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CONTACT US

Section Chair
Polly McNeill
pollym@summitlaw.com

Newsletter Submissions
Eileen M. Keiffer
emkeiffer@gmail.com

Inside This Issue

Stumping for "Likes:" Tools for Addressing the Hazards of Social Media Usage by Public Agencies

By Charlotte Archer

Government officials and agencies are flocking to social media as a direct and unfiltered way to reach the public. Some use it to humanize – to show the agency has a sense of humor and is relatable to the tech-centric generation. As a tool for communication, sites such as Twitter and Facebook offer an inexpensive means for quick dissemination of messages of public interest. But as courts across the country weigh in on legal issues such as free speech in the context of social media, what concerns should public agencies be sensitive to as more and more communication with constituents occurs online, rather than in more traditionally understood forums?

Agencies have begun to tackle issues of retention under the Public Records Act when it comes to social media postings, aided by the advancements in software for archiving posts and comments. But most have yet to grapple with the other risks associated with unfettered tweeting by elected officials and employees. This article aims to examine some of these risks, the direction public agencies have received from the courts, and the approaches utilized by some to tackle these issues with their elected officials and staff.

Twitter and the First Amendment

Nothing has reshaped the understanding of social media usage by an elected official more than President Donald Trump's use of Twitter to announce policy and battle critics. A recent lawsuit by a group of those who had been blocked by the President from commenting on the President's tweets demonstrates one court's take on free speech in the context of the twitterverse.[1]

Judge Naomi Reice Buchwald of the Federal District Court for the Southern District of New York found "the 'interactive space' where Twitter users may directly engage with the content of the (elected official's) tweets" is a "designated public forum." Based on an admission that the President had blocked plaintiffs because they "posted tweets that criticized the President or his policies," the judge found that blocking plaintiffs based on their political speech constituted viewpoint discrimination in violation of the First Amendment.

This decision is the most recent in a line of similar cases holding that an elected official cannot "block" or otherwise limit the public from accessing his or her social media postings. Even a personal Facebook page that is occasionally used to informally solicit comments from constituents is effectively designated a protected forum for public speech.[2] The takeaway: by using social media to provide a forum

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Stumping for "Likes" … *continued from page 1*

of public discourse, agencies are beholden to First Amendment concepts governing that forum.

Other Dangers of Unfettered Re-Tweeting:

- Open Public Meeting Act (OPMA), Ch. 42.30 RCW

Recall, a meeting under the OPMA does not require the contemporaneous physical – or electronic – presence of the members.[3] Consequently, a Facebook post, followed by a thread of comments, may similarly constitute a public meeting subject to the OPMA. Although officials may passively receive information from each other via Twitter, commenting or even "re-tweeting" a post by a colleague is not without risk.

- Campaigning and the PDC

RCW 42.17A.555 and the Public Disclosure Commission's (PDC's) interpretations relating to electronic communication systems caution against the use of such systems for campaigning efforts. Just as an official should not use an agency-issued e-mail account to endorse a ballot proposition, the use of an official twitter account to link to a campaign page likely runs afoul of this prohibition.

- Notice and the Public Duty Doctrine

Could a city face liability for failure to act on information reported by a citizen to a councilmember via Twitter? Does the calculus change if the councilmember's account auto-responds to such a post, thanking the citizen for reaching out? Agencies should be mindful that a stray comment on social media by a councilmember could constitute an admission by the city in litigation, or used as evidence that the city was on notice of a dangerous condition and had a duty to correct it. Importantly, engaging with citizens on social media via an express assurance that help will be provided may undermine the immunity afforded agencies under the public duty doctrine.[4]

The good news: developing a robust social media usage policy and controlling posts made on behalf of an agency can address these issues. Numerous agencies have tackled this issue, providing a starting point for those lagging behind.[5] Discouraging the use of social media by officials to conduct business, requiring clear disclaimers, and regulating the use of features such as "blocking" and "direct messaging" can go a long way to limiting potential liability arising from an offending tweet.

1 *See* Knight First Amendment Institute, et al. v. Donald J. Trump, et al., No. 1:17-cv-05205-NRB (S.D.N.Y. May 23, 2018).

2 *See* Davison v. Loudon County Board of Supervisors, No. 1:16cv932 (E.D. Va. July 25, 2017).

3 *See, e.g.*, Eugster v. City of Spokane, 110 Wn. App. 212, 224 (2002).

