



Ethics and Open Government in a Virtual World

Ethics Week 2020
Board of Ethics and Government Accountability



SOCIAL MEDIA AND THE FREEDOM OF INFORMATION ACT IN 2020

BEGA ETHICS WEEK 2020

Presented by:
Niquelle Allen, Esq.
Director of Open
Government
October 21, 2020

Presentation Contents

Introduction

Government Record-Keeping

Social Media & FOIA Cases

Social Media Policy

Social Media Retention

- *Note: This presentation is not a DC government endorsement of any product or service.*

INTRODUCTION:

Who we are



DC Office of Open Government

- ▶ We are an office within the DC Board of Ethics and Government Accountability.
- ▶ BEGA's mission is to ensure government ethics, openness, and transparency according to DC law.
- ▶ OOG enforces the DC Open Meetings Act and provides advice concerning compliance with the DC Freedom of Information Act.
- ▶ DC law authorizes OOG to issue advisory opinions and to give formal FOIA advice.

INTRODUCTION: What is FOIA

The Freedom of Information Act (FOIA) is a law that gives the public the right to access information from the government.

Under FOIA, government agencies must release information that is requested, unless that information is protected from disclosure.

INTRODUCTION:

What is FOIA



- ▶ The federal Freedom of Information Act (FOIA) was enacted in 1967 and gives citizens access to public information held by federal agencies.
- ▶ FOIA applies to federal agencies, but most states have their own version of an open records act.
- ▶ D.C. FOIA was enacted in 1973, just seven years after its federal counterpart. The Act gives any person the right, upon request, to inspect records held by “public bodies,” a term that includes D.C. government executive agencies, independent agencies (other governmental entities), and the D.C. Council.

Government use of social media

- ▶ Social media is a complex topic from both a legal and policy standpoint. This presentation focuses on the intersection between social media and FOIA.
- ▶ As governments and government officials are increasingly relying on social media to communicate with the public, they are becoming increasingly aware of the corresponding public records responsibilities related to conducting government business using social media.
- ▶ Managing social media content, from a record-keeping perspective, is paramount to maintaining transparency and being able to comply with FOIA requests for that information.



Government use of social media



- ▶ Social media services have transformed the ability of citizens and their governments to communicate and interact. Even though most state FOIA laws were drafted decades ago, they still apply to social media content.
- ▶ The FOIA law has adapted over time to capture advanced technology. And, like Email, social media content can be considered a public record.
- ▶ Public business, meetings, correspondence, and the like - that happen on a government's social media site - are likely considered a public record subject to FOIA law.



Government's Electronic Record Retention Responsibilities

Social media and FOIA in
2020

SOCIAL MEDIA AS A RECORD



This Photo by Unknown Author is licensed under [CC BY-SA-NC](#)

It is well established that State and Federal FOIA Laws require governments to retain and produce electronic records.

Social media accounts and government social media activity may constitute records of the conduct of government business that must be preserved and produced under FOIA laws.

D.C. FOIA LAWS

D.C. FOIA requires government agencies and, in some instances, organizations doing business with the government, to preserve digital content.

When Emails, texts, and social media are used to conduct government business, they must be archived and produced to the public pursuant to D.C. FOIA laws.

- ▶ D.C. FOIA gives the public the right to request, inspect, and/or duplicate “public records.”
- ▶ Public records is a term that includes “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, or used in the possession of, or retained by a public body.”
- ▶ In D.C., public records specifically include electronic records.

D.C. FOIA LAWS

- ❑ D.C. may look to other jurisdictions as “instructive” on how to deal with social media records.
- ❑ Next, we will review how Texas, Massachusetts, Arizona, and Georgia treat social media records.

FOIA LAWS from OTHER STATES

STATE FOIA LAWS - Texas

- ▶ Texas state law, which was modernized in 2013 to include electronic communication, provides:

“The general forms in which the media containing public information exist include... email, internet posting, text message, instant message, other electronic communication.”

- ▶ Texas goes on to further clarify social media public records requirements in its Department of Information Resources (DIR) Social Media Guidelines:

“Content posted by the agency or the public on an agency’s social media website is a state record...and is subject to State Records Retention requirements.”

STATE FOIA LAWS - MA

- ▶ The Massachusetts public records law defines public records as “all ... documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of ... the [C]ommonwealth, or of any political subdivision thereof [municipalities, e.g.] ... unless such materials or data fall within” one or more of the exemptions in the law. This definition includes electronic documents and other data.
- ▶ Mass. also acknowledged in its *Electronic Records Management Guidelines* (p. 5): “Public entities that use social media should be aware that most social media sites are hosted by third party providers. ... Therefore, public entities need to ensure procedures are implemented” to preserve social media data in light of this problem.

STATE FOIA LAWS - AZ

The Arizona Attorney General issued an opinion in 2015 stating that Arizona public officials' text messages and social-media activity are a public record if the information is related to their official roles:

"Electronic messages sent or received by a government-issued electronic device or through a social media account provided by a government agency for conducting government business are public records."

STATE FOIA LAWS - GA

The Georgia Open Records Act states: *“public access to public records should be encouraged to foster confidence in government.”*

This means all public records should be made available for access when an open records request is made. In fact, Georgia’s Open Records Act specifically addresses *“electronic messages, whether in the form of e-mail, text message, or other format”* as public record. That includes social media.



