

# SOCIAL MEDIA 101

AWC EOE Webinar Series 2024

September 18, 2024



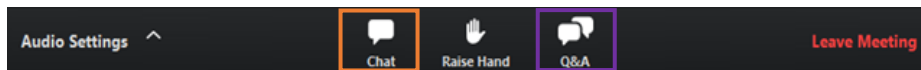
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# Recording and presentation

- This training is being recorded.
- A copy of the recording, the presentation and any additional resource materials will be provided in a post-event email that will be sent out next week.



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# Presenters



**Sarah Doar**

Legal Consultant  
*MRSC*

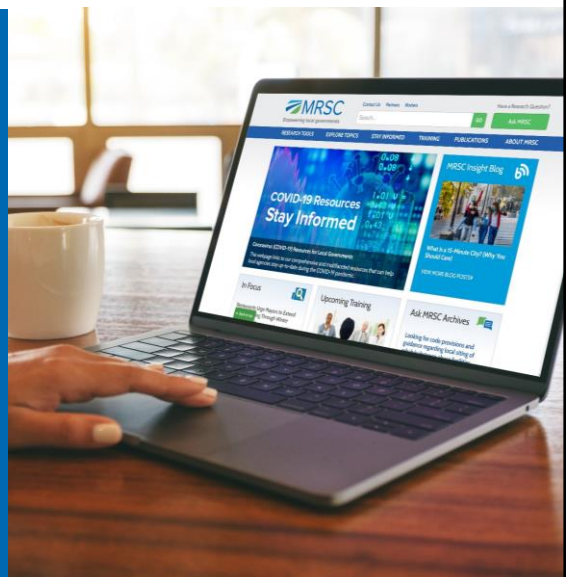
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# Agenda

## Social Media 1<sup>st</sup> Amendment Liability

- The *Lindke* decision's test for liability
- Policies and practices to reduce liability

## Social Media and Public Records

- When are social media posts public records?
- Searching for and retaining public records

## Social Media and Public Meetings

- How to avoid turning social media exchanges into "meetings" subject to the OPMA

## Campaigning on Social Media

- Campaign on personal time only!



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# Social Media 1<sup>st</sup> Amendment Liability

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# 1<sup>st</sup> Amendment Liability



- City social media is a public forum, and the public has a 1<sup>st</sup> Amendment right to interact by posting, commenting, etc.
- Violations of rights can lead to §1983 liability
- **But**—social media is not a “traditional” public forum (like a city sidewalk or park), so cities can regulate their social media by:
  - adopting viewpoint neutral limits on topics, content or statements
  - deleting comments or blocking users that violate

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# City Social Media Policy Example



## City of Sumner

### 18.2.5 Prohibited Content

The City of Sumner welcomes dialogue with the public. Although we encourage posts and comments on City of Sumner Social Media sites, these sites are limited public forums and are moderated by City staff. All posted content (comments, photos, links, etc.) must be related to the topic at hand. The following are prohibited on City of Sumner Social Media sites:

- a. Comments not topically related to the particular post being commented upon;
- b. Posts and comments seeking to utilize City resources to promote a personal cause or commercial sales endeavor outside community-building events and efforts as outlined in the City of Sumner event process;
- c. Political statements, including comments that endorse or oppose political candidates or ballot propositions, are prohibited under state law (RCW 42.52.180);
- d. Posts and comments that promote, foster or perpetuate discrimination on the basis of creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation;
- e. Posts and comments that include vulgar, offensive, threatening or harassing language, personal attacks or unsupported accusations; or that encourage or is anticipated to incite violence;

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## 1<sup>st</sup> Amendment Liability



What happens when councilmembers include *official* city business on their *personal* social media (that's not city regulated)?

Does this mixing of personal and official city business convert the councilmember's personal social media into a 1<sup>st</sup> Amendment protected public forum?

U.S. Supreme Court answers in *Lindke v. Freed*, 2024...

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## *Lindke v. Freed* Facts



- City manager Freed uses his personal Facebook page (that states his CM status) to mix personal and work-related COVID-19 posts
- Resident Lindke comments, and Freed deletes them and eventually blocks Lindke from posting
- Lindke sued, claiming that Freed's blocks violated the 1<sup>st</sup> Amendment / §1983 because the blocks were "state action" taken in Freed's official city capacity

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# Councilmember Speaking Authority



## Prior Washington Law

Councilmember's official speaking authority on personal social media **depends on perception:**

- Councilmember represents or pretends that their social media activity is official, and
- Councilmember's representations/pretense influenced others' behavior



## New Rule (*Lindke*)

Councilmember's official speaking authority on personal social media **depends on actual speaking authority city gives:**

- City has given councilmember actual speaking authority on a topic, and
- Councilmember claims to be using that actual given authority when communicating on social media

Claimant has burden to show city gave speaking authority and that councilmember used it in social media activity

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## *Lindke* Takeaway



Three things determine whether a city has given its councilmembers actual authority to speak officially on personal social media

