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The Legal Implications of Governmental Social Media Use - *New Jersey Lawyer*

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Approximately 77 percent of Americans have profiles on social networking sites and two-thirds of Americans say they get at least some of their news on social media. Thus, Facebook, Twitter, and Instagram can be powerful and effective tools for government agencies that want to provide information directly to the public about their services, emergencies, or community events.

When agencies create social media accounts for use by that government agency or an office, it may implicate the Open Public Records Act (OPRA), the state's records retention laws, the freedom of speech, and possibly even the Open Public Meetings Act (OPMA). Practitioners faced with wanting information or more information based on what an agency has posted may benefit from learning those implications.

Open Public Records Act

Most government agencies and public officials set their other social media settings to 'public,' which, as social media viewers will note, means that the posts can easily be seen by anyone, or at least anyone who chooses to create an account on that social networking site. There is also, however, significant information within a social media account that is not visible to the public, but that may be of interest to practitioners (or members of the public) who monitor the government. For example, both Facebook and Twitter allow users to download a file that contains all activity associated with the account since its creation. Moreover, most social media accounts, including Facebook and Twitter, allow users to block other users. The public might be interested in seeing exactly who the government or a government

official has chosen to block.

This presents a question of whether members of the public can request and obtain that otherwise hidden information through OPRA. Where a government agency or its department creates a social media account in its name to communicate with the public, that account is undoubtedly a 'government record' subject to OPRA because it is "information stored or maintained electronically" that "has been made, maintained or kept on file in the course of...its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof." For those types of social media accounts, the public could request the activity logs, blocked user lists, words that have been censored, or even information about the number of times posts have been viewed.

This issue is not so clear where the social media accounts are created by a public official on his or her own accord, such as a mayor or member of the town council. Only a few courts nationwide have considered whether these types of accounts are subject to state records laws. Indeed, each has applied a factsensitive approach analyzing content of the particular accounts at issue.

There are no published New Jersey decisions addressing whether Facebook pages are subject to OPRA, but two unpublished trial court decisions provide guidance. In Larkin v. Borough of Glen Rock, the requestor sought the blocked user lists from the Facebook pages of the mayor and five borough council members. Rejecting a "one-sizefits-all rule," the court determined that a "fact-sensitive review of the Facebook pages at issue" must be conducted.

The court rejected certifications from the public officials that asserted the information they posted was solely their own opinions and was not authorized by the borough and, therefore, could not be 'official business.' By looking to cases interpreting the official misconduct statute, which punishes public officials who engage in an unauthorized exercise of their 'official functions,' the court held that 'official business' meant "those duties which are imposed by law as well as those which are clearly inherent in and naturally arise from the nature of the office." Thus, the court found that "a mayor or a council member is authorized to speak on behalf of their office. Each council member did so on the Facebook pages in question."

The court cited several facts that led to its conclusion that the Facebook pages were subject to OPRA. First, each page was created after the officials were elected and was "separate and distinct" from private Facebook accounts they maintained to interact with family and friends. In fact, the Facebook pages had titles such as "Mayor Bruce Packer" and "Councilman Skip Huisking." Moreover, each page was used "for the sole purpose of discussing matters directly pending before the Mayor and Council," including ordinances, resolutions, budgets, and committees. "The posts shared ideas, answered questions and interacted with constituents and the public at large about the Borough's official business." The court also noted that at one point, the borough's official website linked to at least some of the Facebook pages, and that the council members linked to each other's pages as well. Moreover, some of the pages listed the officials' government contact information.

In contrast, the same court ruled three months later, in Gelber v. City of Hackensack, that a Facebook page titled "Labrosse Team for Lower Taxes and Honest Government" was not subject to OPRA. The court concluded that the page was not made in the course of official business because it was a campaign page that was created when the officials were mere candidates for office, and that it contained two 'paid for' disclosures, as required by campaign finance law. The court described the page as a "showcase" of the candidates, and said it "promotes political aims and goals, communicates with political supporters and highlights successes with tangible achievements to promote re-election efforts." Finally, the court noted that the page linked to a campaign website (not a government website) and that it also recently endorsed other political candidates for the city's board of education. Thus, it concluded the page was "political in nature" and not a government record subject to OPRA.

