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To City of Stoughton CACP Committee
Mayor Tim Swadley

From Matt Dregne, City Attorney

Date May 28, 2020

Re Elected Official Use of Social Media

INTRODUCTION

This memo addresses the use of social media by elected municipal officials in the City of Stoughton.

The memo first addresses elected official use of "City-Supported Social Media," meaning a social media account or site approved by the City for use by City Officials or Authorized Users pursuant to the Social Media Policy the Common Council adopted in 2019. That policy addresses the use of City-Supported Social Media by city employees and city elected officials, when they are using a platform in an official capacity, and when they are posting information in their private capacity. The policy was carefully calibrated to account for a range of policy and legal implications, including First Amendment considerations.

The memo then addresses elected official use of non-city supported social media. Elected officials may use social media for private purposes. However, when using social media to engage in governmental business, or to speak out on governmental issues, elected officials need to be mindful of the Open Meetings Law, the Public Records Law, and First Amendment public forum issues.

DISCUSSION

1. *Elected Official Use of City-Supported Social Media*.

On June 25, 2019, the City Council adopted a Social Media Policy that governs the use of City-Supported Social Media. The policy includes the following provisions relevant to the use of such social media by Stoughton elected officials:

A. No City-Supported Social Media Site may be created or used [in an official capacity] without the approval of the Mayor, the Common Council, or a Department Head.

B. Elected Officials may post information on any City-supported Social Media Site, but may not modify the City Website without prior approval of the Mayor or the Common Council.

C. City Employees and Elected Officials must refrain from using social media tools to express personal opinions or concerns. They may never use their access to City-sponsored Social Media Sites for personal gain, or to promote private endeavors of others. City Employees and Elected Officials also may not post information on City-sponsored Social Media Sites that constitutes defamation, obscenity, publication of private facts, or speech that violates copyright or trademark laws.

D. Notwithstanding other provisions of this policy, this policy does not restrict the ability of City Employees or City Officials to speak as private citizens on matters relating to City business. City Employees and City Officials may post comments, questions, or opinions on social media sites, including City-sponsored Sites, so long as they make clear that they are acting as private citizens and that their statements in no way represent the official position of the City.

E. The City expects that all participants on City-sponsored Social Media Sites will display respect and civility when posting comments or information. The City of Stoughton reserves the right to remove Inappropriate Content at its sole discretion. For purposes of this Policy, Inappropriate Content is defined as comments or materials that:

(1) Are profane, advocate violence, or are pornographic;

(2) Promote, foster, or perpetuate discrimination on the basis of gender, race, creed, color, national origin or ancestry, age, disability, lawful source of income, marital status, sexual orientation, gender identity, past or present membership in military service, or familial status;

(3) Unlawfully defame or attack an individual or group;

(4) Make direct or indirect threats against any person or organization;

(5) Advertise or solicit business for a personal or private business or endeavor;

(6) Promote or endorse a specific financial or commercial entity;

(7) Defraud or defame any financial, commercial, or non-governmental agency;

(8) Violate any federal, state, or local law or encourage any illegal activity;

(9) Violate any existing copyrights, trade secrets, or legal ownerships;

(10) Compromise the safety and/or security of the public or public systems;

F. Communication among members of governmental bodies using social media may constitute a "meeting" under the Wisconsin Open Meetings Law. Such "meetings" would trigger a host of legal requirements and expenses for the City. For this reason, members of the Common Council and City Committees, Boards and Commissions should avoid interactions among one another on topics related to City business.

2. *Elected official use of social media that is not city-supported social media*.

Elected officials have the right to use social media in the ways that other citizens do. In my view, elected officials have the right to use social media for a broad range of expressive activities. However, elected officials are subject to certain legal requirements and constraints that do not apply to ordinary citizens. This memo address three legal issues of concern to elected officials using social media. One issue involves the possibility that social media could be used in a way that violates the Open Meetings Law. The second issue involves the possibility that a personal social media account could become a public forum, subjecting the elected official / owner of the account to First Amendment considerations relating to controlling access to the account. A third issue involves the possibility that a personal social media account could be used in a way that would subject the content to Wisconsin public records laws.

