

Social Media and Open Government Laws



**LEOFF 2 Board Meeting
November 15, 2017 – Olympia, WA**

**Presented by Tor Jernudd / AAG.
Slides and Training developed by Nancy Krier
Assistant Attorney General for Open Government
Office of the Attorney General**

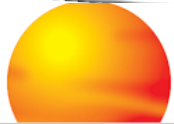


Some Headlines - Washington

BUSINESS JULY 27, 2016 5:34 PM

Three Tacoma groups take exception to PDC executive director's social media comments

BY KATE MARTIN
kmartin@thenewtribune.com



DAILY SUN

Your Lower Yakima Valley News Leader

Home News Sports Opinion Lifestyle Obituaries and Births Events Media Classified

Prosser librarian on leave

Teacher also under fire for Facebook post on immigrants

By Roger Harnack

Wednesday, Fe



BY CANDICE RUUD
cruud@thenewtribune.com
OCTOBER 06, 2017 11:00 AM

Nissen : Open records advocate suing Clark County over Madore's Facebook



KEY MARKET 08/11/2016 | 09:24pm EST

DuPont planning commissioner fired after Facebooking about controversial zoning changes

Nextdoor flap has Seattle scrutinizing how it handles social media

Originally published March 14, 2016 at 6:00 am | Updated March 17, 2016 at 10:16 am

goskagit.com
powered by SKAGIT VALLEY HERALD

Social media lights up after sheriff's Facebook post

By KERA WANIELISTA @Kera_SVH Jul 14, 2016 (28)

Some Headlines – Other States



1 Do municipal Facebook pages and comments count as public records?



Spo

Ruling says public officials' Facebook pages are public record in Pa.

Updated on August 17, 2017 at 5:07 PM, Posted on August 17, 2017 at 4:50 PM

Burlington Free Press
PART OF THE USA TODAY NETWORK

Condos: Social media discussions can be public meetings

MINNPOST

Social media chatter is not an 'open meeting'

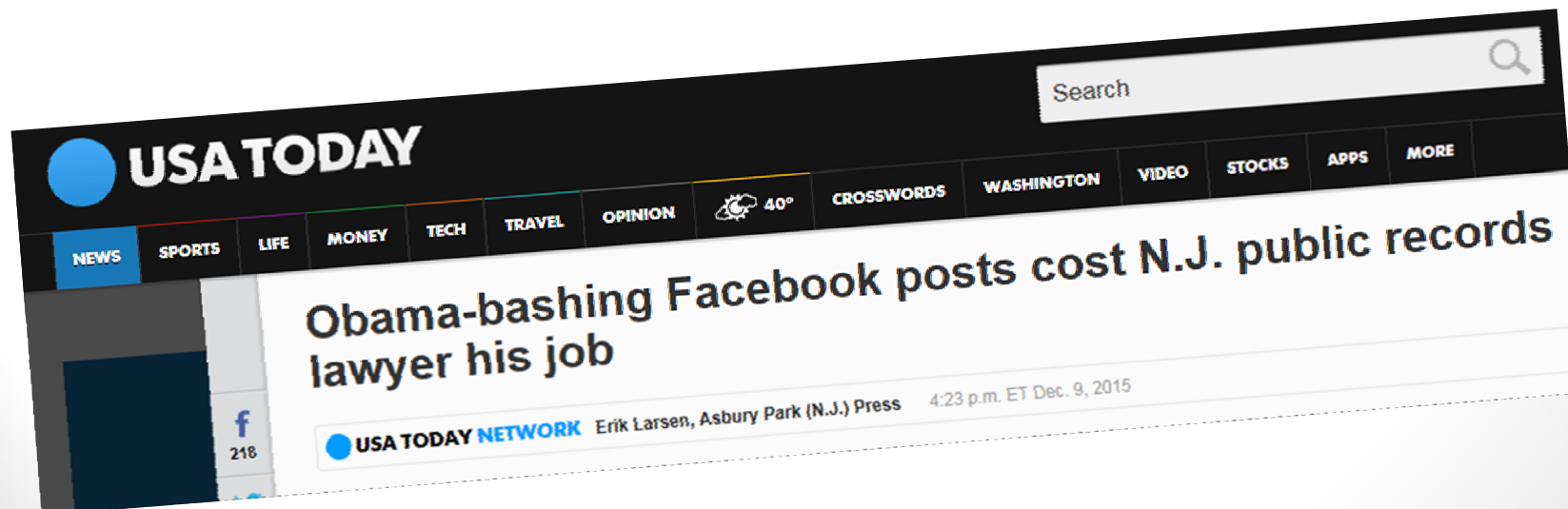
POLICY —

Politicians' social media pages can be 1st Amendment forums, judge says

Officials retain right to moderate comments to combat online trolls, judge says.

