

# PITFALLS AND POSSIBILITIES

*Social networking  
best practices for  
public entities*



**TRIDENT**  
PUBLIC RISK SOLUTIONS

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## EXECUTIVE SUMMARY

As the use of social media grows in popularity, local governments are under considerable pressure to keep up. The benefits are clear. For example, social media can be a cost-effective communications tool for cash-strapped municipalities looking to fulfill mandates, increase public participation and encourage greater social activism. But the profound public nature of social media – the posting and sharing of vast amounts of information, the direct interaction with more and more citizens – may pose threats to privacy and other basic constitutional rights.

This paper outlines some of the legal concerns that social media may raise for public entities. It also recommends a straightforward policy-driven approach to the management of social media, enabling municipalities to capitalize on this emerging citizen engagement tool while minimizing exposure to associated risks.

# CATCHING UP WITH THE REVOLUTION



A city in Canada has experimented with a mobile app that lets people know when their streets will be cleared of snow. A small town in Spain uses Twitter to connect citizens directly with public-works personnel in the field. A public health department in Ohio uses social media to share the latest information about the H1N1 virus.

A growing number of municipalities are discovering the value of social media to interact with their citizens. Some public entities favor the swift and efficient exchange of ideas – a throwback to the open public forums that once defined engagement in towns across America. Facebook, Twitter, blogs, LinkedIn, Pinterest, Instagram, YouTube and others have become essential communications vehicles for the public and, in turn, equally vital to the institutions that serve it.

Many cities and towns now routinely use social media to:

- Host and share results of town halls and council meetings
- Aid crime prevention and other policing activities
- Deliver construction and road-closure updates
- Broadcast emergency alerts and severe weather updates
- Promote events and activities
- Make public service announcements
- Recruit employees

But the infinite creative possibilities of social media must be weighed against the potential pitfalls, many of which are now appearing as these novel ways of interacting with audiences face exposure to lawsuits, punitive actions and intense public scrutiny.

Most of the tripwires in this minefield are associated with basic legal considerations.

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### FIRST AMENDMENT

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Social media's greatest strength may lie in the power of expression and the dialogue that it facilitates between public officials and the people they serve. The law has not yet determined that social media constitutes a public forum, yet it may be prudent to assume this is the case.

Frequently, inquiries are made as to whether it is legally acceptable to attempt to shut down a social media voice who doesn't agree with you or who criticizes your decisions and operations. It

is inappropriate to restrict the First Amendment rights of citizens, elected officials and municipal employees about a public concern. They are entitled to have and express their opinions. But there are limits, and certain postings clearly fall outside the boundaries of protection – partly due to what constitutes a public concern. Personal attacks, personnel disputes and individual job grievances, for example, are not considered to be “fair game” and everyone should be instructed to use proper channels to discuss them.

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**HOW OPEN ARE YOUR MEETINGS?**

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Open meetings laws are clear about how decision-making must be conducted with transparency to ensure the public can be aware of what a governmental authority proposes to do. What isn't so clear is how social media channels may impact compliance with

the law. Some conversations that occur between public officials on the internet can, and often will, constitute a meeting. Even communicating in open forums using coded references may constitute a breach of trust under open meeting requirements.

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**HOW PUBLIC IS THAT RECORD?**

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Public records need to be maintained and made available to the public as a matter of law, but what about social media content? These sources are open for everyone to see. Yet it has been argued that those who don't have access to a computer do not have access to the social media public record. While records

maintained outside of an organization (and not under the control of that organization) would not be required to be produced in a freedom of information request, those under the control of an organization certainly could be subject to public disclosure laws.