A. Open Meetings Law.

Under Wisconsin law, all "meetings" of governmental bodies are required to be noticed and reasonably accessible to the public. The challenge in the social media context is determining when the use of social media would constitute a meeting. The courts and the attorney general's office have provided the following guidance to be considered in deciding whether there is a "meeting."

(1) *Two-part test used to determine if there is a meeting:*

a. There is a gathering for the purpose of discussing, deciding or information gathering regarding governmental business;

b. The number of members participating is sufficient to determine the body's course of action (this can be the affirmative power to pass or the negative power to defeat a proposal).

(2) *Meeting presumed*: If one-half or more of the members of a governmental body are *present*, the meeting is rebuttably presumed to be for governmental purposes.

(3) "*Walking quorum*": A walking quorum results when a series of gatherings occur among separate groups that collectively constitute a number of members sufficient to determine the body's course of action, and the participants agree, tacitly or explicitly, to act uniformly. According to the Department of Justice Compliance Guide, the essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum.

(4) *Email*: The attorney general's office says emails may constitute a meeting. Courts are likely to consider (1) the number of participants; (2) the number of communications; (3) the time frame in which the communications occurred; (4) the extent of the conversation-like interactions. Beware that emails can be forwarded, and replies can be sent to large groups, depriving the original sender of control over the number and identity of recipients.

According to the Attorney General, inadvertent violations can be reduced if email is used mainly to transmit information one-way, with the originator reminding people not to reply.

Because the law is unclear on email, the Attorney General's office "strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority."

(5) *Social gathering*: A social or chance gathering that is not intended to avoid the open meeting law (and does not involve engaging in governmental business) is not subject to the Open Meetings Law.

Applying the foregoing guidance to social media is not difficult in some cases, but can be a real challenge in others. If a sufficient number of members are present on a social media site, together and in real time, and are engaging in governmental business, then in my opinion, this social media gathering would constitute a meeting, subject to the Open Meeting Law.

The legal analysis can become far murkier, however. For example, assume that an alderperson posts a message on their facebook account, expressing an opinion regarding a policy issue that is expected to come before the common council. Assume further that all of the other alderpersons read the message over the ensuing days. In my view, without more, this would be no different than an alderperson sending a letter to the editor that is published and ultimately ready by the other alders. Although all members have read the alderperson's facebook post, the members are not coordinating their votes or using the platform to engage in a debate. They are not acting in a manner that is intended to circumvent the Open Meetings Law.

If we change the facts to add multiple communications among alderpersons on a social media site, over a period of days, the process may devolve into a walking quorum and unlawful meeting. As with email communications, in considering whether a series of communications on a social media site constitute an unlawful meeting, a court is likely to consider (1) the number of participants; (2) the number of communications; (3) the time-frame in which the communications occurred; and (4) the extent of the conversation-like interactions. As with a walking quorum outside the social media context, evidence that the participants did (or did not) use the platform to purposefully coordinate their efforts and engage in governmental business would be significant. What makes social media inherently different from a letter to the editor is the opportunity for back-and-forth communications among users, that cannot necessarily be controlled by the person who starts the conversation, and that can open the door to a legal issue.

In conclusion, I would strongly recommend that elected officials not convene on a social media platform, in real time, to engage in governmental business, especially when doing so in sufficient numbers to satisfy the numbers test. That would clearly violate the law.

The risk of a violation is lower for an elected official who chooses to express an opinion on a matter of public concern on a social media platform, in a one-way communication akin to sending a letter to the editor. However, with social media, there is a risk that one communication will lead to another, and another, and eventually a sufficient number engaged in the "debate" to constitute a walking quorum. Under those circumstances, members would be left to argue that they did not act to reach an agreement on a matter of governmental business. The outcome in a given case is likely to depend on the particular facts of the case, and the extent to which the interactions appear intended to circumvent the law.

B. Public Forum Issues.

Elected officials who use their personal social media accounts to engage in governmental business may find that their accounts have become public forums subject to First Amendment considerations. I have enclosed an article addressing this issue that was written by Attorneys Christa Westerberg and Aaron Dumas.

C. Public Records law.

Elected officials who use their personal social media accounts to engage in governmental business may find that their accounts are subject to Wisconsin laws governing record retention, and public access to records. The same is true of personal email accounts.