DAVID KRAVETS - 7/28/2017, 10:18 AM

Now there's some legal precedent on the matter. It comes from a federal judge in Virginia who said that a local politician had violated the First Amendment rights of a constituent because the politician briefly banned the constituent from the politician's personal Facebook account.



Some Headlines - Federal



Donald Trump's Tweets Are Now Presidential Records

The law says official presidential records must be preserved, and that includes tweets.

By [The Conversation](#), Contributor | Feb. 1, 2017, at 3:00 p.m.

POLITICS 03/09/2017 04:38 pm ET



Congress Warns Donald Trump: Stop Deleting Your Tweets

By doing so, Trump and his staff may be violating federal record keeping laws.



THE WALL STREET JOURNAL.

WASHINGTON WIRE | WHITE HOUSE

Senator Seeks Probe Into White House Official's Tweet

Tom Carper suggests Trump social media director violated prohibition on political activity by federal workers

Hatch Act Protects Freedom of Political Speech on Social Media... to a Point

By [Mathew B. Tully, Esq.](#) | March 26, 2017 | [Human Resources](#) | [Comments \(16\)](#)



THE BUSINESS OF FEDERAL TECHNOLOGY

Comment

Social confusion: Looming records mandates and social media

By [Austin Adams](#) Jun 03, 2016

Congressman Introduces 'COVFEFE Act' to Make Social Media Posts Part of Presidential Records

POSTED 5:39 AM, JUNE 13, 2017, BY [CNN WIRE](#)

Quigley's bill turns the buzz word into an

acronym standing for the Communications Over Various Feeds Electronically for Engagement Act, which would broaden the scope of the Presidential Records Act of 1978 by including the term "social media" as documentary material.

On May 31, President Donald Trump declared at 12:06 a.m. on Twitter: "Despite the constant negative press covfefe."



Social Media

Lawsuit challenges Trump's Twitter blocks

By Adam Mazmanian Jul 11, 2017

Is it unconstitutional for the president of the United States to block a Twitter follower?

That's the question raised by a lawsuit filed July 11 by the Knight First Amendment Institute at Columbia University on behalf of several individuals who say they've been blocked by President Donald Trump's Twitter account.

The suit, filed in the U.S. District Court for the Southern District of New York, also names White House Press Secretary Sean Spicer and Social Media Director Dan Scavino as defendants.



Your attention please

Examples of Public Records Act penalty orders, judgments and settlements following lawsuits by requesters alleging PRA violations by a public agency.
(Does NOT include attorneys fees and costs in all cases).

- **\$600,000** – Snohomish County
- **\$575,000** – Snohomish County
- **\$550,000** – Clallam County
- **\$502,827** – L & I (*upheld by State Supreme Court*)
- **\$500,000** – Board of Accountancy (*global settlement of 7 lawsuits and 15 PRA disputes*)
- **\$488,000** – Bainbridge Island (*\$350,000 penalty, remainder is attorneys fees/costs*)
- **\$371,340** – King County
- **\$192,000** – LCB (*included other open government claims*)
- **\$187,000** – Port of Olympia
- **\$175,000** – Mesa (*reduced from \$353,000 - possible appeal*)
- **\$174,000** – Seattle
- **\$164,000** – Port of Kingston
- **\$100,000** – Shoreline (*with attorneys fees, total amount was more than \$500,000*)
- **\$100,000** – Spokane County
- **\$85,000** – San Juan County
- **\$50,000** – Tacoma
- **\$45,000** – Kennewick
- **\$45,000** – Everett
- **\$45,000** – Port of Vancouver

-
- **\$723,290** – UW (*reversed on appeal*)
 - **\$649,896** – DSHS (*reversed on appeal*)



