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Public body social media rules make retention, ready retrieval imperative

Many public bodies have increased their use of social media platforms, such as Facebook and Twitter, to communicate with the public.

Public bodies need to be conscious of the legal record-keeping obligations that come with using social media. Social media platforms pose new challenges to record-keeping as most platforms are controlled by an independent third-party entity. Entities such as Facebook and Twitter are not subject to the same regulations as public bodies and cannot guarantee that the public body will have control over everything that is posted on their platform.

Additionally, the public body may not have control of how long the content is retained on the social media platform or how and when the content is deleted.

When using social media platforms, public bodies need to be conscious of their compliance with the Illinois Freedom of Information Act and the Local Records Act.

FOIA defines "public records," in part, as including "all records, reports ... recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics having been prepared by or for, or having been or being used by, received by, in the possession of or under the control of any public body." 5 ILCS 140/2(c).

Under this broad definition, social media posts can be categorized as public records prepared or used by a public body. In addition, this definition contains a catch-all provision that focuses a public body on the content and control of the record and not on the physical characteristics which are varied by social media platform.

In instances where the public

body has shared something on social media that has also been published on its website, the public body only has a duty to direct the requester to the website where the record can be reasonably accessed. See FOIA Section 8.5(a).

The LRA defines "public record," in part, as "any book, paper, map, photograph, born-digital electronic material, digitized electronic material, electronic material with a combination of digitized and born-digital material or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures or other activities thereof, or because of the informational data contained therein." 50 ILCS 205/3.

Similar to FOIA, the LRA has a broad definition that encompasses

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most records so long as the record is executed or received by a public body or in connection with the transaction of public business.

Social media posts are likely evidence of the organization and function of a public body, and as such, social media posts can be categorized as public records requiring retention under the LRA.

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The Illinois Secretary of State's Office recently issued guidance on this issue. According to the guidance information, social media posts are considered public records if: (1) either the post is made using an official public body account or a private account is used to post information to the public for the public body; and (2) the content is unique.

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Additionally, the public body does not need to preserve redundant content in all its forms. For example, if the same event announcement is put out via both a public body news release and a post on an official public body social media account, then only one copy must be kept. However, if the content between the news release and the social media post

were to differ significantly, they should be considered unique records and both should be retained by the public body.

Social media posts where the public body engages in dialogue through social media or acts upon a social media "comment" from members of the public could also require retention of the relevant social media posts. While comments and posts made by the public on official public body social media accounts are not by themselves public records, if the public body engages in a dialogue on social media, or acts upon a post, this could trigger the requirements of FOIA or the LRA.

If the public body acts upon a post, the public body should make an effort to retain a copy of the post. Due to this additional requirement, the public body may want to minimize dialogue with the public over social media. Capturing and preserving posts on social media may be challenging as the social media platform may not have a convenient way for the public body to transfer this information to their agency controlled medium for retention.

The public body should also be conscious of FOIA requests that may be made via social media. The public may make requests for certain records on the public body's social media page. The public body should monitor and be aware that FOIA requests made on the social media page are considered a valid form of communication for FOIA purposes and should follow up on any requests no matter how vague the request may be.

If a public body intends on using social media platforms, the public body should have record retention policies that incorporate retaining and archiving social media posts that communicate public business for the public body and are unique to the public body's social media site(s).