

# **The Virginia Freedom of Information Act & Social Media *Records, Meetings, and Best Practices***

What exactly is “social media” for the purposes of FOIA?

Can social media posts be public records?

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The Virginia Freedom of Information Advisory Council receives many questions about how to handle requests for copies of social media posts and questions about whether the use of social media may constitute a meeting subject to the Virginia Freedom of Information Act (FOIA). This guide compiles answers to a number of frequently asked questions as a reference to help determine the FOIA implications for social media use and to provide tips for best practice and additional resources.

## **What exactly is “social media” for the purposes of FOIA?**

FOIA does not define “social media,” but the Code of Virginia defines a “social media account” as “a personal account with an electronic medium or service through which users may create, share, or view user-generated content, including, without limitation, videos, photographs, blogs, podcasts, messages, emails, or website profiles or locations.”<sup>1</sup> This definition covers many of the popular sites and technologies we use every day, such as Facebook and Twitter, but also many less commonly used sites and technologies that continue to proliferate and develop.

Unlike many older forms of communication, various technologies used for social media not only generate records, but also allow multiple users to communicate simultaneously. For example, a paper letter sent through regular mail could generate a record, but does not provide for simultaneous communication. Conversely, a conference call allows simultaneous communication but does not generate a record unless someone specifically takes steps to record the conversation. By contrast, the use of public forums, email messages, Facebook, Twitter, and other forms of social media may both create records and allow simultaneous communication between multiple people. For this reason, different forms of social media may implicate both the public records and the public meetings provisions of FOIA.

## **Can social media posts be public records?**

FOIA does not distinguish between social media and other types of records. As is often the case, technology has developed more quickly than changes in the law. However, the term “public records” is defined broadly to include all types of records that are prepared, owned, or possessed

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<sup>1</sup> Va. Code § 23.1-405 (providing a definition in the context of students at public institutions of higher education); *see also* § 40.1-28.7:5 (providing a nearly identical definition in the context of public employees’ social media accounts).

by a public body or its officers, employees, or agents in the transaction of public business.<sup>2</sup> The definition is broad enough to include social media activity. Presuming the posts were made (1) by a public body, official, employee, or agent and (2) in the transaction of public business, then those posts are public records subject to FOIA.

Examples of posts that are “public records” subject to FOIA:

- A town council posts notice of its upcoming public meetings on the town’s Facebook page.
- A state agency posts a link to proposed regulatory changes on Twitter.
- A public employee uses Facebook messages or email to discuss public business with a fellow employee or a citizen. (Note that such messages are public records regardless of what account is used by the public employee.)

Examples of posts that are NOT “public records” subject to FOIA:

- Personal messages that do not pertain to public business (again, regardless of the account used).
- Political messages, such as an announcement of a person’s intent to seek election or reelection to public office.

### **What about social media posts from other people?**

The definition of “public record” includes records merely “in the possession of a public body, its officers, employees or agents in the transaction of public business.” Following that concept, posts made by other persons on the social media account of a public body, official, or employee may be public records IF they are in the transaction of public business.

Examples of posts by others that are “public records” subject to FOIA:

- A citizen makes a FOIA request on a public body’s Facebook page.
- A citizen posts a recommendation on a public matter to a public body’s Twitter account.
- A lobbyist sends email to all members of a public body concerning a matter on the public body’s next meeting agenda.

Examples of posts by others that are NOT “public records” subject to FOIA:

- Various forms of “spam”—such as unsolicited advertisements for a private business posted by a private party onto a public body’s Facebook page.
- “Trolling”—such as purely derogatory comments or attacks on personal character or other “off-topic” posts designed to incite an inflammatory response that do not relate to the transaction of public business. (Note that posts using harsh or pejorative language may still be “public records,” as it is the content that matters, not the way in which it is expressed.)

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<sup>2</sup> Va. Code § 2.2-3701, “Public records” means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”

- Posts that are purely personal in nature and do not concern public business (social events with family and friends, jokes, pictures of pets, etc.).

### **What about record retention?**

Record retention is addressed under the Virginia Public Records Act, which is administered by the Library of Virginia. Please see the Library's "Records Management and Social Networking Sites" guide, available on the Library's website at <https://www.lva.virginia.gov/agencies/records/tips/documents/socialmediatips.pdf>.

### **Can a meeting be conducted on social media?**

As noted previously, various types of social media allow multiple people to communicate simultaneously. The definition of "meeting" in FOIA includes:

work sessions, when sitting physically, or through electronic communication means . . . as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.

The definition of "meeting" excludes gatherings of employees of a public body, gatherings of members where there is no discussion or transaction of public business, and certain public forums, candidate appearances, and debates.<sup>3</sup> The definition of "electronic communication" means "the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities to transmit or receive information."

Reading these definitions together and considering the capabilities of social media, it is clear that if social media is used to discuss or transact public business by three or more members of a public body (or by a quorum, if the quorum is less than three members) assembled together simultaneously (in other words, through "real-time" communications), then that use of social media would constitute a "meeting" subject to FOIA. As such, it would have to comply with rules for electronic meetings set forth in § 2.2-3708.2, which include various heightened procedural requirements and limitations.<sup>4</sup>

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<sup>3</sup> Va. Code § 2.2-3701, "'Meeting' or 'meetings' means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (b) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a 'meeting' subject to the provisions of this chapter."

<sup>4</sup> Please see the Electronic Meetings Guide published by this office for details regarding electronic meetings.

## Tips for Best Practice

- Consider the “consequence of choice”—If a public official or employee uses social media in the transaction of public business, the official or employee may be creating public records that are subject to public disclosure as well as record retention rules.
- Consider record retention of social media whenever possible to facilitate future FOIA requests.
- Avoid inadvertent meetings—If a form of social media allows multiple simultaneous users, then members of a public body using social media could unintentionally conduct a meeting by discussing public business if a sufficient number of other members also participate simultaneously.
- Avoid “meetings within a meeting”—Using social media and devices such as cell phones, members of a public body can be holding a public meeting while assembled together at a public place and, at the same time, be conducting a closed meeting through social media.<sup>5</sup>

## Where do I go for more information?

**Record retention.** As mentioned previously, record retention is addressed under the Virginia Public Records Act and administered by the Library of Virginia. The Library’s website has a Records Management section (<http://www.lva.virginia.gov/agencies/records/>) that includes contact information, record retention schedules for both state agencies and localities, forms, publications, guidance documents, and other resources.

**First Amendment; freedom of speech and public forum issues.** It is the understanding of FOIA Council staff that litigation has been brought in multiple jurisdictions, including Virginia, on issues concerning the use of social media by various public officials and public bodies. In addition to the use of social media in the FOIA contexts discussed above, some other issues that have been raised include (1) whether a public official or public body must allow others to post on the official’s or public body’s social media account, (2) whether posts may be edited, hidden, or deleted based on content or by user, (3) whether restrictions may be placed on the use of profanity or insulting language, and (4) whether users may be blocked from accessing or posting. Because all of these issues fall outside of FOIA and therefore outside the statutory authority of the FOIA Council, FOIA Council staff recommends that public bodies and public officials discuss these types of issues with their own attorneys.

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<sup>5</sup> Va. Code § 2.2-3701, “‘Closed meeting’ means a meeting from which the public is excluded.”