

TO TWEET OR NOT TO TWEET?

Social Media, Public Records and the Open Meeting Law

By RICHARD T. HOLLAND

Social media are among the most popular benefits spawned by computer technology. According to the Pew Research Center, two-thirds of American adults now use social networking sites to share information, ideas, personal messages and other content, such as videos. An article published by the BBC in 2012 summed it up this way: “The social web and mobile technologies have accelerated the rate at which relationships develop, information is shared, and influence takes hold. People now use social technology to help shape the world’s events and culture.” This phenomenon has only accelerated in the four years since.

Social media services such as Facebook, Twitter and Instagram have transformed the ability of citizens and their governments to communicate and interact. They have also created new challenges for governments. In Audit 11-605 (p. 8), the U.S. Government Accountability Office states: “Agencies may face challenges in

assessing whether the information they generate and receive by means of these technologies constitutes [public] records. Furthermore, once the need to preserve information as [public] records has been established, mechanisms need to be put in place to capture such records and preserve them properly.” The Massachusetts supervisor of records agrees (SPR Bulletin 3-96): “The computer generally enhances the government’s ability to collect, compile, manipulate and disseminate information. Certainly, as the manner in which government information is maintained evolves, the means of accessing such information must experience a parallel evolution to preserve a meaningful right of access.”

Public records are no longer just paper records. The 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 (M.G.L. Ch. 4, Sec. 7, clause 26). This definition includes electronic documents and other data.

As stated in the *Guide to the Massachusetts Public Records Law* (p. 4): “The Public Records Law applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.” The *Guide* also states (p. 28): “The statutory definition of ‘public records’ does not distinguish between paper records and electronically stored information (ESI). Rather, the law provides that all information made or received by a public entity, regardless of the manner in which it exists, constitutes ‘public records.’”

The fact that emails are public records has become a matter of common understanding in local government. This may not be the case, however, with social media content (“posts”). Yet from a

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public records perspective, at least for municipalities that operate their own social media accounts, social media posts are not that much different from emails. Under the statutory definition of “public records,” social media posts are likely “data.” The public records law and corresponding regulations (950 CMR 32.00) do not currently define the term “data,” but the *Electronic Records Management Guidelines*, published by the secretary of state’s office in 2011 and applicable to state agencies, attempts to do so: “Any material upon which written, drawn, spoken, visual, or electromagnetic information or images are recorded or preserved, regardless of physical form or characteristics.” (This definition is not binding on municipalities, as it does not carry the force of law or regulation.) The guidelines also state that “social media sites contain communications sent to or received by state employees that are subject to the same electronic records requirements” as any other electronic document.

Social Media Retention Requirements

Electronic records must be managed and maintained in accordance with an electronic records management plan. The purpose of such a plan, according to the *Massachusetts Municipal Records Retention Manual* (p. 13), is to describe how such “records are [to be] logically categorized or arranged for easy retrieval, use, and destruction.” Thus, for municipalities that use social media, capturing and preserving social media content must be part of any municipal electronic records management plan. This may be easier said than done, as acknowledged in the *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. Other than suggesting the (seemingly impractical) taking of periodic

screenshots, however, the *Guidelines* do not offer much in the way of help about how to do this.

The supervisor of record’s bulletins on “emails” may be instructive on the preservation of social media: According to Bulletin 1-99, “email messages are subject to the same records management principles as all other records of the office.” Each public official who creates or receives an email must review the content of each such email and consult the retention schedules to ascertain the applicable retention period. The official must also print each email (including attachments) and file it with the municipality’s paper records. The printed copy of the email must include “envelope information” (i.e., “the mailing address, date/time stamp, routing instructions and transmission and receipt information”). If it is too large to print, the bulletin continues, the email must be stored electronically pursuant to an email record-keeping system. It is reasonable to expect that the supervisor would similarly treat social media posts. (Note: After

issuance of Bulletin 1-99, the Massachusetts Uniform Electronic Transactions Act [M.G.L. Ch. 110G] was enacted in 2004, which, in Section 12(a), generally allows electronic documents to be maintained in electronic form, and in Section 17(a), provides that the supervisor of records shall determine how municipal electronic records are to be created, maintained and preserved.)