4 *See, e.g.*, Osborn v. Mason County, 157 Wn.2d 18, 27, 134 P3d 197 (2006).

5 *See* Governor Inslee's efforts at https://www.governor.wa.gov/news-media/social-media/guidelines-sample-policies; the Association of Washington provides useful guidance at https://wacities.org/news/2017/12/20/guidelines-for-elected-and-appointed-officials-using-social-media.

Update from the Administrative Law Section's 2017 Student Grant Recipient

By Sabiha Ahmad

During the summer of 2017, the Administrative Law Section's student grant allowed me to work as a law student intern at the Unemployment Law Project (ULP) in Seattle. ULP has offices in Seattle and Spokane, and provides low and no-cost legal services to Washington state residents whose unemployment benefits are being denied or challenged.

A national program for unemployment insurance was established by the Social Security Act of 1935 during the Great Depression. Washington's current version of the law is called the "Employment Security Act." In the preamble, our legislature captured the seriousness of the harms posed by unemployment in markedly strong language: "Whereas, economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family."[1]

At ULP, I represented former employees who were appealing decisions by the agency responsible for determining eligibility – the Employment Security Department (ESD). If the ESD does not itself alter its decision, the appeal will be sent to the Office of Administrative Hearings. The hearings are conducted by a neutral Administrative Law Judge and all parties typically call in over the phone. I myself was never able to meet any of the clients I represented over the course of the summer, although I will never forget the sound of their voices in the messages of gratitude they left after a successful appeal. The more difficult cases were those where the employer fired my client for misconduct, which is not considered "involuntary unemployment." I obtained favorable decisions at my stage of representation for five of my six clients, saving some of them over a thousand dollars in back payments. They were an entirely blue-collar bunch – grocery store clerks, retail workers, and one longtime hospital worker.

My success at ULP was largely attributable to the office's eminently efficient and good-humored manager, Jason Arends, and the director/attorney, John Tirpak. John was almost always available to guide us through the process of gathering facts and building a case. His confidence and positive reassurance made our first-time forays into litigation so much smoother. John was also vital in supporting my efforts to use my linguistic skills to expand ULP's outreach to Hindi/Urdu/Punjabi-speaking populations in South King County. After I reached out to one of its members, a

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Redmond-based mosque called "MAPS" generously welcomed us to participate in a free legal clinic in downtown Kent. I was able to drive around the county and distribute ULP's multi-lingual literature at employment centers, social service centers, mosques, Sikh temples, Hindu temples, and churches in the area.

None of this would have been possible without the support of the Administrative Law Section. I had the privilege of meeting the board at their official gathering this summer. Many of the attorneys I met continue to offer advice and guidance, and a few have fast become invaluable mentors in my professional pursuits. I feel lucky to have stumbled into this remarkable community and I look forward to expanding its reach in whatever small ways I can. Thank you!

1 RCW 50.01.010.

Case Law Update

Puget Sound Group, LLC et. al v. Washington State Liquor and Cannabis Board, Division II of the Washington Court of Appeals, No. 50090-6-II, (July 2018) (unpublished opinion).

By Alexis Quinones

Division II of the Court of Appeals issued a recent ruling in *Puget Sound Group, LLC v. Washington State Liquor and Cannabis Bd.*[1] upholding agency action that increased the cap on retail marijuana licenses. This action stems from the Washington state legislature's enactment of the Cannabis Patient Protection Act ("CPPA") in 2015, amending RCW 69.50 and 69.51A, which were designed to roll medical marijuana into the existing regulated recreational scheme established by Initiative-502 in 2012.

The CPPA effectuated the conversion of medical marijuana into the existing scheme by, in part, (1) setting a date certain by which then-existing relatively unregulated medical cannabis dispensaries operating somewhat loosely under SB 5072 would become illegal to operate; (2) deferring to the Washington State Liquor and Cannabis Board ("LCB") to develop a competitive merit-based application process,[3] and (3) increasing the maximum number of cannabis retail licenses throughout Washington state.[4]

The appellants in this case challenged the LCB's implementation of the CPPA, specifically claiming that (1) the emergency rule[5] issued by the LCB establishing a three-part priority qualification for new cannabis retail licensees failed to implement a competitive, merit-based application process that provided opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry and further that the rule was arbitrary and capricious because it was adopted without deliberation and consideration of alternatives, and (2) the LCB did not follow proper rule-making procedure when it increased the maximum number of retail licenses throughout the state by a mere 222 licenses, and further that such action was arbitrary and capricious because it lacked sufficient deliberation and consideration of evidence.[6]

The Court of Appeals refused to rule on the appellants' first claim challenging the three-part priority qualification emergency rule due to mootness. It determined that the challenged emergency rule had expired and was replaced by a nearly identical permanent rule[7] codified at WAC 314-55-020; however, the appellants did not challenge the permanent rule.

