

# Social and Digital Media and the Fire Department The Legal Issues

Presented to the  
Westchester County Association of Fire Districts  
January 25, 2017

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Smith Buss & Jacobs LLP



## Two Sets of Legal Issues

- Free Speech and 1<sup>st</sup> Amendment Issues
- Compliance with Open Government Requirements



## Free Speech and the First Amendment

Government employees have diminished 1st Amendment rights.

Volunteer Firefighters are considered government employees for First Amendment Issues.

*(Reed v. Medford Fire Dept., 806 F.Supp.2d 594, ED NY 2011)*

Volunteer Firefighters, as government employees, therefore have diminished 1st Amendment rights.



## Restrictions on “Government Employees”

*Pickering v Board of Education* (US Supreme Court 1983)

2 step analysis:

1. Determine if the speech is a matter of public concern, and if yes,
2. Weigh the interests of the government employee, commenting on matters of public concern, against the State’s interest in effective public service.



## Pickering says:

- When the speech *substantially interferes* with the legitimate operations of government, it CAN be regulated.
- Not only to the extent “necessary for their employers to operate efficiently and effectively.”

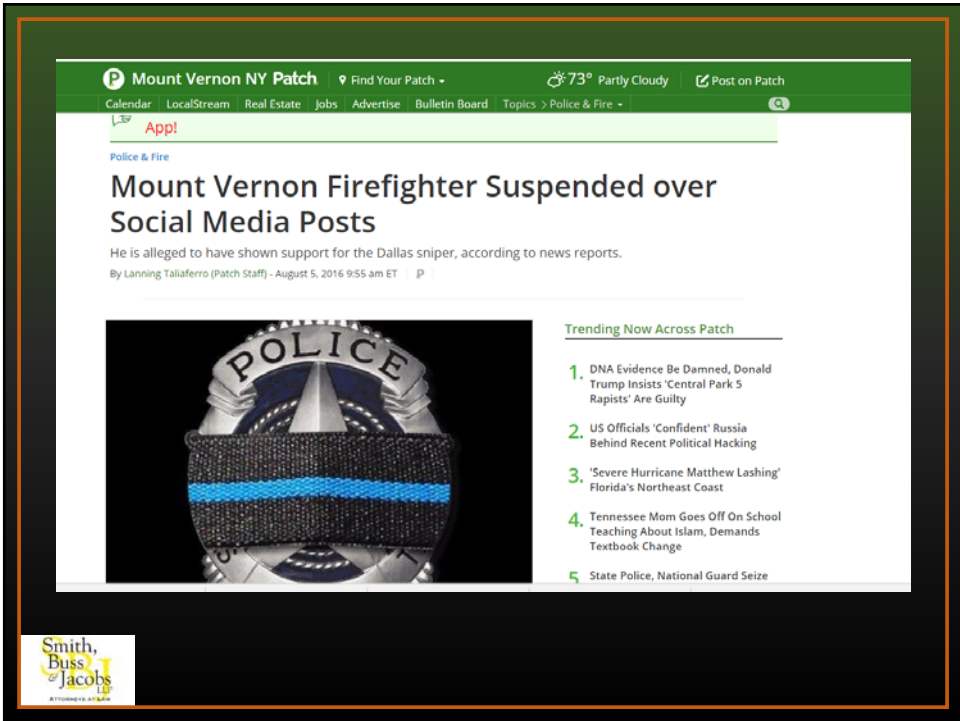
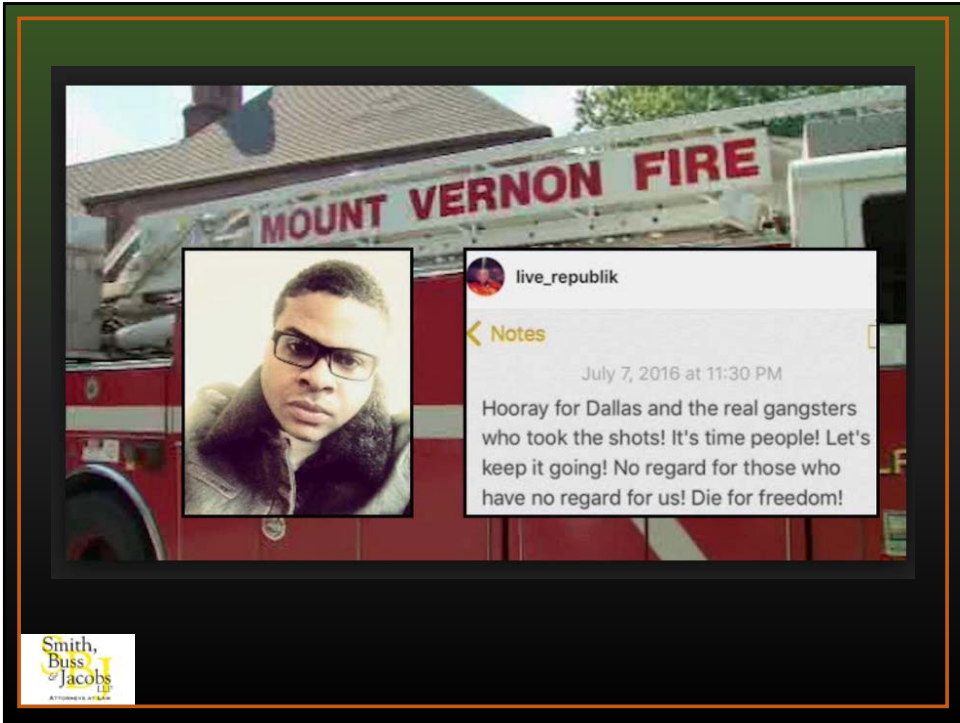