Washington - Two Sunshine Laws

Open Public Records

RCW 42.56

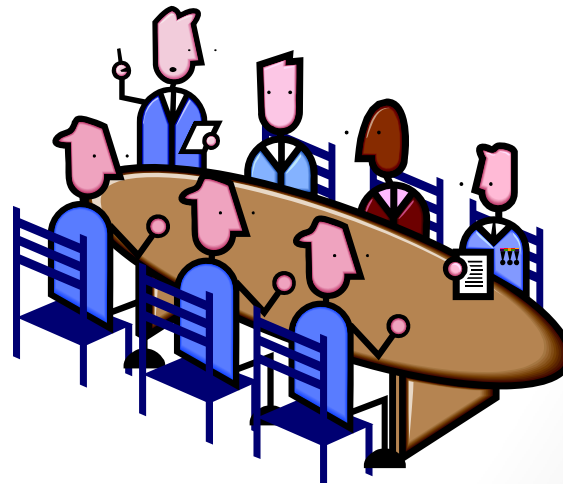
Public Records Act
(PRA)



Open Public Meetings

RCW 42.30

Open Public Meetings Act
(OPMA)



Intent



Open Public Records

- “The people of this state do not yield their sovereignty to the agencies that serve them.”
- “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so that they may maintain control over the instruments that they have created.”
- The “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”
- Liberal construction.

Open Public Meetings

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Scope & Penalties

Open Public Records

- PRA applies to “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”
- Includes paper records, **electronic records**, emails, overheads, photographs, CDs, microfiche, etc.
- **Location of record does not matter for PRA purposes.**
- **Agency must conduct reasonable search where public records are likely to be found.**
- Court can impose penalties & attorneys fees for agency violations of PRA, such as not producing responsive records.

Open Public Meetings

- OPMA applies to **multi-member public state and local agency governing boards.**
- Applies to **quorum of such a board or commission transacting the agency’s business (‘action’), including “discussion.”**
- **Location of meeting does not matter for OPMA purposes.**
Case law: could be via email.
- Court can impose penalties & attorneys fees for knowing violations of OPMA.

Court Cases



Open Public Records

- PRA case law provides that “public records” must be provided by a public agency, even if located in an employee or official’s private account or device.
- See upcoming slides.

Open Public Meetings

- OPMA case law provides that a meeting can occur via email, phone.
- While no current case, same principles presumably apply to social media.
- See upcoming slide.

Social Media Use – PRA & OPMA

Possible Issues

Open Public Records

- “**Public records**” include agency Facebook posts, Tweets, YouTube videos, etc.
- Those agency social media records responsive to a PRA request must be **searched, retained and produced** – does the agency have the tools to do that?
- Are agency officials/employees using personal social media accounts to business?



Open Public Meetings

- A “**meeting**” could occur if a quorum collectively participates in a **discussion of agency business on a Facebook page or through other social media.**
- But the agency is required to do certain advance public notices before meetings, maintain minutes, and permit the public to observe (with no conditions on attendance), so without those, OPMA would not be satisfied.



You May Recall...PRA Case of *Nissen v. Pierce County* (Aug. 2015)

- Text Messages

- **Text messages sent and received by a public employee in the employee's official capacity are public records of the employer, regardless of the public or private nature of the device used to create them; thus, even if the employee uses a private cell phone.**
- A record that an agency employee prepares, owns, uses, or retains ***within the scope of employment*** is a record "prepared, owned, used or retained by a state or local agency" under the PRA.
 - An employee's communication is "within the scope of employment" ***when the job requires it, the employer directs it, or it furthers the employer's interests.***
 - This inquiry is always case- and record-specific.



Nissen v. Pierce County

- Call and Text Logs

- For a record to be “**used**” by an agency it must bear a nexus with the agency’s decision-making process.
- A record held by a third party, without more, is not a “public record”, unless the agency “uses” it. In this case, that applied to **call and text logs** at the phone service provider which **were not used by the agency** (“the county did nothing with them”).

