request—no matter who owns the device or account or pays the bills for their use. The best course of action is to segregate public and private content, ideally by separating computers or devices or at least by segregating within the device itself. For example, on a home computer, place all e-mails and files relating to work in separate folders. Then, if a demand is made to produce these records, you can testify that you have carefully separated public and private, which may help you avoid a court order for a third-party examination of your hard drive or device.

Myth 8: The drafters of the Public Disclosure Act intended it to capture all forms of social media. Did the proponents of the Initiative 276, way back in 1972, imagine a time when countless volumes of data would be stored entirely on computers? Did they envision cities hiring expensive consultants to retrieve metadata from gigabytes of archived files? Probably not. But it's always helpful to consider the "first principles" of public disclosure when deciding how to handle difficult production or retention questions related to social media. Educate your staff and officials about retention and disclosure. Make sure your public records officer or team knows how to work with requesters to get them what they want efficiently. Err on the side of disclosure and transparency, and ask questions early: it's better than finding out the answers too late.