

Ramsey Ramerman

Subject: RE: Local Government's use of Web 2.0 sites

From: Ford, Tim (ATG) [mailto:TimF@ATG.WA.GOV]
Sent: Tuesday, July 07, 2009 3:11 PM
To: Ramsey Ramerman
Subject: RE: Local Government's use of Web 2.0 sites

Attached is an email from Russel Wood at Archives. He gives some guidance on retention of twitter posts, etc. I inserted some answers [in red] below in the text of your email.

Tim

From: Ramsey Ramerman
Sent: Tuesday, May 19, 2009 8:54 AM
To: 'Ford, Tim (ATG)'
Cc: Ramsey Ramerman
Subject: Local Government's use of Web 2.0 sites

Tim

Per our conversation yesterday, I wanted to ask your opinion about the use of Web 2.0 sites such as Facebook, Twitter and YouTube by local governments. Specifically I wanted to know your opinion about:

1. Records retention: What do local governments need to retain? Is a Word version (or other native format version) of the content they add to these sites sufficient? Do they also need to save screen shots? If so, how often? Do they need to retain copies of any comments posted by the public? Should they allow comments?

Russel Wood's email answers most of question 1.

Agencies which post on social networking websites like Twitter should retain the content they post if it meets the definition of a "public record" under RCW 42.56.010. If the content is retained, then it is really not necessary to take a screen shot.

Whether you want to retain records by using a screen shot will just depend. If an agency posts infrequently on Twitter, then maybe a screen shot is a good idea because it may only be a one page website. Aside from Twitter, most agency websites are not just one page where a screen shot might be a useful tool for retention purposes. Most agency websites are an aggregation of different pages, documents, and interactive programs. A screen shot is not a useful tool for dynamic websites with multiple pages that are updated frequently. If an agency wants to use a screen shot to retain records, then it probably needs to take a screen shot every time the website is updated.

It doesn't make sense to use a screen shot for retention purposes for another reason. [Example: A policy memo is drafted for a client agency. The memo is retained pursuant to the agency's retention schedule.

The client later wants the memo posted on a website. The document is already being retained so why take a screen shot?]

Whether an agency allows public comments on a website will depend on the agency's need and purpose for the website, both of which are policy concerns. I caution agencies that if they allow public comments by creating a "general public forum" on an agency website, then there are first amendment concerns of free speech if a government agency later censors the comments. Public comments on websites may or may not be a public record. That will be determined by the agency purpose for the webpage and use of the comments. If the purpose of allowing public comments is to provide the governing body an opportunity to gauge public sentiment, and the comments are printed and distributed for reading by members of the governing body, then the comments are likely public records.

2. Public Records Act: What is the "public record"? Is it the content the agency adds? Does it include the "look and feel" parts of the website that is supplied by the Web 2.0 site? Or are the look and feel parts not "related to the conduct of government"? What about comments? What format is required: The native format of the content or screen shots of what is actually visible on the site? For Twitter, if the agency subscribes to any person, are the received tweets public records? How should they be retained?

The public record is usually just the content posted by the agency. The look and feel may include a logo that is also a public record. However, not all meta-data that relates to the look and feel of a webpage will be a public record. Meta-data like the HTML hexadecimal color code for the background of the webpage is probably not related to the conduct of government, especially when it is supplied by the private company providing the website and not the government agency.

Agencies should retain and disclose electronic records in an electronic format, but it is not required to be in the native format. For disclosure, the AG's model rules state an agency may provide records in a generally commercially available format or a reasonably translatable electronic format. WAC 44-14-050.

Subscribing to tweets may make those tweets a public record depending on the use and purpose.

3. First Amendment and comments (this is beyond the open government aspect so if you can't opine, that's OK, but it would be really helpful, particularly in light of your advice to Palouse and Spokane Valley concerning comments at open public meetings): What type of limitations can an agency put on comments? Should agencies have policies that govern content and then remove comments that violate the policy, or should agencies pre-screen comments to ensure they comply with the policy? Can agencies limit comments to topics posted on the site?

It depends on the purpose for allowing comments. The Palouse example was a public forum for general comments on anything. The Palouse council continues to provide that forum after I wrote my letter because they think the forum is good. I agree. However, what may be good for Palouse may not be needed for a different agency. Palouse is a small town that provides general services, so a general forum for public comments is smart. A different type of public agency, like a licensing board, may only need public comments on narrow topics, and it may choose to create a limited forum. The constitutional test for limiting comments is different depending on whether government creates a general forum or a limited forum. Determine the agency need and then create a forum to match the need. Agency policy for removing comments should be based on a close read of case law.

4. Open Public Meetings laws: Can a council member use a site like Facebook? What precautions should council members take to ensure compliance with the OPMA? What steps should a council member take for a personal site to ensure that it does not have OPMA or PRA implications?

A council member has a First Amendment right to create a personal website. A personal website is a medium for communication to the public at large and with an individual commenter. Council members should be careful not to have inadvertent communications with other council members through that personal website for issues that may come before the governing body for consideration. (See my post

on “Unredacted” regarding informal communications between council members.
<http://www.atg.wa.gov/UnredactedPost.aspx?id=23030>.)

I don't think a personal website implicates the PRA, although there can be exceptions. Part of the definition for a “public record” requires that a writing related to government conduct is “prepared, owned, used, or retained” by an agency. A council member's personal website is generally not an agency use. However, if postings on a personal website are the equivalent of a “meeting” like in the Wood case, then those postings are arguably public records. Any posting that is later forwarded to an agency for governmental action could be a “public record” once in the possession of the agency.

5. Terms of agreement and state laws (again, this is beyond the open government issues): Can local governments assume from the AG's use of Web 2.0 sites that there are no terms at least in Facebook, YouTube and Twitter, that are inconsistent with state law?

I think there is a group looking into this question. I will ask around. I am guessing that our “initial” assessment did not find any terms inconsistent with state law, but I don't know if there was a formal or informal assessment.

Here is a link to my post this morning on this issue:

<http://www.localopengovernment.com/2009/05/articles/lauderdale-city-attorney-tells-politicians-stay-off-facebook/>. Let me know if you have any comments or you think I have missed something.

I'd also be interested in your opinion of whether these questions would be better suited for a formal AGO.

Thank you so much.

Ramsey

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