Call Log (104)

L * These details are cross-referenced from this device's contacts

Incoming (23)

#	Country code	Network code	Party	Time
1	310	410	[REDACTED] Pedro*	7/29/2012 7:30:13 AM(UTC+0)
2	310	410	[REDACTED] Pedro*	7/30/2012 1:36:51 AM(UTC+0)
3	310	410	[REDACTED] Dad*	7/30/2012 2:34:08 AM(UTC+0)
4	310	410	[REDACTED] Dad*	7/30/2012 5:38:54 PM(UTC+0)
5	310	410	[REDACTED] Cesar*	7/30/2012 5:44:59 PM(UTC+0)
6	310	410	[REDACTED] Beto*	7/30/2012 5:49:11 PM(UTC+0)

Nissen: “Mechanics” of Searching/Producing Public Records Controlled by Employee

- The public **employee** must **obtain, segregate and produce** to the employer those public records that are responsive to a PRA request from the employee’s **personal accounts, files, and devices**.

~ *Nissen v. Pierce County*



Mechanics (cont.) - Affidavit



- The **employee's reasonably detailed, nonconclusory affidavit** submitted in good faith attesting to the nature and extent of the **search** can provide the requester, the agency, and the trial court with sufficient information.
 - The trial court can resolve the nature of the record based solely on affidavits without an in camera review and without searching for records itself.
 - So long as the affidavit gives the requester and trial court a sufficient factual basis to determine information withheld is nonresponsive, the agency has performed an adequate search under the PRA.
- Where an employee **withholds personal records** from an employer, he or she must submit an **affidavit** with facts sufficient to show the information is not a “public record” under the PRA.

~ *Nissen v. Pierce County*

Comments from the Supreme Court in *Nissen v. Pierce County*



- “One characteristic of a public record is that it is “prepared, owned, used, or retained by any state or local agency.” RCW 42.56.010(3). The County is correct that every agency the PRA identifies is a political body arising under law (e.g., a county). But those bodies lack an innate ability to prepare, own, use, or retain any record. They instead **act exclusively through their employees and other agents**, and when an employee acts within the scope of his or her employment, the employee's actions are tantamount to “the actions of the [body] itself.” ...Integrating this basic common law concept into the PRA, **a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record “prepared, owned, used, or retained by [a] state or local agency.”** RCW 42.56.010(3).

Social Media Use – Developing Law - Examples of Pending and Recent Public Records Act Cases

West v. Vermillion, Puyallup. Issue: Access to an elected official's personal website records. Court of Appeals – Division II. (Next slide).

West v. Clark County. Issue: Access to an elected local official's personal Facebook page records. Official's search affidavit is also being contested. Cowlitz County Superior Court. (Pending) (Official dismissed; county is still a party).

West v. Puyallup. Issue: Access to local official's Facebook page records. Pierce County Superior Court. (Pending)



West v. Vermillion, Puyallup (Nov. 8, 2016)

- PRA request for public records in a **local elected official's personal residence, on a personal computer, and in a personal email account & website.**
- *Official's position:* Refused to provide records. Official said he had an expectation of **privacy** under state and federal constitutions.
- *Court of Appeals:* Official's arguments rejected.
 - Public records must be disclosed. The constitutions do not provide an individual a privacy interest in those public records.
 - Case remanded to have superior court amend its order and conform the procedures to *Nissen*.
- Petition for review denied by State Supreme Court.
- Petition for certiorari denied by U.S. Supreme Court.

Reminder: PRA & Privacy



- **There is no general “privacy” statutory exemption in the PRA.**
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
 1. **“Highly offensive to the reasonable person” and**
 2. **“Not of legitimate concern to the public.”**

~ RCW 42.56.050

This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.

PRA & Privacy (cont.)

- **Nissen:**

- “Because an individual has no constitutional privacy interest in a public record, Lindquist's challenge is necessarily grounded in the constitutional rights he has in personal information comingled with those public records.”
- “The people enacted the PRA “mindful of the right of individuals to privacy,” Laws of 1973, ch. 1, § 1(11), and individuals do not sacrifice all constitutional protection by accepting public employment... Agencies are in the best position to implement policies that fulfill their obligations under the PRA yet also preserve the privacy rights of their employees.”

- **Predisik v. Spokane School Dist. No. 81:**

- A person “has a right to privacy under the PRA only in ‘matter[s] concerning the private life.’” Those are “private facts” fairly comparable to these:
 - “Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.”

So, Query:

- Is it “private” information if you are conducting **official agency business** on your own Facebook page, or Tweeted it from your own Twitter account, or shared it via your Instagram account, or maybe even on Nextdoor.com?