- City **enactment** of policies regulating official speaking authority on personal social media
- Consistent **enforcement** of enacted social media speaking policies
- City **history** of giving official speaking authority on personal social media (either to a specific individual or to a position)

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## Enactment of Policy Regulating Speaking Authority



### Be specific and definite

- **Limit** city approval of official social media use to city owned and regulated social media platforms
- **No approved use of personal social media** to communicate city business (be topic general and viewpoint neutral)
- **Clearly require city authorization to speak on city matters** (requirement to “cc” city officials on communications not enough)

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## Consistent Enforcement of Enacted City Social Media Policy



### Enforce enacted policies consistently and uniformly

- Courts can consider failure to enforce prohibitive social media speaking policies as a form of speaking authorization
- Enforcement content and timing
  - **Address communication *method* (personal social media) in enforcement measures**—only address communication *content* as needed to identify it as regulated city business
  - **Enforce *after* violations occur**—avoid enforcing to pre-emptively prohibit anticipated social media statements

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# City Historical Speaking Authorization as Source of Speaking Authority



- “As in years past, all communications regarding [topic] shall be directed to councilmember”
  - Historical speaking authority given to an **individual**
- City practice to rely on a council special focus area chair to update the community on particular city topics
  - Historical speaking authority given to **position**

Unclear—how much “history” is “history”?

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# Social Media Speaking Authority



## Potential policy language to address councilmember personal social media speaking authority

- Official city communications require express City authorization. Unauthorized statements or discussions on personal social media are personal in nature, and given in personal capacity
- City approves no personal social media use to discuss official city business or to formally communicate with the public on city matters
- Any public concerns/complaints received on personal social media shall be directed to city officials for official response and follow up
- City policy requires that communication of official city announcements, updates and responses to individual concerns occur only through city managed social media (or other official city communication)

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## Example Policy Language



### Cities of Vancouver and Cheney

Social media **are not to be used** as mechanisms for conducting official city business other than to informally communicate with the public. Examples of business **that may not be conducted** through social media include making policy decisions, official public noticing, and discussing items of legal or fiscal significance that have not previously been released to the public. Councilmembers' social media site(s) should contain links directing users back to the City's official website for in-depth information, forms, documents or online services necessary to conduct official city business.

Upon the advice and recommendation of the City Manager and staff and at the discretion of the Council, social media applications, tools or sites may be limited or banned by Council if they are not or cannot be used in compliance with this policy.

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## Example Policy Language



### Cities of Yakima

17. City employees and/or elected officials are discouraged from using personal equipment and/or personal accounts to post information to official City social media sites. City employees and/or elected officials are similarly **discouraged** from using personal equipment and/or personal accounts to post information regarding official City business on other social media sites. All social media site posts by City employees and/or elected officials regarding official City business are subject to Washington State public disclosure laws, open meetings laws, and all other applicable laws, rules, and regulations.

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## Practical Guidance



### Councilmember personal social media use

- **Label** personal social media pages to avoid confusion: (“this is the *personal* Facebook page of Councilmember \*\*\*)”)
- **Include communication disclaimers:** “unless otherwise specifically indicated, all opinions expressed here are strictly my own”
- **Include council-adopted official positions** on topics whenever they differ from stated personal opinions
- **Remind councilmembers:** they can be *personally* liable for 1<sup>st</sup> Amendment violations under §1983

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## Practical Guidance



### City policy enforcement

- Provide councilmembers with social media policies and guidance at their onboarding/term start
- Give councilmembers periodic policy “refreshers”
- City enforcement measures against councilmembers are limited, but can document and communicate “violations”
- Propose and encourage the council to adopt its own social media rules for self-enforcement

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# Social Media and Public Records

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## Public Records



Posts on a councilmember's personal social media are public records **if:**

- **Topic:** the posts refer to or impact city actions, processes or functions; **and**
- **Authority:** the councilmember posted in their official capacity—any one of the following qualifies:
  - Councilmember's city position *generally* required the post
  - City *specifically* directed the post
  - Post furthers city interests (more than a minimal amount)

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## Searching for Public Records in Response to Requests



- Agencies must search personal social media accounts if they are likely to contain responsive records
- ***Nissen v. Pierce County (2015)***: agencies can meet search requirement if officials search their own personal accounts for records and give the city an affidavit/declaration reasonably detailing search places and search terms used
- Failure to do adequate search or to timely produce records = agency liability

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## Records Retention Schedule



Cities are also required to **retain** public records in accordance with Secretary of State City CORE records retention schedule

- If social media posts qualify as public records, city must keep them for 2 years, then:
  - Must transfer the posts to State archives after **2-year** retention **if** a city elected official or executive is a post sender or receiver
  - Can destroy other posts, but if they contain other city records, confirm that city has retained primary copies of them before destruction

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# Sample Social Media Records Retention Policy



## Cities of Vancouver

### 8.0 Records Retention Act Compliance

State and local records retention laws and schedules apply to social media content. All social media content that is required to be retained by the City shall be maintained for the required retention period on a City server in a format that preserves the metadata of the original record.