Outside of New Jersey, reported decisions suggest this fact-based approach is standard. For instance, in West v. Puyallup, the Washington Court of Appeals was tasked with determining whether a Facebook page associated with city council member Julie Door was subject to the state's public records law. To qualify as a public record, the requestor was required to prove that the account was made within the scope of Door's "official capacity" or to "conduct public business."

Door argued that the page was simply a campaign page used to provide information to her supporters, and that it had not been referenced by the city at city meetings or cited in support of any agency action.The requestor argued that Door had made posts that referenced or linked to the city's official Facebook page or the police department's official Facebook page, and talked about issues and happenings within the city.

The court ruled that Door's Facebook page was not subject to the public records law because it was not her "official business" and she was not "conducting public business" on the page. The court noted that the page was not "characterized" as an official city council member page because it was titled "Friends of Julie Door." Further, while members of the public commented or posted questions on the page, Door never responded to them, and instead directed people to send questions to her work-related email address. Finally, the court reasoned that the "posts did not contain specific details about Door's work as a City Council member or regarding City Council discussions, decisions or other actions." Rather, the "posts merely provided general information about City activities and occasionally about Door's activities."

In Pacheco v. Hudson, a requestor sought information from the "Keep Judge Matthew Wilson Facebook page," which was maintained by the judge's personal election campaign. The requestor argued that the account became a public record when members of the public posted unsolicited comments about a case that was pending before the judge, praising his decisions and urging him to rule against one party.

There, the Supreme Court of New Mexico noted because the judge had not blocked third parties from posting on the Facebook page, it demonstrated that "social media can pose particular risks of an appearance of impropriety on the part of judges who must participate in political elections." However, the Court ruled that the judge's Facebook account was not a public record because the judge had not discussed any pending cases or any judicial business. Rather, his page represented strictly "personal campaign activities."

Accordingly, whether a Facebook page is subject to OPRA will depend on whether a court finds the public official was using it in the course of his or her official business. This will necessarily require a case-by-case fact-based analysis. Those seeking to make that determination can look to the above cases, cases interpreting the official misconduct statute's definition of 'official functions,' and cases addressing the First Amendment's "under color of state law" or "state action" analysis, as discussed below.

Records Retention Laws

Public agencies that delete or edit Tweets or Facebook posts run the risk of violating the state's record retention laws. One reason is that the Destruction of Public Records Law requires government agencies to maintain public records for specific periods of time, which are set forth in a series of records retention schedules that are approved by the State Records Committee within the Division of Revenue and Enterprise Services—Records Management Services (RMS). While the law's definition of 'public record' does not expressly include information stored electronically, RMS has issued guidance that provides that because electronic records are subject to OPRA, they should be maintained pursuant to records retention schedules.

RMS has said that social media accounts should be maintained according to the same records retention schedule for government websites. The current retention schedules require website content pages to be retained for 30 days after a website is discontinued. Public records may
not be automatically destroyed, however, as public agencies must obtain authorization from RMS prior to destruction.

Agencies should heed caution before altering the content of their Facebook pages to make them appear more similar to Gelber or Pacheco than Larkin, as doing so would likely violate the record retention laws. Further, versions of the pages may appear in a web cache. In fact, the court noted in Larkin that the agency had deleted links from its official borough website to the pages "after service of plaintiff's complaint," apparently to distance the borough from the Facebook pages. Thus, deleting the content in no way benefited the agency and instead focused the court's attention on the website's former content.

Free Speech Implications

When a government agency or official blocks a user from a social media account, it may constitute a violation of the First Amendment to the U.S. Constitution and Article 1, Paragraph 1 of the New Jersey Constitution where the court finds the public official was acting "under color of state law" in using the social media account.

Perhaps America's most notorious Twitter user is President Donald Trump, whose tweets are reported on news programs almost daily. Thus, it makes sense that one of the few cases addressing whether a public official's use of social media can violate a person's free speech rights involves President Trump.

