

Overview of Social Media – OML, CORA, 1st Amendment, Policies

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Many special districts, or their elected or appointed officials, are using social media to reach their stakeholders and to provide important public information. As your District establishes its social media presence, there are some limitations or complications of which every special district should be aware. This article provides an overview of some of the practical or legal issues, but please remember that this is not legal advice. The Pool encourages Districts to work with their general counsel on questions or advice on these and any legal issues.

This overview is structured as follows:

- Setting forth questions to get a social media discussion started;
- Overviewing open meetings, open records, and First Amendment issues in the context of social media;
- Resources to use, including:
 - Websites with example social media policies;
 - Template Social Media Resolution; and
 - Template Social Media Policy.

Social media lets us connect remotely and immediately with one another – and can be a great tool for outreach to your District’s residents. Thinking through a few preliminary issues prior to setting up your District’s official account, and adopting a social media policy, can help you start off on the right foot.

I. Practical Questions on Social Media

A. Does your audience have access to and use social media?

Special districts using social media to connect with residents are likely already aware of any internet infrastructure or technology challenges in their area. All the same, the first step in the use of social media for any outreach is to consider if your residents have and will use internet-based social media platforms at all.

Some public or private entities may assess their audience, and the overall trends, by doing a market survey. Do other, similar (or nearby) districts or public entities have a social media presence? What channels are they using, such as Facebook, Twitter, or Instagram? What content do they post? What type of response do their posts receive?

Many special districts may also choose to establish a social media presence to be ready to post emergency information for its residents, their families, and the general public. For emergency information reasons, the audience may be wider than for day-to-day District information and updates.

B. How would a social media account be administered by District staff?

Information on social media is only as good as its source, and only relevant if up-to-date. If your District has employees assigned to communications or outreach, the information posted on social media can be generated and maintained by professional staff who understand your audience and how to communicate with them effectively. However, if your District does not have staff assigned to these functions, establishing a social media presence may not be a reasonable means to get your message to the public.

When establishing a social media presence, it is also critical to consider the scope of planning for and maintaining your social media channels. Be sure to take into account workflow and clearly define staff roles, so as to eliminate overlap and to encourage quality control. Other considerations to address include storing and changing account information, security protocols, and contingency plans for turnover.

Again, social media can be a great method to provide information, but if your District does not have the resources to create and maintain content, there may be little reason to establish an account, other than to provide general information about your District. Further, if social media users learn that an account cannot be relied upon for updated information, the loss of interest and momentum can be difficult to revive.

If a social media site allows for the posting of comments, there may be legal issues with the creation of a type of public forum (more on that below). User interaction, including likes, shares, and comments, gets your account noticed (and triggers the algorithms on many of these sites to put your posts on users' feeds). However, there are practical considerations of comments too: does your District have the staffing to monitor, moderate, and respond to the discussion? If not, allowing comments on your District's social media site may not be very helpful to the users.

C. Does your District have other policies in place that may inform or interact with an official social media account?

Prior to establishing a social media presence, your special District may want to consider adopting its own social media policy to set expectations for how, when, and by whom the special districts official account may be used. Having these policies and procedures in place from the start can help your District avoid some of the legal issues that have arisen for public entities or officials in the last few years. Some districts may seek authority through Board direction, motion, or resolution (see example below), and follow with a social media policy that provides more detail on the day-to-day administration of an account.

As you approach a draft social media policy, you may want to consider other policies or procedures that your District already has in place. Has your District adopted a records retention policy? Does your District have a civility policy for its Board? Does your District have a communications policy governing how a Board may communicate with staff, or how District officials or employees may communicate with the public when on the job? If your District already has a good method of establishing who speaks formally for the District, or what official communications are appropriate, use these principles to inform your draft social media policy.

