Chapter 102

Blackout in the Name of Sunshine:
When Open Government Law Stifles Civic Social Media

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ABSTRACT

Local governments, and particularly local public officials, have adopted online social networking tools en masse in an effort to communicate with constituents. As this chapter shows, the resulting information flow consists of communication from the public official to constituents, from constituents to the public official, and among constituents, but in the context of the public official's social network. This environment constitutes a "civic social network," which operates as the new public square. Many local governments, however, are attempting to bar officials' use of civic social networks because they risk violation of open government laws, such as open meeting and open records laws. This effort to stifle valuable civic communication harms norms of transparency and accountability – the very values that open government laws should promote. These laws should be revised or reinterpreted to allow civic social networks to fulfill their promise as the new public square.

INTRODUCTION

Local public officials, like businesses and individuals, are scrambling to use social media. It should come as no surprise that people whose lives center on constituent contact want to adopt tools that let them reach large numbers of people at little cost. But this phenomenon, which started with the use of formal, government-created Websites with press releases, updates, and photos, has gone much further. Today there is hardly a mayor or city councilmember in a major American city without a Facebook page, a Twitter account, and a blog. It is common for major policy announcements to occur by tweet and entire town hall meetings to happen in chat rooms. But most interestingly, civic social media have created a three-way information flow: from official to constituent; from constituent to official; and among constituents in the context of the public official's network.[1]

This three-dimensional communication network is more than just an application of new; empirical evidence suggests that online discourse has become the new public square. (Mossberger et al., 2007; Brehm & Rahn, 1997; Jennings & Stoker, 2004). Local public officials and their constituents are flocking to social networking tools, and even government agencies that recently resisted have succumbed (Smith, 2010; Sherman, 2011).

But idealists hoping that social networks would enable a high-minded process of deliberative democracy have reason to be disappointed; study after study has demonstrated that online political discourse is factually unreliable, consists of opinion rather than objective information, creates "echo chambers" in which people only talk to or hear from those who already agree with them, and therefore reinforce polarization in politics (Dutton & Peltu, 2007). Nevertheless, social media have successfully enabled low-threshold civic engagement by citizens and public officials. A 2010 study showed that nearly one-third (31 percent) of online adults use platforms such as blogs, social networking sites, email, online video, or text messaging to get government information, and 13 percent of Internet users read a government agency or official's blog. Taken together, nearly a quarter of Internet users have posted comments or interacted with others online around government policies or public issues (Smith, 2010). Like it or not, civic social media are the new public square.

BACKGROUND

For all the enthusiasm by public officials and constituents, the rapid adoption of social networking tools has caught some local governments flat-footed. Those governments worry that public officials' use of civic social media may run afoul of laws mandating open meetings, freedom of information, ethics, and campaign finance limits. In many cases, local governments have either attempted to flat-out ban government use of social media or proposed restrictions that, for all intents and purposes, ban public officials from using social media in their official capacity.

Because few (if any) laws deal specifically with social media, policymakers have had to extrapolate from existing law. The results have been varied, as demonstrated by the following examples: (1) The City of Redondo Beach was advised to avoid all use of social networks for any purposes; (2) The City of Seattle was advised to adopt regulations that would bar City Council members from "friending" each other on social media, for fear of allowing inadvertent online meetings in violation of the Open Public Meetings Act, and bar any links that would lead to third-party content that is commercial (like advertisements) or political (like a comment from a constituent in support of a campaign); (3) Attorneys for a Florida municipal planning board told the board that, as a general matter, it should not have a social network profile "under any circumstances"; (4) Attorneys for a collection of Washington cities advised city council members to avoid posting any content regarding policy or city-related issues; and (5) counsel for the City of Fort Lauderdale discouraged any City participation on Facebook or "any similar interactive communication technology" (Sherman, 2011).

Agencies, legal counsel, and public officials have grappled with at least three types of potential statutory violations that apply to communications among public officials and constituents using social media.

Freedom of Information or Public Records Acts

Public officials' use of social media can create public records that are inaccessible to many members of the public in their original location, and may not be retained or cataloged in the same way as email or written correspondence. Consider the following scenario: Councilmember Jones posts on Twitter that he opposes Mayor Smith's

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