RECENT SOCIAL MEDIA CASES

Facebook and Twitter

WEST v. CITY OF PUYALLUP



The Court of Appeals in Washington State held in 2018:

“We confirm that a public official's posts on a personal Facebook page can constitute an agency's public records subject to disclosure under the PRA if the posts relate to the conduct of government and are prepared within a public official's scope of employment or official capacity.”

West v. City of Puyallup, 410 P.3d 1197 (2018).

JOHNSON v. CIA



The Massachusetts District Court held in 2018:

“The Agency is required to search for and produce the record even though it is hosted on Twitter’s website because the Agency has sufficient control over the document.”

Johnson v. CIA, 330 F. Supp. 3d 628 (D. Mass. 2018).

DAVISON V. RANDALL



The US Court of Appeals for the Fourth Circuit affirmed the decision of the District Court finding that Loudoun County School Board (LCSB) Chair Phyllis Randall's Facebook page constituted a public forum and that she did not maintain it in a lawful manner.

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).



DEVELOPING A SOCIAL MEDIA POLICY

SOCIAL MEDIA AND FOIA

ISSUES TO CONSIDER



[This Photo](#) by Unknown Author is licensed under [CC BY-NC-ND](#)

- ▶ Ensure that the agency has proper procedures in place to retain social media posts and associated comments with respect to official agency (as opposed to personal) social media accounts.
- ▶ Clarify that use of personal social media accounts (including campaign accounts) should not be used to create public records.
- ▶ Provide guidance to agency officials and employees regarding best practices in their use of non-governmental social media accounts.

KEY ELEMENTS OF A SOCIAL MEDIA POLICY



- ▶ Notes that content posted to agency social media accounts is a public record;
- ▶ Requires agencies to maintain the social media account content in accordance with applicable retention requirements;
- ▶ Encourages posting of copies instead of original public records on social media to avoid retention problems.

OCTO SOCIAL MEDIA POLICY

Permissible Uses



- ▶ Engage constituents in real time and provide customer service;
- ▶ Promote thought leadership among District Government entities;
- ▶ Disseminate news and information and services and events;
- ▶ Provide another vehicle for agency outreach;
- ▶ Build real and virtual communities;

OCTO SOCIAL MEDIA POLICY



- ▶ View and post content for research, communication and information exchange directly related to the mission, charter, or work tasks of a DC government agency;
- ▶ View and post content for research, communication and information exchange for professional development, to maintain currency of training or education, or to discuss issues related to the Internet user's DC government activities;
- ▶ View and post content to build information exchange among residents and build communities around District service offerings; and
- ▶ Other governmental communications not requiring a high level of security.

OCTO SOCIAL MEDIA POLICY

A D.C. government considering establishing a Facebook, Twitter, or other social networking site should first adopt and/or review OCTO's social media policy to govern the administration and monitoring of site content or establish its own.



Also set ground rules for public input and comments along with and adopting policies for employee usage of social media.

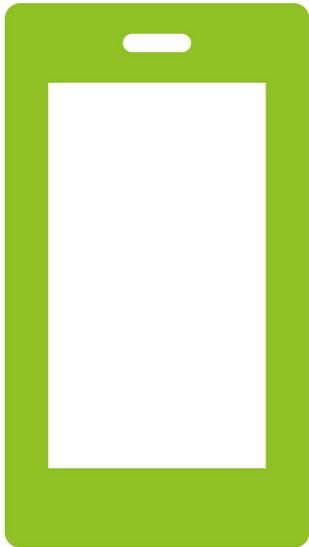
DC GOV Social Media Policy:
<https://octo.dc.gov/node/707>
132

SOCIAL MEDIA POLICY KEY ELEMENTS

What is posted on government social networking sites is public information.

Government employees and officers should not post non-public information or information that is generally covered under a FOIA exemption on social media.

Government Agencies can avoid public confusion, lawsuits, and other problems with a strong social media policy.



SOCIAL MEDIA RETENTION METHODS

SOCIAL MEDIA AND FOIA 2020

SOCIAL MEDIA RETENTION



Social media brings up new challenges respecting records requests.

Government email and paper records exist in static form when created. D.C. government has systems in place to automatically preserve these records.

Social media records have characteristics that make it challenging to retain.

SOCIAL MEDIA RETENTION METHODS



Take no action, and rely on the social networks to retain records;

Use a manual process, like taking screenshots; or

Use what's known as a **social media archiving solution** – a system that captures your social media content in near-real time and preserves it in a separate archive, one that's both searchable and includes the metadata (sometimes necessary for legal reasons) of each post.

SOCIAL MEDIA RETENTION METHODS



Relying on the social networks to capture and preserve social media records assumes the social networks will retain all of your content indefinitely.

Manually preserving records is often inefficient and time consuming.

Social media archiving through a government enterprise information technology solution or a third-party service may eliminate these issues.

THANK

YOU!

D.C. OFFICE
OF OPEN
GOVERNMENT
CONTACT
INFORMATION

Niquelle M. Allen, Esq.,
Director,
niquelle.Allen@dc.gov
(202) 481-3406

Johnnie I. Barton, Esq.,
Chief Counsel,
johnnie.barton2@dc.gov
(202) 741-5373