II. Legal Considerations: Implications of Social Media in Public Meetings, Records, and Fora

A. Colorado's Open Meetings Law

Colorado's Open Meetings Law (OML) is intended to broadly require that public business be open and transparent, with a legislative intent section that provides: "It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." C.R.S. § 24-6-401.

As a reminder, here are the basic requirements of the OML (see C.R.S. § 24-6-402(b)):

- All meetings of a quorum or 3 or more members of a local public body (whichever is fewer) at which any public business is discussed or at which any formal action may be taken are meetings open to public.
- Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum of the body is in attendance, or is expended to be in attendance, shall be held only after full and timely notice to the public.
- A "public meeting" includes any gathering convened in person, by telephone, electronically, or by other means of communication.

If discussions or decisions are not properly conducted under the OML, the risk is that a Board's action or policy-making decision may be invalidated (and the district ordered to pay the plaintiff's costs and fees). Therefore, social media discussions between Board Directors about public business may be grounds for an OML challenge. While there have not yet been published court decisions in Colorado as of the date of this article, social media is recognized by most practitioners as an "other means of communication" by which a public meeting between officials, lacking proper notice and failing to be open to the public, may occur.

Please note that the OML statutes include express recognition that not every type of discussion between Board Directors would constitute a public meeting. Emails between elected officials that does not relate to pending legislation or other public business are not a public meeting. C.R.S. § 24-6-402(2)(d)(III). However (and unrelated to social media), your District staff may wish to consider blind copying on emails to Board Directors about meeting logistics in order to avoid a recipient from "replying all" and starting a conversation about upcoming Board business. Further, chance meetings or social gatherings at which discussion of public business is not the central purpose are not public meetings. C.R.S. § 24-6-402(2)(e). To the extent that social media provides opportunities for chance meetings or social gatherings between Board Directors, a discussion may not be problematic. However, non-substantive conversations over social media (or email or text) can evolve into substantive discussions.

OML Tips:

- Use separate social media accounts/emails for official communications – this practice will help avoid a casual communication evolving into a substantive discussion;
- Remember to follow your District’s communications, civility, or other procedures, in addition to any social media policy; and
- When using official accounts or communication methods, write or say only what you would want to see on the front-page of the newspaper.

B. Colorado’s Open Meetings Law

The Colorado Open Records Act (CORA) is intended to broadly require that public records be open for public inspection, with a legislative intent section that provides: “It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in [CORA] or as otherwise specifically provided by law.” C.R.S. § 24-72-201. Unlike open meetings, open records laws in Colorado apply to public employees as well, not just to elected or appointed public officials.

As a reminder, here are the basic requirements of CORA (see C.R.S. § 24-72-202(6)):

- All writings [including correspondence]
- that are made, maintained, or kept
- for use in the exercise of functions required or authorized by law or rule or involving the receipt or expenditure of public funds.

Practitioners are likely to agree that social media posts (as well as texts) can constitute a public record under CORA (although, please note that as of the publication date of this article, there are not yet any published court decisions on this issue), because the definition of “writing” is very inclusive. The definition includes books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics – and includes digitally stored data, such as email messages. C.R.S. § 24-72-202(7). Please note, however, that social media posts or comments must also be made/maintained/kept for use in the performance of public functions or involve the receipt or expenditure of public funds to be subject to public inspection.

CORA requests for the social media information of public entities in Colorado are a newer kind of request, and the practice around responding to these is evolving. Some custodians have responded to such requests by pointing requesters to the social media account or site where the information is located. For comments posted on a public entity’s site by others (more on this follows), some public entities retain copies of comments that have been removed, pursuant to its “Terms of Service” or “User Agreement,” to have these comments available for public inspection, if requested.

If social media is being used for public functions in your District is using social media, engage in a discussion with legal counsel about how related CORA requests should be handled, update your CORA fee policies if needed, and include a records retention provision in your District’s social media policy.