Reminder: OPMA Case – *Wood v. Battle Ground School District*

- Court of Appeals:
 - “Admittedly, unlike Washington, some states have explicitly addressed the use of electronic or other technological means of evading these [open meeting] laws. But unlike those states, Washington broadly defines “meeting” as “meetings at which action is taken,” regardless of the particular means used to conduct it.”
 - “Thus, in light of the OPMA's broad definition of “meeting” and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a “meeting.”
 - In doing so, we also recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a “meeting.”

Examples of Board Policies

- **Cities of Cheney, Seattle:** City councilmembers are strongly discouraged from “friending” each other on Facebook.
- **Port Angeles:** City councilmembers are not permitted to comment on the agency’s Facebook page.
- **Bonney Lake:** “Participation in online discussions by elected or appointed officials may constitute a meeting under the [OPMA]. Councilmembers, Commissioners, and other officials and appointed volunteers...should, in general, not comment or otherwise communicate on the City’s Social Media site(s).”



Other Social Media Law Developments – 2013 Statute, FYI



RCW 49.44.200

Personal social networking accounts—Restrictions on employer access—Definitions.

(1) An employer may not:

(a) Request, require, or otherwise coerce an employee or applicant to disclose login information for the employee's or applicant's personal social networking account;

...

(Certain other requirements and exceptions apply. See statute, and Municipal Research and Services Center article on this legislation - "Use of Social Networking in Employment Decisions" – July 5, 2013)

Some Resources – Municipal Research & Services Center

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Social Media

On this Page ▼

Social Media and Local Government Webinar

MRSC hosted a webinar, [Social Media: Harnessing the Power While Managing the Risks](#), on September 17, 2014. This webinar featured Bronlea Mishler, Deputy Director of Communications for Snohomish County, and Jim Doherty, MRSC Legal Consultant, going over the basics of how and why social media is important to local government as well as social media's legal relationship with public records and the open public meetings act.

MRSC hosted a live webcast, [Local Government Use of Social Media](#), on June 11, 2010. The webcast featured Bruce Blood, Citywide Web Manager, City of Seattle; Brenda Cooper, Chief Information Officer, City of Kirkland; and Marlene Feist, Communications Director, City of Spokane. The PowerPoint presentation is below:

- [Social Media: Local Government Uses and Policies](#)

Related Materials

 **BLOG**
[The Exciting Possibilities of Crowdsourcing](#)
[Addressing Free Speech in your Social Media Comment Policy](#)

 **IN FOCUS**
[Strategies for Making Government Social Media Awesome in 2016](#)
[#CityHall is Trending: How to Take Advantage of All the Tools](#)

 **WEBINARS**
[Social Media for Government: Harnessing the Power While Managing the Risks](#)



Establishing Effective Social Media Policies for your Agency

February 24, 2015 by [Josh Mahar](#)
Category: [Social Media](#)



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The PRA and Nextdoor.com: 3 Things Public Officials Should Know Before They Log On

March 16, 2016 by [Robert Sepler](#)
Category: [Public Records Act](#)





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Four Tools for Retaining Records of Your Social Media Content

November 3, 2014 by [Josh Mahar](#)
Category: [Social Media](#)



A little while ago MRSC hosted a webinar on [social media for governments](#). We gave people some great information on best practices in social media and also highlighted some of the common public records issues that agencies need to be aware of. But one thing we could have addressed a bit better was what tools are out there for actually archiving your social media content to comply with the [PRA](#).

Well, never fear, we're back with some more information. I've done a little sleuthing through phone apps, web research, and sitting through some overly long demos and sales



Addressing Free Speech in your Social Media Comment Policy

August 9, 2016 by Josh Mahar
Category: Social Media





Use of Social Networking in Employment Decisions

July 5, 2013 by [Paul Sullivan](#)
Category: [Selection and Recruitment](#)

Legislation has been enacted that will prohibit an employer's ability to require that job applicants and current employees provide social media passwords or other account information as a condition of employment or continued employment. The legislation, [chapter 330, Laws of 2013](#), goes into effect July 28, 2013.{C}

Here is an excerpt from the [Final Bill Report](#) for the legislation:

An employer cannot:

- request, require, or otherwise coerce an employee or applicant to: (1) disclose login information for personal social networking accounts; or (2) access their account in the presence in a manner that enables the employer to observe the contents of



Electronic Communications and Social Media: Managing Employer Risks with Clear Policies

March 1, 2012 by [Mark Busto](#)

Category: [HR Advisor](#)

This Advisor column was originally published in March 2010.

