

# Legal Issues Relating to Online Social Networking

**L**ibraries of all types — public, school, academic, and special — gain advantages in using web-based social networks. Some libraries have a presence on Facebook, maybe a Twitter account, and almost all have an online presence via a library website. Benefits include a cost-effective means of communication with library patrons, offering both transparency and opportunities for public participation, greater awareness, and sometimes more meaningful engagement by library patrons. But the governing authorities of these libraries, particularly those of public libraries, also must be aware of the implications of using these media. Keep in mind the following possible legal consequences and develop policies to address them.

## OPEN MEETINGS ACT AND FREEDOM OF INFORMATION ACT (FOIA) COMPLIANCE

Does the posting of comments by board members on Facebook create a “meeting” subject to the Open Meetings Act? What if those comments are posted by the official during an actual meeting that has been noticed and is open to the public? At least one state attorney general (Florida) has issued an opinion that posts on Facebook would be subject to the Open Meetings Act. These questions have not yet been answered by Illinois courts or the Illinois Attorney General, but given the potential for criminal penalties, government officials should avoid contemporaneous discussions of public business on social networking sites, or in chat rooms, and ensure that their social networking interactions comply with the Open Meetings Act.

Communication via a government-sponsored website, including comments and other postings, is likely to be subject to both FOIA and records retention laws if it concerns government business. Thus, governments must retain these records indefinitely or

request permission to destroy them under public records law, and must provide this information upon request under FOIA. While the Illinois Secretary of State’s Records Management Section of the Illinois State Archives has not yet issued any guidelines or policies on retention of social media content, they are currently investigating and will likely adopt rules in the near future. Other states (New York, Florida, Washington) have concluded that content posted on government social networking sites is subject to record retention laws and archiving requirements.

## FIRST AMENDMENT AND PRIVACY ISSUES

Whether a website is considered a public forum (or limited public forum) is an open question, raising concerns as to whether a government entity, such as a public library, can remove allegedly objectionable Facebook comments without implicating First Amendment protections. Other legal issues may arise, such as revealing confidential or proprietary information.

Libraries might consider moderating comments and removing those that are objectionable; however, only content that is ugly, offensive, denigrating, and completely out of context should be removed, and content that is simply politically unfavorable or negative in the context of the conversation should be allowed to remain. Another way to manage comments is to restrict access to only those who register. However, if you require people to register, you must carefully consider what information they must provide (name, address, phone number, e-mail, screen name), who will maintain the information, and whether others participating in the discussion will have access to this information. You can avoid these issues completely by disabling the comment portion of a government networking site.

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## DISCRIMINATION

Data show that there is a discrepancy in the use of the Internet by income, race, age, and education level, raising concerns that the use of social networks to share information and solicit input might reach a less diverse group of people. If government officials are using social networking sites as the only means to provide information or seek input, a significant number of citizens may be unreached or underrepresented. Moreover, government bodies are obligated by law to provide disabled individuals with “equal access” to information posted on social networking sites, unless it would “pose an undue burden” or that doing so would “fundamentally alter the nature of the provider’s programs.” Thus, governments using social networking sites should have an alternative way to provide the information (print, mail, phone, etc.).

## NOT A REPLACEMENT FOR IN-PERSON COMMUNICATION

Although social networking offers quick and efficient participation in the government process, a question remains whether cyberspace can adequately replace the real-time experience of a “live” government meeting. For example, questions can be asked in face-to-face meetings that may not be so easy through social networking. It may be difficult to arrive at a consensus or strike compromises using purely social networking sites, as people can remain anonymous and less accountable. Finally, public business cannot be entirely conducted via social networking because the Open Meetings Act has specific limitations on electronic attendance at meetings that require a quorum of the public body to be physically present at the actual meeting.

## COPYRIGHT ISSUES

Governments should be cautious about what they post on their social networking sites to avoid copyright infringement. Photos and video should be produced by government employees or contractors working directly with the government. If copyrighted materials are used, make sure you obtain and maintain physical records of the copyright licenses. Governments should also be aware that some social networking sites (such as Facebook) have terms of use that state that all content uploaded to the site becomes the property of Facebook.

## DEVELOPING A SOCIAL MEDIA POLICY

If your library, school or university, municipality, or other governing body doesn’t have a social media policy, apply these guidelines to establish one. And be prepared for it to be subject to revision as laws and legal precedents emerge. The simple realization that information posted on social networking sites is public information can help avoid confusion and lawsuits. Set ground rules for input and comments, and adopt policies for employee usage of social media. A social media policy should include, at a minimum, the following:

1. **Purpose:** The policy should contain a statement that the use of social media by the government entity is for the purpose of obtaining or conveying information that is useful to, or will further the goals of, the government.
2. **Approval and Administration:** The policy should provide for an administrator to oversee and supervise the social media networking sites of the government. The administrator should be trained regarding the terms of the policy and his or her responsibilities to review content to ensure it complies with the policy and furthers the government’s goals.
3. **Comment Policy:** The policy should identify the type of content that is not permitted and subject to removal. This might include comments that are not relevant to the original topic; profane, obscene, discriminatory, or violent content; threats; solicitation of business; content that violates a copyright or trademark; and any content in violation of federal, state, or local law. The policy should also contain a disclaimer that any comment posted by a member of the public is not the opinion of the government. Finally, the policy should include language that reserves the right of the administrator to remove content that violates the policy or any applicable law.
4. **Compliance with Laws:** The policy should include language regarding compliance with applicable federal, state, and local laws, regulations, and policies. It should be made clear that content posted on a government site is subject to FOIA and record retention laws; in addition, content may be subject to e-discovery laws. Finally, information protected by copyright or trademark should not be posted or maintained on a social media site unless permission has been granted by the owner of the intellectual property.

5. **Employee Usage Policy:** These policies should include, if applicable, employer monitoring of employee use of government computers. The policy should also caution employees that they have no expectation of privacy while using the Internet on employer equipment. The policy might also require employees of a particular government or company to post a disclaimer that any postings or blogs are solely the opinion of the employee and not the employer. Employees should not use the government or company logo, seal, trademark, or other symbol without written consent of the administrator. The policy should also address the protection of confidential and sensitive government or company information, as well as personal information relating to clients, customers, or residents. Employees should be required to sign a written acknowledgment that they have received, read, understood, and agreed to comply with the policy.

An employer should be careful not to implicate the First Amendment rights of employees nor violate applicable federal or state employment laws. A recent example involved a settlement between the National Labor Relations Board (NLRB) and an ambulance service that fired an employee for criticizing her

employer on Facebook. The employer argued that the employee's statements violated the company's social media policy barring workers from disparaging the company or their supervisors. The NLRB argued that the National Labor Relations Act protects an employee's discussion of conditions of his or her employment with others, and that co-workers' comments on the employee's Facebook page implicated those protections. As part of the settlement, the company stated it would change its policies so they did not restrict employees from discussing work and working conditions when they are not on the job.

Over the past ten years, libraries (and almost everyone else) have established a presence on websites and other web-based social networking sites such as Facebook and Twitter, among others. As new forms of web-based social media are introduced, libraries will need to keep up with technology, while ensuring that they do not lose sight of their legal obligations to the public and their patrons in these evolving digital times. Developing a valid and enforceable social media policy will remind your library of its obligations to its public, its patrons, and its employees. **ILA**



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