Pertaining to the appellants' second claim, the Court of Appeals determined that increasing the maximum number of retail licenses did not fall under the definition of rulemaking[8] set out in the APA[9] because it did not subject applicants to a penalty or sanction, nor did it alter the quali-

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Case Law Update *continued from previous page*

fications or standards for issuance of a license. The Court of Appeals further determined that the process utilized by the LCB in setting the cap was neither arbitrary nor capricious because the agency utilized a third-party data analysist, BOTEC, to determine the medical marijuana retail market size, required additional explanations from BOTEC where the LCB felt uncertain about BOTEC's conclusions, and utilized its own policy judgment in making its final determination.

1 Puget Sound Group LLC v Washington State Liquor and Cannabis Bd., at 6 (slip opinion).
2 SB-5073, passed in 2011 by the Washington State Legislature and codified by at 69.51A, was partially vetoed by then-Governor Gregoire as it pertained to the legalization of dispensaries.
3 "The state liquor and cannabis board must develop a competitive, merit-based application process that includes, at a minimum, the opportunity for an applicant to demonstrate experience and qualifications in the marijuana industry" Former RCW 69.50.331(a) (2015).
4 Former RCW 69.50.345(2)(d) (2015).
5 WSR 15-19-165.
6 Puget Sound Group LLC v Washington State Liquor and Cannabis Bd, No. 50090-6-II (Wash. Ct. App. Div II 2018).
7 It should be noted that SB 5131, passed in 2017, amended RCW 69.50.331 by removing the retail applicant three-tiered priority qualification entirely.
8 Agency rulemaking is defined at RCW 35.05.010.
9 Administrative Procedure Act ("APA") codified at RCW 34.05.

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Eileen M. Keiffer emkeiffer@gmail.com.

Randall Hoffman v. Kittitas County, et al, Division III of the Court of Appeals of the State of Washington, No. 35091-6-III (July 2018).

By Eileen Keiffer

The Court of Appeals, Division III, examined the broad discretion of trial courts to select appropriate penalties for violations of the Washington Public Records Act (PRA), Ch. 42.56 RCW. The trial court in the case concluded that the County had improperly redacted and withheld 126 records for 246 days. However, the trial court found that the error was the result of negligence, as opposed to bad faith.

Weighing the penalty factors set by the Supreme Court in *Yousoufian v. Office of Ron Sims, King County Exec.* (*Yousoufian II*),[1] the trial court ordered the County to pay the plaintiff his reasonable attorney fees and a penalty of $0.50 per day for each day the office had failed to produce or improperly redacted documents.

PRA penalty determinations are reviewed by appellate courts under the abuse of discretion standard.[2] That standard is extremely deferential and appellate courts will only reverse a trial court decision under the standard if the trial court applies the wrong legal standard, relies on unsupported facts, or adopts a view no reasonable person would take.[3]

Division III examined Hoffman's focus on alleged bad faith and found it misplaced pursuant to the current case law. The court found that *Yousoufian II* held that rather than focusing on bad faith, trial courts should instead be guided by a series of aggravating and mitigating factors, only some of which address a PRA violator's level of culpability. Additionally, Division III found this decision requires a court to assess the trial court's penalty decision holistically, in light of the totality of relevant circumstances. Applying this analysis, Division III did not find reversible error in the trial court's culpability assessment, given that some of the problems leading up to the PRA violation were attributable solely to one employee who had since retired (and thus, stiff penalties were unnecessary to deter future violations), and the agency's responses to the requestor were timely, if incomplete.

1 168 Wn.2d 444, 229 P.3d 735 (2010).
2 RCW 42.56.550(4) provides that "it shall be within the discretion of the court to award" PRA penalties. See also Yousoufian v. Office of King County Exec., 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (Yousoufian I) ("(T)he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.").
3 Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The Frank Homan Award

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law.

Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member.

Nominations for the 2018 award are now closed. However, it is not too early to nominate for 2019! Nominations for the 2019 Award are due by June 30, 2019. For nominations, send an email to Chad Standifer at ccstandifer@yahoo.com. Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent of the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style – including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law. **Click here to join!**

The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

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