

Legal Issues Associated With Government Use of Social Media

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What is social media?

- Social interaction facilitated through technology
- Media because it resembles traditional published content
- Transforms monologues into dialogues

- Pete Codella and Brian Seethaler
of the Salt Lake City Social Media Club



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Examples of social media

- Blogging and microblogging (Blogger, Twitter) 
- Social networking (Facebook, LinkedIn) 
- Multimedia sharing (YouTube, Flickr) 
- RSS (really simple syndication) - automated notification of frequently updated content, known as "feeds" 
- Wikis - collaborative authoring and editing 

Is social media just a fad?

Social Media Revolution

If Facebook were a country...

1. China
2. India
3. Facebook
4. United States

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Is social media just a fad?

It's not just for kids...

Social networking use among internet users ages 50 and older nearly doubled - from 22% in April 2009 to 42% in May 2010.

- *Pew Internet and American Life Project*



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Government agencies are early adopters of social media

Federal Government

- 24 of 26 primary Federal agencies, including the Whitehouse, U.S. Army

State Government

- Currently, there are more than 200 Utah state departments using Twitter that collectively tweet an average of 20 times per hour.

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Government agencies are early adopters of social media

Local Government

- Over 50 Utah municipal agencies use Facebook
- There are more than 140 state and local Facebook accounts.
- For a list of Utah local governments using social media, visit www.utah.gov/connect

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What are the benefits for local government use of social media?

- Easy, cost effective dissemination of information
- Increase in citizen engagement
- Quick alerts of emergency and public safety information
- New feedback channel for citizens

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What are the benefits for local government use of social media?

However, there are potential legal issues with government use of social media.

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LEGAL ISSUES

Areas of legal concern with government use of Social Media:

1. First Amendment issues
2. Employment related issues
3. Privacy issues
4. Litigation issues
5. Intellectual property issues
6. Open Meetings Act issues
7. GRAMA issues

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FIRST AMENDMENT

First Amendment issues arise in two contexts:

1. Regulating citizen access/posts to SM sites
2. Regulating employee speech

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Regulating citizen access/posts

Regulating citizen access and posts depends on what type of "public forum" is created:

- traditional public forum (streets, parks, town squares, etc.)
- limited purpose (designated) public forum (city council meetings, forums limited to a certain topic, purpose or group)
- non-public forum (jails, military bases, etc.)

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Regulating citizen access/posts

Traditional public forum-----free speech interests strongest

Ltd. purpose public forum---free speech can be regulated

Non-public forum-----public free speech interests not implicated

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Regulating citizen access/posts

If your Social Media site allows others to post you have likely created a designated public forum.

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Regulating citizen access/posts

Citizen posts can be legally managed in one of three ways:

1. permit all comments and have a moderator post corrections or point out inaccuracies;
2. limit use of social media tools to those where posting comments can be disabled; or
3. regulate content by adopting a policy that meets First Amendment considerations

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Regulating citizen access/posts

Content cannot be prohibited or restricted unless the restriction is:

- narrowly tailored to achieve
- compelling governmental interest

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Regulating citizen access/posts

Content can be regulated if a policy is created and displayed that:

1. articulates clear governmental purpose/interest for the site;
2. prohibits content unrelated to purpose;
3. reserves right to remove content unrelated to purpose or topic.

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Regulating citizen access/posts

Content restrictions can vary depending upon the purpose for which the particular Social Media site is being used.

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Regulating citizen access/posts

Examples of SM site purposes:

- to disseminate time-sensitive information to the public (e.g. Twitter)
- to promote and market government sponsored services and activities (e.g. YouTube and a Blog)

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Regulating citizen access/posts

Examples of SM site purposes:

- to promote communication between public and the govt. agency on specific topics (e.g. comment or bulletin board)
- to facilitate emergency communications (e.g. Twitter)

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Regulating citizen access/posts

Examples of SM site purposes

- to respond to constituencies concerns and facilitate citizen engagement (e.g. Facebook, Twitter)
- to enable publication of official documents, notices and government actions (e.g. interactive web site)
- to direct web traffic to government web sites (e.g. Twitter, YouTube, Facebook)

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Regulating citizen access/posts

Examples of content which can be prohibited by policy:

1. comments not topically related
2. content that promotes discrimination
3. posts that constitute or encourage illegal activity

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Regulating citizen access/posts

Examples of content which can be prohibited by policy:

4. solicitations of commerce
5. sexual content or links to sexual content
6. profane language

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Regulating citizen access/posts

Examples of content which can be prohibited by policy:

7. content that violates a legal ownership interest of another party
8. information that compromises safety or security
9. comments regarding political campaigns or ballot measures

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Regulating citizen access/posts

If your site is a designated (limited purpose) public forum you cannot prohibit/remove content on the basis that it is critical of the governmental entity or disagrees with a government official or body.

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What if...?

- **What if a poster says something bad about our city?**
 - A. If the topic is within the purpose of the forum, then do not delete the posting or ban the user. This is where you **must be viewpoint neutral**. Remember, these folks are going to talk anyway. By addressing this directly on your site, you have the opportunity to turn the conversation around.

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What if...?

- **What if a poster uses profanity on our Facebook page?**
 - A. Your policy and purpose statements should address this. If not then you should leave the profane words up.

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What if...?

- **What if a poster says something bad about an elected official?**
 - A. If you have not addressed this in your published policy and purpose statements, then you should leave the posting UNLESS it is libelous. Libel is not condoned or protected by the First Amendment.

