SOCIAL MEDIA LEGAL ISSUES
UPDATE
Jennifer Richie, City Attorney, Waco
TCAA Summer Conference 2016
OVERVIEW

- Administering the City’s Social Media
- Employment Issues
ADMINISTERING THE CITY’S SOCIAL MEDIA
WACO’S SOCIAL MEDIA PRESENCE

- 1 City Facebook page
- 19 City Department Facebook Pages
  - Police
  - Health District
  - Waco Mammoth Site
- 8 Twitter accounts
- 5 Instagram accounts
- 19 different employees administering these accounts
# Administering the City's Facebook Pages

<table>
<thead>
<tr>
<th>PAGE</th>
<th>LIKES</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Waco Public Information</td>
<td>6,944</td>
</tr>
<tr>
<td>Parks and Recreation</td>
<td>5,226</td>
</tr>
<tr>
<td>Waco City Cable Channel (WCCC.TV)</td>
<td>344</td>
</tr>
<tr>
<td>Waco-McLennan County Library</td>
<td>1,612</td>
</tr>
<tr>
<td>Waco-McLennan County Public Health District</td>
<td>468</td>
</tr>
<tr>
<td>Cottonwood Creek Golf Course</td>
<td>5,822</td>
</tr>
<tr>
<td>Waco Police Department Neighborhood Services</td>
<td>14,282</td>
</tr>
<tr>
<td>Waco Police Department Community Outreach</td>
<td>1,060</td>
</tr>
<tr>
<td>Waco Mammoth National Monument</td>
<td>6,153</td>
</tr>
<tr>
<td>Cameron Park Zoo</td>
<td>30,935</td>
</tr>
<tr>
<td>Waco Crime Stoppers (Waco's Most Wanted)</td>
<td>1,121</td>
</tr>
<tr>
<td>Waco Transit</td>
<td>658</td>
</tr>
<tr>
<td>Brazos Nights Concert Series</td>
<td>12,880</td>
</tr>
<tr>
<td>Waco Police Department</td>
<td>30,069</td>
</tr>
<tr>
<td>Waco-McLennan County Office of Emergency Management</td>
<td>1,519</td>
</tr>
<tr>
<td>Waco &amp; the Heart of Texas (CVB)</td>
<td>31,645</td>
</tr>
<tr>
<td>Waco Convention Center</td>
<td>10,590</td>
</tr>
</tbody>
</table>
## Administering the City’s Twitter Accounts

<table>
<thead>
<tr>
<th>Account</th>
<th>Followers</th>
</tr>
</thead>
<tbody>
<tr>
<td>@cityofwaco</td>
<td>10,000</td>
</tr>
<tr>
<td>@WacoLibrary</td>
<td>483</td>
</tr>
<tr>
<td>@wacomclennanOEM</td>
<td>919</td>
</tr>
<tr>
<td>@CamParkZooWaco</td>
<td>2,936</td>
</tr>
<tr>
<td>@WacoandtheHOT</td>
<td>1,443</td>
</tr>
<tr>
<td>@WacoConventionC</td>
<td>628</td>
</tr>
<tr>
<td>@wacotransit</td>
<td>979</td>
</tr>
<tr>
<td>@wacopolice</td>
<td>12,400</td>
</tr>
</tbody>
</table>
The law is developing.

In 2010, the City of Redondo Beach, California, deleted its Facebook page based on a presentation from the City Attorney to the City Council on legal concerns.

City of Redondo Beach now has a Facebook page.

City removed two posts from its Police Department’s Facebook page and banned the posters.

The city and county were sued and settled by changing their policy and paying attorney’s fees.
“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”
• Government Speech
• Public Forum
  • Traditional
  • Designated
    • Limited
• Non-public
GOVERNMENT SPEECH

- Expanding area of the law

GOVERNMENT SPEECH

- *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009) (finding that city did not violate the 1st amendment when it refused to place the Seven Aphorisms of Summum statue in its park, a park that contained a statue of the Ten Commandments).

- Court stated that there are limits to government speech, like the establishment clause (at 1132).

“The point of the new ‘government speech doctrine’ ... is to allow government to express its own viewpoint and reject alternative viewpoints.”

Non-interactive forums, like our web page, would be government speech

Sutliffe v. Epping School District, 584 F.3d 314 (1st Cir. 2009) (holding that town’s refusal to place a link to an organization on its website was government speech, and the website was not a public forum)

Twitter?

Facebook pages probably not government speech
PUBLIC FORUM DOCTRINE

- Public Forum
  - Traditional
  - Designated
    - Limited
- Non-public

Public Forum Doctrine

- **Traditional**
  - May not have content based rules unless narrowly drawn for compelling government interest (strict scrutiny)
  - Content neutral rules still need to be narrowly tailored to a significant government interest and leave open alternative means of communication
  - Streets and parks that have been devoted to public expression by history or government fiat

- **Social Media probably not traditional public forum – no history**
PUBLIC FORUM DOCTRINE

- Designated
  - Public property that the state has opened for expressive content
  - If open it to all, you go through same legal analysis as traditional, i.e. narrowly drawn to compelling government interest

Limited Public Forum

- Opened only to a certain group of people or certain subject
- Must be reasonable and viewpoint neutral

Example: Council meeting
Interactive social media sites can be limited public forums if they are focused and limited in scope and topic.