CORA Tips:

- Use separate social media accounts/emails for official communications – this practice will help avoid complications where private communications and official business intersect;
- Remember to follow your District’s communications, civility, or other procedures, in addition to any social media policy – District officials and employees need to understand their roles and their speaking authority before taking official positions;
- When using official accounts or communication methods, write or say only what you would want to see on the front-page of the newspaper; and
- Confer with legal counsel on the following:
 - Does the email/text/social media post relate to public business/purpose?
 - Does an exception to releasing for public inspection apply?
 - May we refer the requester of social media posts to our District’s page?
 - How should we handle CORA requests for third party social media comments that we have removed for violating our terms of service?

C. Social Media and the First Amendment

In the last few years, a new legal development has appeared in the context of social media use: individuals have challenged being edited, deleted, or blocked comments or participation from the social media accounts of a public official or entity as viewpoint discrimination in violation of the federal First Amendment, guaranteeing the right to free speech.

Freedom of speech is protected against government restrictions in public forum/fora. For example, a town square is a traditional public forum where a government may enact reasonable restrictions (on time, place, or manner), but the government restriction cannot burden or discriminate against certain types of speech. While the United States Supreme Court has yet to review one of these challenges, various litigation is working its way through the federal courts on the question of whether public officials’ social media accounts have created a designated or limited public forum.

Here is an overview of a few of the published decisions which provide insight into how courts in different federal circuits and with different facts may construe viewpoint discrimination in the digital age:

- *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2nd Cir. 2019) (the U.S. Supreme Court later vacated on grounds of mootness) (holding that the President’s Twitter account that included content and discussion that was overwhelmingly public in nature created a public forum, and concluding that it was viewpoint discrimination to block specific users).
- *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that blocking a user from posting on the social media page of the Chair of the County Board of Supervisors, which was a public forum, was viewpoint discrimination).
- *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021) (holding that when a legislative candidate blocked a user from her Twitter account after posting crucial comments was not acting

under color of law because it was created as a private account and she used it for campaign purposes).

Of course, if a public official or entity's social media account does not allow comments, there is far less likelihood that an argument can be made that a public forum of any type was created. However, in an age where social media companies often use user engagement to prioritize the posts from a particular social media account, rather than chronological posts, prohibiting comments may impact your District's ability to reach its audience. But, without careful consideration of these issues prior to establishing a social media account, it is difficult to put the genie back in the bottle: once an account allows anyone to join and/or anyone to post comments, regulating speech may raise questions about public fora.

First Amendment Tips:

- First, decide whether your District's social media account will allow users to post comments;
- If your District allows comments, do you have the following in place or taken these steps?:
 - Terms of service which allow the District to remove/delete/edit threatening, obscene, defamatory, retaliatory, or otherwise illegal comments (also, violations of others' intellectual property rights);
 - District staff resources to moderate and/or review comments;
 - Clear delegation of authority to the right people at your District to moderate, review, or edit comments under the District's social media policy (no random staff making editorial or legal decisions);
 - An updated records retention or social media policy, including how the District will manage deleted comments; and
 - Conferred with legal counsel, if necessary?
- Provide training and information to your Board Directors and District employees, including avoidance of mixing personal social media with official District social media.

III. Resources

A. Examples of public entity social media policies or procedures

There are many good examples of social media policies or procedures on the internet – here are a few that your District might review when considering these issues:

- King County, WA; Social Media Handbook: https://kingcounty.gov/~media/about/News/Social-media/socialmedia/documents/Revised_Social_Media_Handbook_-_2020.ashx?la=en
- Colorado State University: <http://policylibrary.colostate.edu/policy.aspx?id=497>
- U.S. General Services Administration: <https://www.gsa.gov/about-us/newsroom/social-media/gsa-social-media-policy>

B. Template – Social Media Resolution

There may be more than one way that a District can adopt policies or procedures – one way is for the District’s Board of Directors to consider and adopt a Resolution providing high-level guidance to its employees. Once a Resolution is adopted, the District employees may then follow the policy set forth in the Resolution when drafting a more detailed Social Media Policy.