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What if...?

- **What if a citizen posts incorrect information?**
 - A. Join in the conversation and provide more information and sources of information.

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What if...?

- **What if a citizen posts commercial information for their business?**
 - A. Commercial speech has less constitutional protections than public free speech. Unless the commercial posting advances the published purpose of the forum, you may delete the posting.

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Regulating citizen access/posts

Policies must be:

- enforced consistently
- applied in a non discriminatory manner
- displayed to users or made available by hyperlink

Example:
Seattle's policies:
www.seattle.gov/pan/SocialMediaPolicy.htm

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Regulating citizen access/posts

Policy recommendations:

- Carefully consider where and if Social Media fits within your overall communications and public engagement strategy before using.
- Identify specific goals and purposes for using a Social Media site.

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Regulating citizen access/posts

Policy recommendations:

- Involve legal counsel in drafting suitable SM policies.
- Take advantage of social media site options specifically designed for government.
- Regularly train staff and elected officials about the substance and monitoring and enforcement of policy.

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Regulating Government Employee Speech

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Regulating govt. employee speech

- Government employees, like the general population, are utilizing Social Media in ever increasing numbers.
- Government employees, unlike most private employees, do not forfeit their First Amendment rights by virtue of their employment.

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Regulating govt. employee speech

- Speech by government employees, however, may be regulated under certain circumstances.
- Government may restrict employee speech to protect legitimate government interests.

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Regulating govt. employee speech

- Free speech issues usually arise in context of disciplining or terminating an employee for his/her speech.
- Courts apply a balancing test to determine if the First Amendment prohibits an employee from being disciplined for their speech.

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Regulating govt. employee speech

Three-part judicial test:

PART ONE: is person speaking on a matter of public concern?
(If yes, then free speech protections apply)

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Regulating employee speech

Three-part judicial test:

PART TWO: is person speaking as a citizen or as a public employee?
(if speaking as public employee then free speech protections do not apply)

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Regulating employee speech

Three-part judicial test:

PART THREE: do the interests of the govt. in promoting efficient operations outweigh the interests of the employee in commenting on matters of public concern?
(if yes, then employee may be disciplined for speech)

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Regulating employee speech

The following examples illustrate application of the three part test in practice.

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What if...?

- May an employee post sexually explicit material or pictures promoting questionable behavior on their private social media site after work hours?

A. No, if the employee is identifiable as a government employee, provided your internal policy addresses the subject.

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What if...?

- **May an employee post negative comments about co-workers, the agency or residents on their private social media site after work hours?**

A. No, if your internal policy addresses this. Policy may be enforced in the same way as other internal policies.

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Regulating employee speech

Policy recommendations:

- Evaluate the pros and cons of employee access and use of agency equipment and during working hours.
- Encourage professional behavior when employees identify the agency as their workplace on private social media sites.

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Regulating employee speech

Policy recommendations:

- Involve legal counsel and human resources in drafting suitable social media policies.
- Make sure that your new policies are aligned with current policies.
- Regularly train staff on your organization's social media policies.

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The Social Media Guide

- We will update the on-line guide with new content in the coming months.
- Find out about these updates via CPPA twitter account located at: www.twitter.com/cppa

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For more information...

Center for Public Policy & Administration
www.cppa.utah.edu/policy_publications.html#egov

State of Utah Social Media Pages
www.utah.gov/connect

Sample Social Media Policies
www.ca-ilg.org/socialmediapolicies
govsocmed.pbworks.com/

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Government Use of Social Media
as of 8/10/2010

Type	Name	Twitter	Facebook	Youtube	twitter.com/ facebook.com/ youtube.com/
Fed	Whitehouse	1,801,431	687,736	4,484,150 channel views, 30,883,984 video uploads	T=Whitehouse F=Whitehouse Y=Whitehouse
Fed	US Army	35,628	369,845	295,604 channel views, 2,778,643 video uploads	T=usarmy F=Usarmy Y=soldiersmediacenter
Fed	Orrin G. Hatch	10,606	3,387	10,188 channel views, 40,569 video uploads	T=OrrinHatch F=OrrinHatch Y=SenatorHatch
State	Utah Government	4605	538	9,348 channel views, 2894 video uploads	T=UtahGov F=utahgov Y=utahegov
State	Utah Senate	3355	667	11, 441 channel views, 21,634 video uploads	T=utahsenate F=utahsenate Y=utahsenatechannel
State	UDOT	2094	444	13,274 channel views, 34,383 video uploads	T=UtahDOT F=UtahDOT Y=UtahDOT
County	SL County Health	2914	486	7,384 channel views, 11,989 video uploads	T=slvhealthdept F=slvhealthdept Y=SaltLakeValleyHealth
	SL County Library		2224		F=saltlakecountylibrary
	Utah County	291			T=utahcountygov
Cities	Washington City	78	358	1520 channel views, 5084 video uploads	T=washingtonutah F=washingtoncity Y=washingtoncityutah
	West Jordan	81	568		T=CityWestJordan F=pages/West-Jordan-UT
	Centerville	487			T=centervilleut
Elections	Peter Corroon	603	4883	1879 channel views, 3601 video uploads	T=peter_corroon F=pages/Corroon-for-Governor Y=votecorroon
	Gary Herbert	193	4154	11, 441 channel views, 21,634 video uploads	T=herbertforutah F=HerbertforUtah Y=HerbertforUtah