Need rules to limit your scope.
FACEBOOK AS A LIMITED PUBLIC FORUM

- Can post rules for City’s Facebook under About -- Page Info – Long Description

- Like council meeting rules, you are attempting to limit the subjects open for discussion on your Facebook page.

- Restrictions have to be reasonable and viewpoint neutral.
FACEBOOK AS A LIMITED PUBLIC FORUM

- Designate employees who can administer Social Media for the City AND TRAIN THEM!
  - Best practice is to put social media administration in their job description

- Create a policy for administration of City Social Media sites
Facebook as a Limited Public Forum

- Trained staff that:
  - If the post is on topic, but is negative, then the post remains
  - Presumption that the post remains
  - The broader the subject of your Facebook page, the less you can delete
OTHER ISSUES TO CONSIDER

- Open Meetings
  - Online Message Board (TEX. GOV’T CODE § 551.006)
- Disability Access to Social Media
- Privacy
- HIPAA
- Texas Election Code Section 255.003: Unlawful use of public funds for political advertising
- FLSA
  - Consider using exempt employees to administer social media.
OTHER ISSUES TO CONSIDER:
OPEN RECORDS

- Social Media posts are considered public information and are subject to records retention requirements
- Need to archive your social media pages
- Archiving Service may not be able to archive closed group Facebook pages
  - Waco stopped its 2 internal Facebook pages because we could not archive them
GOOD RESOURCES

- Sheila Gladstone, *Social Media & HR: Friends or Enemies?*, TMHRA Annual Conference (Summer 2014)

- Sheila Gladstone, *Is Your Policy Manual Up to Date?*, TCAA Summer Conference (June 19, 2014)

FIRST AMENDMENT: FACTORS THAT COURTS CONSIDER

- Whether the speech was made as an employee or as a citizen

- If as a citizen, whether the employee’s speech was a matter of public concern

- Even if of public concern, whether the employee’s First Amendment interests in speaking outweigh the interests of the government, as an employer, in providing effective and efficient services

- If all of the above, whether the employee has shown that the speech played a substantial part in the government’s employment decision

• *Graziosi v. City of Greenville, Miss.*, 775 F.3d 731 (5th Cir. 2015)
  
  • Upheld termination of police sergeant that posted on mayor’s Facebook page:
    
    • Criticism for not sending department representatives to a police funeral in another city; and
    
    • Criticism of the Chief’s leadership
    
    • Found that officer was speaking as a citizen
      
      • Sgt. was off duty and on home computer
      
      • Public speaking was not part of her normal duties
      
      • Fact that officer identified herself as a police officer in her post does not make the speech that of an employee
● **Graziosi v. City of Greenville, Miss., 775 F.3d 731 (5th Cir. 2015) CONTINUED**

  • Found that post was not of public concern; was an internal squabble

    • Whether a statement addresses a matter of public concern is a question of law

    • Weighed the content, form, and context of the post

    • Found significant that Sgt. was just back from a suspension and was mad at the Chief

  • Stated that even if she was speaking on a matter of public concern, City’s substantial interests in maintaining discipline and close working relationships and preventing insubordination within the department outweighs officer’s interest

    • Do not need to prove actual disruption

    • Prevention of future disruption is sufficient justification
● *Stinebaugh v. City of Wapakoneta, et al.,* 630 Fed Appx. 522 (6th Cir. 2015) (finding that fire chief contacting a council member about purchasing a fire truck was as a citizen and not as an employee)

● *Liverman v. City of Petersburg, et al.,* 106 F. Supp.3d 744 (E.D. Va. 2015) (finding a post about Police Department’s promotional process was of public concern but post about the inexperience of a particular sergeant was personal and not of public concern)
Recent Cases

- **Duke v. Hamil**, 997 F.Supp.2d 1291 (N.D. Ga. 2014) (upholding demotion of deputy police chief after he posted an image of a confederate flag on Facebook page and stated that “it is time to start the second revolution”; stating that this was too disruptive to the department).

- **Buker, et al. v. Howard County, et al.**, 2015 WL 3456750 (D. Md. May 27, 2015) (granting MSJ for Howard County for termination of a Battalion Chief who posted “beating a liberal to death” and “liking” the post described below; found post’s disruption to department outweighed 1st Amendment right).
  
  - 2015 WL 3456757 (D. Md. May 27, 2015) (denying MSJ and finding no heightened interest of Fire Department because terminated volunteer fire fighter who posted in response to above posting “pick a black one, those are more ‘scary”’ was not in management).

- **Gresham v. City of Atlanta, et al.**, 542 Fed. Appx. 817 (11th Cir. 2013) (finding disruption to a Police Department when employee criticized another officer on Facebook rather than report it to chain of command).
RECENT CASES

- **Bland, et al. v. Roberts, et al.,** 730 F.3d 368 (4th Cir. 2013) (finding employee’s “like” of a political campaign page was protected 1st Amendment activity)

- **Vincent v. Story County, Iowa,** 2014 WL 10007079 (S.D. Iowa Jan. 14, 2014) (on MSJ, finding victim witness coordinator’s “like” of a post about a police shooting of a family member to be too disruptive to the office; seemed persuaded by county attorney telling employee ahead of time not to comment about the shooting)