For many of us, it is hard to remember a time when conducting our work duties did not involve extensive use of email communications and the internet. For this reason, most employers long ago recognized the need to implement email and internet use policies for their employees. Nonetheless, internet use has rapidly changed as a result of the proliferation of interactive social media, with sites like Facebook, LinkedIn, and Twitter. When employees engage in such internet social networking, the line between workplace and personal conduct can be easily blurred. The expansion of such internet use serves as an important reminder to employers to: (1) revisit existing electronic communication policies covering internet and email usage generally; and (2) formulate policy language

Association of Washington Cities

(Handout)



Guidelines for elected and appointed officials using social media

Social media is a tool growing in popularity for developing direct communications with your community and creating informal opportunities to reach out beyond official publications. City policies should cover the “official” city account, employee use of social media inside and outside of work, and elected official use of social media.

The extent to which a jurisdiction or individual uses social media varies. Before engaging you should assess your risk tolerance and make sure certain laws – such as the Public Records Act and Open Public Meetings Act – are followed.

A few clarifying definitions...

Social media can include websites and applications that enable users to create and share content or to participate in social networking.

A social platform is a web-based technology that enables the development, deployment and management of social media solutions and

Make a clear distinction between official accounts, campaign accounts, and personal accounts

One way elected officials and staff can clearly distinguish private social media accounts is by adding disclaimers on election and personal accounts, and not using the account for city business. *City-sponsored accounts may not be used for campaign-related purposes.*

To keep a personal account from becoming subject to public records, consider some basic precautions.

Do:

- Post a disclaimer on your personal account that identifies the account purpose and that the opinions you express are your own.
- Limit the account content to personal use.
- Understand and use privacy settings to manage the account.
- Have a plan in place to respond to or forward city-related comments to the city including how

State Archives

(Handout)



WA State Archives

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Managing Social Media

- [Blogs, Wikis, Facebook, Twitter & Managing Public Records](#)
- [Keep Electronic Records in Electronic Format](#)

Agency Policies

- Information about creating agency policies on social media (including examples) is available from the Municipal Research and Services Center (MRSC):
 - [MRSC - Establishing Effective Social Media Policies for your Agency \(February 2015\) \(External Link\)](#)

Capture/Retention Tools and Services

- Reviews of some of the different social media retention tools are available from the Municipal Research and Services Center (MRSC):
 - [MRSC - Four Tools for Retaining Records of Your Social Media Content \(November 2014\) \(External Link\)](#)

Training...

Self-Service

- [Lions and Tigers and Twitter Oh My! - Records Management for Blogs, Texts, Social Media, Cloud Computing and more! \(Recorded Webinar - July 2015 - 33mins\)](#)

In-Person / Live Webinars

Records Retention Schedules

[State Government Agencies](#)[Local Government Entities](#)

Laws and Rules

[Preservation and Destruction of Public Records \(chapter 40.14 RCW\)](#)[Penal Provisions \(chapter 40.16 RCW\)](#)[Preservation of Electronic Records \(WAC 434-662\)](#)

Questions?

recordsmanagement@sos.wa.gov

Phone: (360) 586-4901

Social Media Use and Risk Management Tips

Open Public Records

- Agencies should think about the records they are creating, and what laws apply, BEFORE engaging in social media.
- Agencies should have clear policies.
- Agencies should keep updated on changes in law and social media technology.
- Agencies should review available resources – look at best practices; be aware of penalties.
- Agency employees/officials should understand issues of conducting agency business in non-agency accounts.



Open Public Meetings

- Agencies subject to OPMA should be aware that quorum discussions of agency business – including postings on social media --- can trigger OPMA requirements and possible penalties if requirements not followed.
- May need to adopt agency/board policies.

Examples:

Cheney, Bonnie Lake, Seattle, Vancouver, Shoreline, Bothell, Others (see MRSC)



Thank you! Questions?