Personal Use

Perhaps a more challenging issue is the personal use of social media by municipal employees and officials. Not unlike the sending of a text message on an employee's personal mobile device, sending a tweet from a personal social media account, for example, raises perplexing questions.

Assume, for example, that two members of a five-member board exchange tweets on a matter of public business. Are the tweets a public record simply because they were "made" by municipal officials (see statutory definition of "public record")? Does the answer to the question depend solely on the content of the tweets, or do we also need to know whether they were using municipal equipment? What if, instead, the tweets were exchanged using personal devices from the privacy of the members' homes?

It appears that the secretary of the Commonwealth has not issued formal guidance directly on these questions, though, given the rise of social media and recent changes to the public records law, it may soon do so.

Nevertheless, SPR Bulletin 3-96 reminds us that "[a] literal reading of [the definition of a 'public record' contained in the public records law] necessarily leads to the conclusion that the availability of information in the custody of Massachusetts governmental entities is dependent upon the substance of the information, rather than the form in which it is maintained." In addition, the Massachusetts Supreme Judicial Court has concluded, with respect to the Massachusetts open meeting law (more on this below): "Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages,

whether electronically, in person, over the telephone, or in any other form." [*District Attorney for the Northern District v. School Committee of Wayland*, 455 Mass. 561, 570-571 (2009); see also *McCrea v. Flaherty*, 71 Mass. App. Ct. 637 (2008)] According to this reasoning, a tweet or Facebook post (or even a text) sent wirelessly by a municipal official from a personal mobile device may be deemed a public record if it addresses or relates to matters of public business irrespective of the location of the public official when the communications were sent or received.

As for purely personal social media posts made using municipal equipment, they may also be deemed a public record, though they may be protected from disclosure under the exemptions in the public records law (see M.G.L. Ch. 4, Sec. 7(26)), including exemption (c) ("relating to a specifically named individual, disclosure of which may constitute an unwarranted invasion of personal privacy"), or, perhaps less likely, since social media posts are generally intended to be viewed by third parties, exemption (e) ("notebooks and other materials prepared by an employee of the [C]ommonwealth which are personal to him and not maintained as part of the files of the governmental unit"); and they may be subject to minimal, if any, retention periods under the *Massachusetts Municipal Records Retention Manual*. On these difficult questions, a municipality should consult with its legal counsel.

Open Meeting Implications

In addition to public records implications, social media posts also risk violating the Massachusetts open meeting law.

Like the public records law, the open meeting law (M.G.L. Ch. 30A, Secs. 18-25) was enacted to promote transparency in government. The law requires that meetings of multi-member public bodies be open to the public, unless one of the narrowly construed exemptions set forth in the law applies. It defines a "meeting" as "a deliberation by a public body with respect to any matter within the body's jurisdiction" [M.G.L. Ch. 30A, Sec. 18]; and defines "deliberation" as "an oral or written communication through any medium,

including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction (a quorum is a 'simple majority' unless otherwise provided by law, G.L. Ch. 30A, Sec. 18); provided, however, that 'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting [sic] or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed."

(An important observation is that a "meeting" is a communication, and as a result, a meeting for the purpose of the open meeting law may [unlawfully] occur even if all the members of the public body are miles apart. With few exceptions, multi-member bodies are prohibited from deliberating unless a meeting has been advertised forty-eight hours in advance and at least a quorum is physically present at the location of the meeting, which must be accessible to the public [M.G.L. Ch. 30A, Sec. 20].)

"Tweeting," for example, may risk violating the open meeting law. We have not yet seen examples of such violations, but several cases decided by the attorney general's office involving emails are instructive.

In one case, a private individual emailed all members of a three-member board of selectmen requesting clarification of an item on the board's meeting agenda. The board's chair responded by hitting "reply to all." In his response, the chair expressed, among other things, an opinion on public business. None of the other selectmen replied. The private individual to whom the chair responded subsequently filed a complaint with the attorney general's office. Although "by sending his email to the entire Board, the complainant invited [the chair] to respond to all recipients," the chair was, nonetheless, found to have (individually) violated the open meeting law [OML 2013-27]. "Expression of an opinion on matters within the body's jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds." The board, however, was not found to have violated the open meeting law, because the other selectmen did not reply

to the chair's email. Had they done so, the entire board would have been in violation.