In Knight First Amendment Institute at Columbia University v. Trump, the plaintiffs alleged they were unconstitutionally blocked from Trump's @realDonaldTrump Twitter account, which was separate from the official @POTUS account and pre-dated his election. The United States District Court for the Southern District of New York found that while Trump's actual tweets and his Twitter "timeline" were "government speech" and not subject to a forum analysis, the "interactive space" in which members of the public who are not blocked can reply to Trump's tweets constituted a "designated public forum."

The court reasoned that Trump and his social media director's control over the Twitter account was "governmental," "under the color of state law," and "state action" because the account stated that it was "registered to Donald J. Trump, 45th President of the United States of America, Washington, D.C.;" that the tweets constituted "official records" that had to be preserved under the Presidential Records Act; and that the account had been used "in the appointment of officers (including cabinet members), removal of officers, and the conduct of foreign policy." In other words, Trump presented the account "as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that are taken only by the President as President."

Trump argued that he had a First Amendment right to choose the people with whom he associates and the "right to not engage (i.e., the right to ignore) the individual plaintiffs." The court rejected that argument, noting that Trump could utilize Twitter's mute feature to refrain from seeing the critical replies to his own tweets, which "unlike blocking" does not "restrict the right of the ignored to speak."

Because it was "indisputable" that the individuals had been blocked because of their criticism of Trump and his policies, the court held that "the viewpoint-based exclusion of the individual plaintiffs from that designated forum is proscribed by the First Amendment and cannot be justified by the President's personal First Amendment interests."

Other courts have come to differing conclusions regarding whether a public official violates the First Amendment by blocking users on social media. The United States District Court for the Eastern District of Kentucky, in Morgan v. Bevin, refused to apply a forum analysis to the governor's @GovMattBevin Twitter account and Facebook account, and instead held the "privately owned" accounts constituted either personal speech or government speech. The court concluded that members of the public have no constitutional right "to a government audience for their policy views," and that the accounts were simply a "means for communicating his own speech, not for the speech of his constituents."

In Davison v. Loudoun Cnty. Bd. of Supervisors, the United States District Court for the Eastern District of Virginia found that a public official violated the First Amendment when she engaged in viewpoint discrimination and blocked users from her Facebook page titled "Chair Phyllis J. Randall." The court looked at several factors to decide that the official was "acting under color of state law" through the Facebook page, such as the fact that her government staff helped her set the page up; she routinely engaged in back and forth conversations with constituents on the page; the name of the page included her title, was categorized as that of a government official, and listed her contact information at her government office; she had made posts on behalf of the county board of supervisors as a whole; and the content mostly was about matters relating to her office.

Government leaders do not lose their own free speech rights when they take office, so they are allowed to maintain entirely personal social media accounts and, for those accounts, freely censor whomever they wish. However, much like determining whether a social media account is subject to OPRA, determining whether it constitutes a designated public forum rather than purely personal speech requires a case-by-case analysis, making it easy to understand how a government official who routinely talks about government business might be creating a designated public forum.

Open Public Meetings Act (OPMA)

OPMA requires "adequate notice," meaning at least 48 hours of notice, before a "meeting" may be held. A meeting is defined as "any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body." However, OPMA does not apply to gatherings "attended by less than an effective majority of the members of a public body."

Though there are no cases directly on point, it is easy to see that an OPMA violation could occur if public officials are not careful. Social media posts inherently invite conversation. If one council member makes a post about a matter pending before the governing body or affecting the town and several other council members post responses, an OPMA violation may have occurred. This would be true even if the council members did not intend to hold a meeting, because they nonetheless 'gathered' and intentionally discussed public business.

Conclusion

Government agencies that utilize social media could run afoul of various laws and/or be required to make public what they intended would be private. To determine whether content may be obtained, practitioners (or the public) can examine the agencies' policy to explore whether content is deleted without a copy being retained and whether elected officials are discussing public business on social media by an effective majority of the governing body, which could constitute an illegal public meeting.

Government officials who use social media may create an 'official' account that is completely separate from their personal accounts and refrain from discussing any government business on their personal accounts to maintain privacy. While the official accounts would be subject to OPRA and the First Amendment, by keeping the two accounts separate government officials can ensure they have a place to engage in social networking with friends, family, and other personal contacts, and that their own free speech rights are protected there.