Please note that the template below adopts an approach for a District’s social media that would not allow user comments.

RESOLUTION NO. _____, SERIES _____ A RESOLUTION ESTABLISHING THE SOCIAL MEDIA POLICY

Resolved, by the Board of Directors of the [name of District] that the following is hereby adopted to set the policy and establish guidelines for the use by the District of social media sites as a means of conveying District information [its residents? the public? Designate the audience here]:

1.0 PURPOSE:

- 1.1 The intended purpose of the use social media sites by the District is to disseminate information from the District to [its residents? the public? Designate the audience here] to [purpose of information in social media posts, public information, transparency, emergency response...]. The Board has a primary interest and expectation in deciding what is communicated on behalf of the District on its social media sites.
- 1.2 For the purpose of this resolution, social media refers to any facility for online publication and commentary, including without limitation social networking sites such as Facebook, Twitter, LinkedIn and content hosting sites such as YouTube, as well as blogs and wikis.
- 1.3 This policy is in addition to and complements any existing or future policies of the Districts regarding the use of technology, computers, smart phones, email and the internet. This policy is applicable to all Board Directors, the [District Manager or equivalent] and District employees.

2.0 GUIDELINES:

- 2.1 The [District Manager or equivalent] or his/her designee shall adopt written policies regarding which social media platforms are appropriate for which to establish an official District site, but no social media account for which there are not adequate controls for managing the posting of content or comments shall be established.
- 2.2 The [District Manager or equivalent] or his/her designee shall adopt written policies on what content is appropriate to post on the Pool social media site, including but not limited to posts to inform residents on [District Manager or equivalent]. The policy must also include:
 - a. procedures requiring the documentation of written permission to post any content that is the intellectual property of others;
 - b. the prohibition on posting confidential, privileged, or protected information;
 - c. the retention and deletion schedule for any information or comments posted;
 - d. the prohibition on posting any matters pertaining to the public business of Members;
 - e. guidance on posting information that could be construed as a public record; and
 - f. guidance on establishing terms of service.

- 2.3 Posting on the District’s official social media accounts, or posts on other entities’ or third-parties’ accounts made on behalf of the District, must be approval by the **District Manager or equivalent** or his/her designee.
- 2.4 Posting on social media sites or accounts by other entities or third-parties on behalf of the District is subject to approval by the **District Manager or equivalent** or his/her designee.

3.0 Effective Date. This Resolution shall take effect _____, _____.

Approved the ___th day of _____, _____.

BOARD OF _____

BY:

President/Chair

ATTEST:

Secretary/Clerk

C. Template – Social Media Policy

There may be more than one way that a District can adopt policies or procedures – one way is for the District’s Board of Directors to consider and adopt a Resolution providing high-level guidance to its employees. Once a Resolution is adopted, the District employees may then follow the policy set forth in the Resolution when drafting a more detailed Social Media Policy, like the template below.

Please note that the template below adopts an approach for a District’s social media that would not allow user comments.

[NAME OF THE DISTRICT] SOCIAL MEDIA POLICY

Pursuant to Resolution No. _____, Series _____ (the “Resolution”), in which the Board of Directors (the “Board”) of the [name of the District] established guidance for social media for the District and directed the [District Manager or equivalent] draft written policies to implement the administration, the following are adopted as the social media policy (the “Policy”) of the District as of [date on which this Policy becomes effective]:

1.0 PURPOSES:

The Resolution established the below as the purposes for which the District may use social media and are restated here and incorporated into the Policy as follows:

- 1.1 The intended purpose of the use social media sites by the District is to disseminate information from the District to [specify audience and purpose]. The Board has a primary interest and expectation in deciding what is communicated on behalf of the District by the [District Manager or equivalent] on District social media sites.
- 1.2 For the purpose of this resolution, social media refers to any facility for online publication and commentary, including without limitation social networking sites such as Facebook, Twitter, LinkedIn and content hosting sites such as YouTube, as well as blogs and wikis.
- 1.3 This resolution is in addition to and complements any existing or future policies of the Pool regarding the use of technology, computers, smart phones, email, and the internet. This policy is applicable to all Board Directors, the [District Manager or equivalent] and District employees.