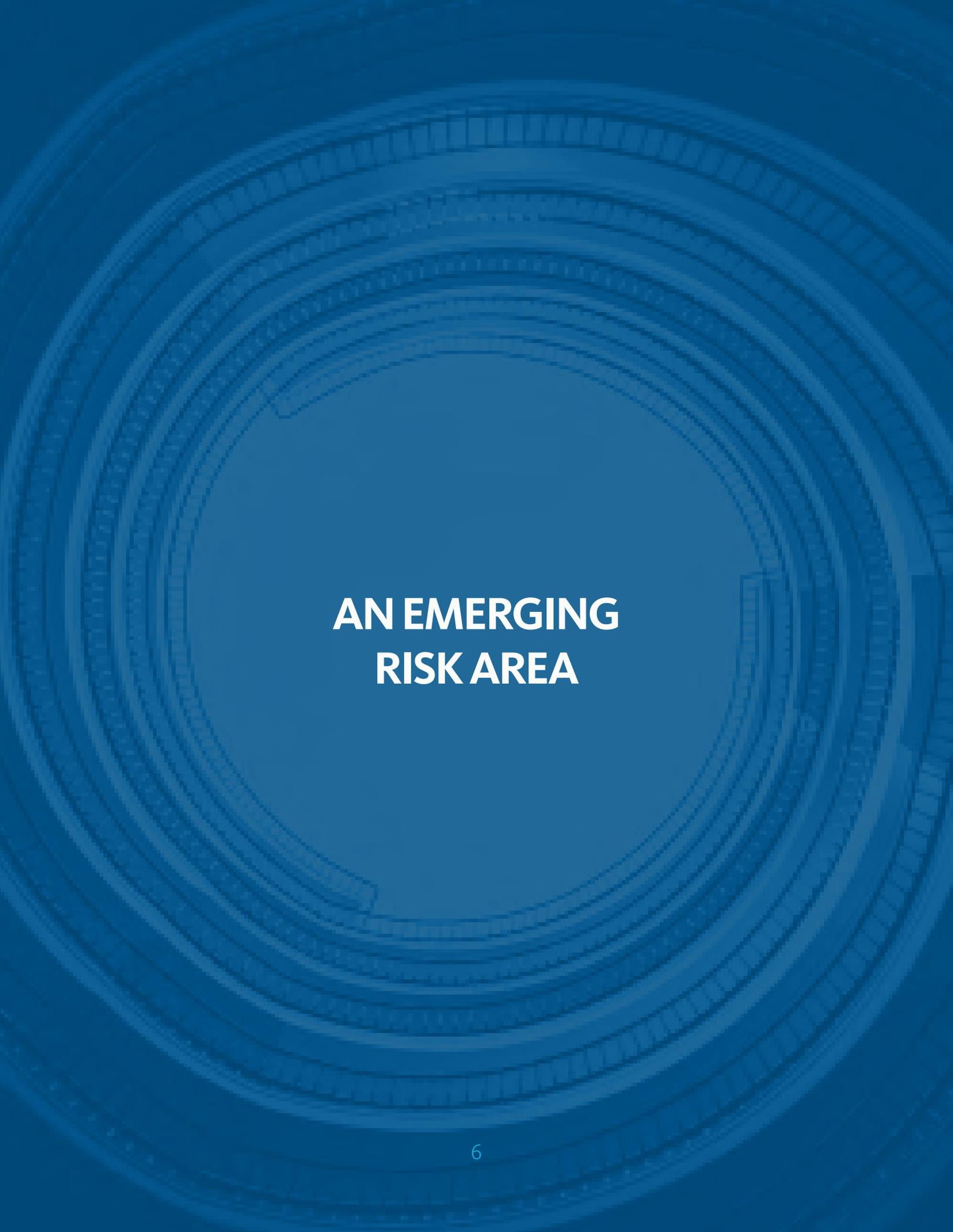
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**USING PUBLIC RESOURCES**

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Public officials are barred from using public resources for personal or campaign purposes. What's more, public resources cannot be used for political activity. Some social networks tend to be politically motivated,

and it may be easy for people who shouldn't be seen doing anything other than the public's business to get drawn in. Avoid posting information about candidates, or advocating for ballot measures.



**AN EMERGING  
RISK AREA**

Other legal considerations abound, including those related to copyright, privacy and discrimination. The law remains fluid on social media. So does insurance.

Some of the key exclusions under Commercial General Liability (ISO CG 0001 12/07) Coverage B include<sup>1</sup>:

- (1) insureds in the business of advertising, broadcasting, publishing, telecasting, designing or determining website content for others, or providing Internet search, access, content or service;
- (2) injury arising out of an electronic chatroom or bulletin board the insured owns, hosts, or exercises control over;
- (3) infringement of copyright, patent, trademark, trade secret or other intellectual property rights, not involving the insured's own advertisement;
- (4) prior publication (barring coverage for liability arising from materials first published before the policy inception); and
- (5) violation of statutes.

Public entities may want to pay special attention to sections (2) and (4). While the language in (2) is somewhat outdated, the issue of "ownership" and

"control over" may still present coverage questions. A municipality using Twitter, Facebook or other types of third-party sites, does not "own or host" the site; but if a municipality has a group or feature page, that may constitute something that it "exercises control over". The concern with (4) comes from the assumption that anything posted to the Internet may last forever. Material published to a site – even if later taken down – may continue to exist in some format. There could be potential coverage issues in the event that a claim for damages involves previous publication years.

There are other key coverages for public entities such as public official errors & omissions, law enforcement liability and employment practices liability that have their own exclusions and limitations that may apply (for example, the exclusion or limitation for claims seeking injunctive relief).