In another case (OML 2012-93), a building committee co-chair sent emails to a quorum of the committee. In one email, the co-chair circulated a presentation intended for town meeting and requested comments. In a second email, the co-chair asked for comments on a public records request received by the committee. Although some committee members responded to the co-chair's emails, they did not send their emails to a quorum of the committee. The attorney general's office held that the co-chair violated the open meeting law because the emails discussed public business within the committee's jurisdiction. Since the other members who responded to the co-chair did not email their responses to a quorum of the committee, however, the attorney general's office ruled that the committee did not violate the open meeting law.

In a third decision (OML 2012-63), a

quorum of a board exchanged emails on the work schedule of the board's assistant, which the attorney general's office ruled did not constitute public business. At some point, however, the emails discussed the decision-making authority of individual board members. This, according to the attorney general's office, constituted "public business." As a result, the board violated the open meeting law. Therefore, although a quorum of a public body may lawfully exchange emails on matters that do not constitute public business within the body's jurisdiction, it is never prudent to do so. The problem is that it is not always easy to know whether a subject is "public business within [a public body's] jurisdiction," and even when public officials think they know, the attorney general's office may disagree.

If the emails at issue in these open meeting law decisions were, say, tweets or Facebook posts, the results may have been the same. This is because it is the creation of the communication and its

deliberative effect that are important, not the method of, or medium used for, that communication. In other words, whether sent as an email, tweet, or Facebook post, a deliberative communication among a quorum of a public body will violate the open meeting law.

Moreover, just as serial emails may violate the open meeting law, social media posts may have the same effect. According to the *Open Meeting Law Guide* published by the attorney general's office, serial communications will constitute a deliberation if there are "multiple communications ... that together constitute communication among a quorum of members." Serial tweets, for example, may, if they constitute a deliberation among a quorum of a public body, violate the open meeting law.

Social media are especially concerning because, as the attorney general's office notes in OML 2013-27, "social networking sites such as Facebook invite the temptation to deliberate outside of a

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properly posted meeting.” In one case (OML 2013-62), the chair of a municipal energy committee formed a private Facebook group to organize proponents for an energy project, and the chair and three other members of the nine-member energy committee exchanged messages on Facebook about the project. The attorney general’s office found “no evidence that a fifth member of the Committee was ever a member of the Facebook Group or communicated via the Facebook Group,” and thus ruled that there was no “deliberation” among a quorum. If it had found such evidence, however, the office stated that it would have found that the committee violated the open meeting law.

Although it may be appealing to think that a personal communication posted on social media without the intent that it ever be seen or responded to by other members of a public body is not a violation of the open meeting law, the policy of transparency underlying that law may force a different result, especially where

the communication is on a matter of public business and other officials respond to the post in a manner qualifying as a deliberation.

Municipal Responsibilities

Municipal officials should keep in mind that a corollary of the obligation to capture and preserve public records is an obligation to conduct public business in a manner that facilitates preservation. In other words, public officials should create electronic records using municipal equipment to ensure that such records are captured; and members of public bodies subject to the open meeting law should reserve communications on municipal business to scheduled meetings of the public body.

Each municipality should develop a detailed written policy on the use of social media by employees and officials, carefully circumscribing the “when, who and how” regarding the use of social media. The municipality also must develop an electronic records management

plan that includes social media. Such policy and plan should be prepared in consultation with legal counsel and an information technology professional. Careful preparation of those documents is especially important given the recent changes to the public records law (effective January 2017), which, among other things, permit a person who successfully appeals a denial of a public records request to seek payment of his or her attorneys’ fees.

So, to tweet or not to tweet? Sure, but only in accordance with an electronic records management plan and employee social-media policy.

Municipalities may obtain assistance in the development of an electronic records management plan by contacting the Public Records Division in the secretary of state’s office, or municipal counsel. For more information about the new version of the public records law, visit www.sec.state.ma.us/pre/prenotice.htm. ❄



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