Prior approval of the retention format and procedures *for each social media tool being used* by Council members to conduct City business must be received from the City Manager upon the advice and recommendations of the Public Records and Information Technology staff. It is the responsibility of each Councilmember to either register their social media account(s) with the City Information Technology Department for capture and archiving by the City, or independently maintain current, approved retention procedures, and ensure that those procedures are followed.

Councilmembers who do not register applicable social media accounts with the City should consult with the City Manager and appropriate staff for the applicable retention schedule and method.

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## Social Media and Public Meetings

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# Public Meetings



The OPMA (RCW 42.30) applies to councilmember “meetings” that include “action”

- **Meeting**—*Egan v. Seattle* (2020)—“meetings” are gatherings with collective intent to transact agency business / take “action”
  - *Wood v. Battle Ground S.D.* (2001)—councilmembers can “meet” even when not physically present together
  - Social media exchanges between councilmembers can create “serial” meetings—a series of less than quorum/majority meetings that can add up to a “full” meeting
- **Action**—RCW 42.30.020(3)— “action” is transacting agency business— includes councilmember discussions, considerations, reviews, decisions, etc.

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# Legal Issues

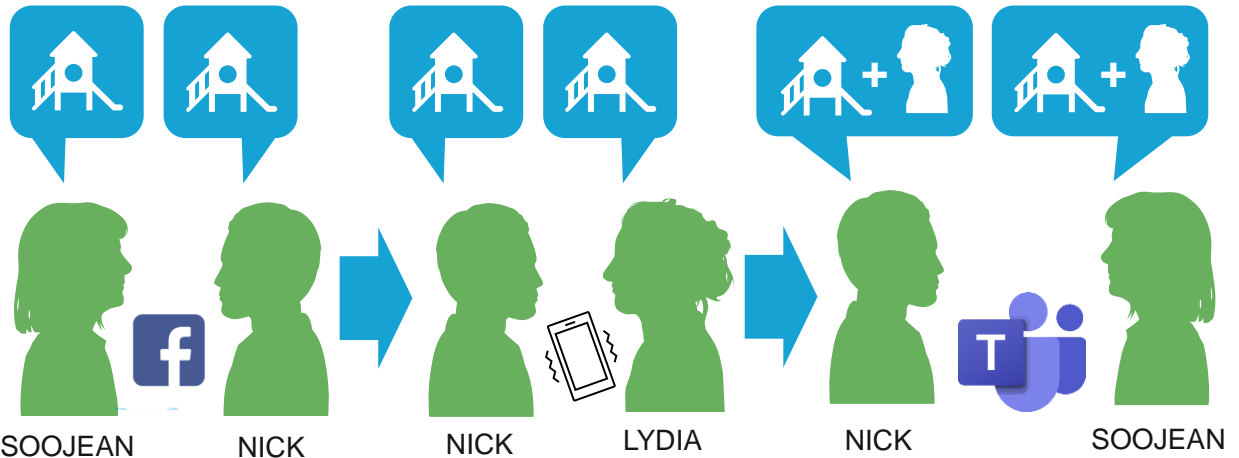


When councilmember social media activities become a “meeting,” the following violations may occur:

- **Meeting location**—non-emergency social media exchanges involving council quorum have no physical meeting location for public attendance (may violate RCW 42.30.070)
- **Public comment**—if councilmembers’ social media exchange includes “final action,” the public has no chance for public comment (RCW 42.30.240)
  - **Final action**—collective decision or vote by majority
- **Secret votes**—RCW 42.30.060 prohibits “secret” council votes outside of public meetings

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## Serial Meeting: Facebook, Text, Chat



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## OPMA Violation on Social Media



Although these are separate, individual and discrete social media communications, collectively a 3-member quorum has discussed agency business

- A council meeting with action subject to OPMA
- **OPMA violations**
  - No public attendance at “meeting”
  - No public comment with final action (collective decision to pursue park development plan)

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## Not OPMA Violations



- Less than council majority meets in private
- Councilmembers *passively* receive information with no response or discussion
- ***Seattle v. Kaseburg (2018)***: councilmember e-mail exchanges with individual community members that are not circulated among council majority (may also apply to social media exchanges)

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## Campaigning on Social Media

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## Campaign Statements



RCW 42.17A.555 prohibits city employees and officials from using “city facilities” to campaign for or against a ballot measure or a political candidate

- City facilities include use of city computers or cell phones to access personal social media for campaigning
- Campaign statements made at an open press conference or in response to a specific inquiry are OK so long as no public facilities used

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## Campaign Statements



**Public Disclosure Commission (PDC) guidance is that elected officials can:**

- Campaign on their own time using no city facilities
- Speak publicly about a candidate or ballot measure **if**
  - the city has adopted a formal position/resolution about it, **or**
  - the official clearly indicates they are speaking for themselves and not for the city

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