

# Keeping it Legal on Social Media

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**Presented by:**  
Julie A. Tappendorf  
Ancel Glink

**Ancel  
Glink** | DIAMOND BUSH  
DI CIANNI  
& KRAFTHEFER

## Take Home Tips

1. Gov't social media is probably a public record
2. Be careful not to “censor” comments
3. Employees will behave badly on social media
4. Adopt a social media policy to set guidelines for comments, records retention, OMA, FOIA, employee usage
5. Train, train, train

**Ancel  
Glink** | DIAMOND BUSH  
DI CIANNI  
& KRAFTHEFER

## Open Meetings Act

Will social media interactions and communications by your government officials be considered “meetings” subject to OMA?

**TAKE HOME TIP:** In Illinois, “electronic communications” appear to include social media communications.

## Freedom of Information Act

Is information on your social media sites (posted by you and others) subject to release under FOIA?

**TAKE HOME TIP:** Like OMA, “electronic communications” seem to include social media content.

## Records Retention

Are communications and other information posted on your sites subject to local record retention laws?

**TAKE HOME TIP:** The Illinois State Archivist just published guidelines for government agencies on what content on social media may be subject to records retention laws.

## First Amendment

- Are postings on government social media sites protected by the First Amendment?
- Is a government social media site a “public forum” or government speech?

**TAKE HOME TIP:** Don't be South Pittsburg.

## DON'T - South Pittsburg Example

Town commissioner's defense of South Pittsburg's comment policy which prohibits all negative comments on the town's social media sites:

"The first thing everyone wants to say is, 'I can't post anything on Facebook.' Well, you can. Just not [anything] that sheds a negative light on any person, entity, board, or things of that nature."

## DO - Comment Policy

The policy should identify the type of content that is not allowed and will be subject to removal.

**TAKE HOME TIP:** Make sure your comment policy/TOS (or a link to that policy) is posted on your social media sites.

**BONUS TAKE HOME TIP:** Be specific.

THIS: Discriminatory or racist comments will be removed.

NOT THIS: Criticism of the City will not be tolerated.

## DO - Comment Policy

Comments containing any of the following inappropriate content will not be permitted on government social media sites and are subject to removal and/or restriction:

1. Comments not related to the original topic, including random or unintelligible comments;
2. Profane, obscene, violent, sexual, or pornographic content and/or language;
3. Content that promotes, fosters, or perpetuates discrimination on the basis of race, color, age, religion, gender, sexual orientation, or national origin;
4. Defamatory statements or personal attacks;
5. Threats to any person or organization;
6. Solicitation of commerce, including advertising of any business or product for sale;
7. Conduct in violation of any federal, state, or local law;
8. Encouragement of illegal activity;
9. Information that may tend to compromise the safety or security of the public or public systems;
10. Spam or links to other sites;
11. The promotion of services, products, or activities not related to District business;
12. Content in support of or opposition to political campaigns or ballot measures;
13. Information about a user that is private or personal; or
14. Content that violates a legal ownership interest, such as a copyright or trademark.

## Copyright Issues

- Does the government have permission to use content posted on its social media sites (i.e., photos and videos)?
- There is no blanket government exception to copyright laws.

**TAKE HOME TIP:** Create your own content (i.e., take and use your own photos)

## Use of Citizen Photos

- **Typical Photo Release**

Photos and videos are periodically taken of people participating in government programs and activities. All persons registering for government programs/activities, or using government property thereby agree that any photograph or videotape taken by the government may be used by the government for promotional purposes including its promotional videotapes, brochures, flyers, and other publications without additional prior notice or permission and without compensation to the participant.

- **So, what is missing?**

## The Anonymous Poster

- The identity of an anonymous poster on social media may be disclosed by court order if the individual requesting disclosure can establish that the anonymous posts meet the standard for “defamation.”

## Private vs. Official Sites – Employees/Officials

- Is the site private or an official site of the government?
- If private, do visitors perceive the site as an official site of the government?
  - Is the site misleading?
  - Is there authority to represent the government?
  - Is there government control over the site?

## Employees Behaving Badly

- So many examples...

## “I wish I could get fired...”

*“I wish I could get fired some days, it would be easier to be at home than to have to go through this.”*



Sometimes, wishes do come true.

## This is your car on drugs...

- The NLRB upheld the termination of a BMW salesman who posted the following on Facebook after a customer's 13-year-old son drove an SUV into a pond:
  - "This is your car: This is your car on drugs."
  - "The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOPS!"

## “Patient privacy, what’s that?”

A dispatcher posts a screenshot of a patient call, including name, personal information, and description of a medical emergency.

## Recent Cook County Resignation



**Daniel F. Gallagher**

I think Moosechelle was hiding a secret service agent in the seat of her dress.

**Daniel F. Gallagher**

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As Eddie Murphy would say, "Da bitch ugly!".

## “Like” = Speech

Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page.

A “like” can be speech, and political speech is protected.

## Discipline

### Employers can discipline for:

- Excessive use of social media at work
- Disclosure of confidential information
- Making false statements about employer

### Protected vs. not protected activities:

- Protected concerted activities among co-workers - protected
- Matters of public concern – protected for public employees
- Individual gripes and personal attacks – not protected

## Purpose of a Social Media Policy

- Social media policies are important to:
  - Govern the administration, monitoring, and retention of site content
  - Set ground rules for public input and comments
  - Establish policies for employee use of social media

**TAKE HOME TIP:** Draft your purpose statement first – all of the substantive policies should further your purpose.

Ex: The purpose of the City's Facebook page is to disseminate information to City residents and others about City activities and events.

## Approval and Administration

- An administrator should be appointed to oversee and supervise the government's social media sites.
- The administrator should be trained on the policy and his or her responsibilities.

**TAKE HOME TIP:** The intern should not be in charge of your social media sites.

## Scope of an Employee Policy

- Conduct on the employer's official social media sites.
- Conduct "on the job" or on employer equipment.
- Conduct outside of work that may impact employer.

**TAKE HOME TIP:** Be careful about restricting or disciplining for an employee's exercise of protected speech (i.e., speaking on matters of public concern).

## Employee Usage Policy

- Establish clear guidelines and boundaries for employee social media activities.
- Communicate whether social media use at work will be banned or minimal use allowed.
- Protect confidential and sensitive government information.

**TAKE HOME TIP:** Zero tolerance policies are difficult to enforce. Be careful of unequal enforcement.

## Employee Monitoring

- Caution employees they have no expectation of privacy on government equipment.
- If you monitor employee usage on government equipment:
  - Balance government interest and employee privacy rights

**TAKE HOME TIP:** Provide notice to employees if you monitor and have them sign an acknowledgment.

## Employee Training

- Employee training is important, particularly because technology changes so quickly.

**TAKE HOME TIP:** Have employees sign an acknowledgment that they (1) read the policy and (2) received training.

## Questions

Julie A. Tappendorf  
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer  
Chicago, Illinois  
312-604-9182  
[jtappendorf@ancelglink.com](mailto:jtappendorf@ancelglink.com)



Visit Julie's blogs:

Municipal Minute

<http://municipalminute.ancelglink.com>

Strategically Social

<http://strategicallysocial.blogspot.com>

Twitter: @julietappendorf and @municipalminute