This continues to be an emerging risk area. Most insurers are monitoring the legal environment to determine if future adjustments in underwriting analysis, risk management best practices and coverage provisions will be needed.

In the meantime, here are a few recommended actions that municipal authorities can take to minimize exposure while enjoying the benefits of social media.

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## 1. MAINTAIN A SOCIAL MEDIA POLICY

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Large or small, it is recommended that your public entity should develop and implement a comprehensive social media policy. (You'll find a number of helpful resources at the end of this paper.) The policy should be reviewed and approved by your by local legal counsel.

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<sup>1</sup> This policy language was developed by [Insurance Services Office Inc.](#) (ISO) and has been adopted as a standard throughout the industry.

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## 2. COMMUNICATE THE POLICY TO ALL EMPLOYEES AND ELECTED OFFICIALS

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A policy is meaningless if no one knows about its existence. Social media policies are particularly important to publicize, since most people in the organization use various networking platforms. Some public entities require staff to sign a form indicating they have read and will comply with the policy by – among other things – being professional, truthful and considerate in what they post.

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## 3. MAKE SURE YOUR POLICY DULY CONSIDERS FIRST AMENDMENT RIGHTS AND ENABLES YOU TO ADDRESS PROBLEMATIC CONTENT

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The policy should state that the organization has a right to restrict or remove content that violates its standards due to:

- Sexual content or links to sexual content
- Comments that are not related to the topic
- Comments in support of or opposition to political campaigns or ballot measures
- Profane language or content
- Information that may tend to compromise the safety or security of the public or public systems
- Content that promotes, fosters or perpetuates discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation
- Solicitations of commerce
- Conduct or encouragement of illegal activity
- Content that violates a legal ownership interest of any other party

The State of Utah's social media policy acknowledges that staff moderating comments in some social media formats such as Facebook, blogs and Twitter may encounter comments that cause them concern in their position as a public employee. If user content is in context to the conversation, then the policy directs them to allow the content to remain, regardless of whether it is favorable or unfavorable to the state. If the content is ugly, offensive, denigrating or completely out of context, then the content is required to be removed.

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## 4. AVOID GETTING TOO SPECIFIC

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As technology shifts, policies that address specific applications can soon become dated. Keep your approach and your policy broad and focused on proper and improper behaviors.

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## 5. OWN YOUR SOCIAL NETWORK PRESENCE

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Especially among smaller entities, it is not unusual for social networking links to be established and then ignored. Assign someone to be responsible for continually monitoring what's going on in your networks. Citizens need to feel that their concerns are being heard on social media, otherwise the language and tempo of communications may escalate.

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**6. MAKE SURE EMPLOYEES KNOW THAT THE INSTITUTION'S SOCIAL MEDIA IS A PUBLIC RESOURCE**

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Everyone can benefit from the reminder that city social media feeds should not be used for personal or political reasons.

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**7. REMEMBER THAT OPEN MEETINGS LEGISLATION MAY APPLY TO SOCIAL MEDIA**

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The courts have not yet provided much guidance in the interpretation of open meetings law, but officials are well advised to exercise caution when discussing public business using any social networking tool.

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**8. KEEP ALL RECORDS**

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To avoid possible conflicts in the future, make sure that your records retention policy addresses all forms of electronic media – not just emails. Ensure public records are accessible, and have a plan to address inquiries.

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**9. BE PREPARED**

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Missteps will happen. Some offhand comment will be posted, someone will see meaning that was not intended, or someone will just plain slip. A quick, honest and humble response can help diffuse an incident and show a mature and responsible attitude toward the use of social media.

A hand holding a smartphone displaying a social media login screen. The screen shows a Twitter logo at the top, followed by a 'Sign up' button and a 'Log in' button. The background is a solid blue color.

# **SOCIAL MEDIA IS HERE TO STAY**

Creative use of social networks by public entities is key to advancing the business of local governments and communicating meaningfully with their citizens; however, these novel tools also pose a number of threats and challenges. Policies that

are designed to clearly state an organization's obligations – and establish a firm understanding among employees, elected officials and the public at large – may support the effective risk management of social media risks.

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### SOME HELPFUL RESOURCES

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A quick web search will point you to many resources related to the creation of social media policies. These websites may help get you started:

- Digital-experience expert Chris Boudreaux has compiled [a social media policy database](#) that includes many public entity examples.
- The International City/County Management Association (ICMA) offers a guide titled [Playbook: Social Media and Local Government](#). The playbook provides tips, strategies, examples and best practices for use of social media to communicate efficiently and effectively with constituents.
- The [Institute for Local Government](#) provides articles and tip sheets to help navigate the operational and policy issues that may arise when using social media.

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