2.0 ADMINISTRATIVE GUIDELINES:

- 2.1 The [District Manager or equivalent] or his/her designee will:
 - a. Coordinate a process for reviewing all social media sites to determine which are appropriate for use by the District for the purposes set forth in Section 1. of the Policy.
 - b. Paragraph 2.1 of the Resolution provides that no official District social media account may be created for which there are not adequate controls for managing the posting of content or comments shall be established. Due to concerns over the burden of managing posted comments, the Policy currently prohibits any District social media account for which users may post comments.
[Please note, this provision prohibits accounts with comments; revise if allowing user comments.]

- c. Include the following “Terms of Use” statement in all Pool social media accounts:
The [specify full name of District here] (the “District”) maintains this social media account to enhance [specify audience and purpose]. Any information or content posted does not constitute legal advice. References to any specific commercial products, process or service by trade name, trademark, manufacturer, or otherwise, does not constitute or imply endorsement, recommendation, or favoring by the District. Content posted on this account may contain hypertext links to information created and maintained by other public and private organizations; please, be aware that the Pool does not control or guarantee the accuracy, relevance, timeliness, or completeness of this outside information. Be advised that the information available on this website may not reflect official positions or actions taken the Pool Board; however, information is posted to this account pursuant to the Pool Social Media Policy. The Terms of Use of this social media platform also apply.
- [If your District is allowing comments, see examples above for the Terms of Service provisions that may apply, including removal of threatening and other prohibited comments, including IP violations.]*
- d. Coordinate a process for reviewing, approving, and maintaining a list of authorized Pool Administrator users for any Pool social media accounts. Only one log-in and password account is allowed, and any account information must be provided to the Pool Administrator and Deputy Pool Administrator.
 - e. Coordinate security protocols for Pool social media accounts, including periodic password updates. Any security concerns that arise in the course of administering any Pool social media account should be escalated to the Pool Administrator and Deputy Pool Administrator.

3.0 CONTENT GUIDELINES:

- 3.1 In general, the audience for any content posted on a District social media account is [specify the audience]. The following list are the types of information or content appropriate for the District’s audience:
 - a. ...
 - b. ...
 - c. ...
- 3.2 Posting on the District’s social media accounts, or posts on other entities’ or third-parties’ accounts made on behalf of the District, must be approved by the [District Manager or equivalent] or his/her designee.
- 3.3 In general, posts on the District social media accounts should be scheduled consistently and in coordination with other communications or contacts to [specify the audience].
- 3.4 The following governs specific types of information or content on any District social media account:
 - a. Confidential, privileged, or protected information may not be posted.
 - b. Opinions or advocacy pertaining to the public business of the District, local, state or federal government may not be posted in order to avoid any political speech or campaign-finance issues.
 - c. Any posts related to a third-party vendor must supported by documentation of the vendor’s written permission to the Pool Administrator or his/her designee and reviewed by the Pool General Counsel prior to posting. Any posts related to a third-party vendor may only be for vendors with which the Pool has an active contractual relationship and must meet the informative purposes set forth in Section 1 of the Policy.

- d. Any content that is the intellectual property of others must be supported by documentation of written permission to the [District Manager or equivalent] or his/her designee and [potentially also reviewed by District general counsel] prior to posting.

4.0 CONTENT AND DOCUMENT RETENTION:

- 4.1 All information and content used and posted on the District's social media accounts shall be retained on the account for three years and retained internally for seven years.
- 4.2 Documentation of written permission for Section 3.4.d. shall be retained internally for seven years.