## Livermore v. City of Petersburg SC

New Case – Decided 12/16/2016:

"A social media platform amplifies the distribution of the speaker's message — which favors the employee's free speech interests — but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency. What matters to the First Amendment analysis is not only the medium of the speech, but the scope and content of the restriction."





## Greenburgh cop investigated for racist Facebook post

Richard Liebson and Jonathan Bandler, rliebson@johud.com 8:36 a.m. EDT May 2, 2015

*'The timing, the nature of it ... it's all really, really disturbing,' police chief says.*



(Photo: File photo/The Journal News)

The caption on the post reads: "what can I say!"

Police Chief Christopher McNerney said members of the department brought the post to his attention Wednesday evening, at which point the Web page, under the name "B-rad Di," had already been deactivated.

1145 CONNECT 26 TWEET 1 LINKEDIN 95 COMMENT EMAIL MORE

GREENBURGH — A town police officer was placed on modified duty and is under investigation after apparently making a racist post on his Facebook page during the height of the Baltimore rioting this week.

The Journal News obtained a screen shot of the post made Monday night on Officer Brad DiCairano's page. It juxtaposed two photographs: one of blacks on a minivan during last year's protests in Ferguson, Missouri, and the other of baboons swarming a car driven by a white woman.

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## Police officer suspended over baboon Facebook post

Jonathan Bandler, The (Westchester County, N.Y.) Journal News 2:06 p.m. EDT May 4, 2015



(Photo: The (Westchester County, N.Y.) Journal News file photo)

449 CONNECT 47 TWEET 38 COMMENT EMAIL MORE

WHITE PLAINS, N.Y. — A police officer in Westchester County, N.Y., who came under fire last week for a racist post on his Facebook page, was suspended without pay Monday.

In a post April 27, Brad DiCairano, of the Greenburgh Police Department, juxtaposed a photo of blacks on a minivan protesting the Michael Brown killing in Ferguson, Mo., last summer with one of baboons jumping all over a white woman's car. The post was made during the height of Baltimore

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## Henrico firefighter suspended without pay over alleged online comments

She just trying to find her a black baby daddy and have her son chillren so she can get an EBT card and a check.

Yesterday at 11:00 AM · Like · 2 · Reply

... kind of noble ... we need ... and man th ... Wall ... soon build ... and ...

17 hours ago · Like · 1 · Reply

Fuck yeah. Go Trump. I'm ready for the Muslim and his transgender spouse to leave the White house and hopefully get rid of the race baiting media. Also would like to stop having diversity shoved down our throats and hiring people based on skin color or gender even though they're not qualified. Let's get rid of the PC Bullshit and for those who feel like America is too white or too Christian, let them move where they will feel better about themselves. Preach on!!!

17 hours ago · Like · 1 · Reply

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Tuesday, February 13, 2011

### Officer Said His Job Is 'Human Waste Disposal'

By Jeff Proctor  
Copyright © 2011 Albuquerque Journal  
Journal Staff Writer

An Albuquerque gang unit officer who shot and killed a suspect after a traffic stop last week had listed "human waste disposal" as his occupation on his Facebook page — drawing sharp criticism from the city's top cop.

Police Chief Ray Schultz said he was "disgusted" by the comment posted by Detective Trey Economy III on the social networking website.

The post has since been removed, but Schultz said it will be part of an internal affairs investigation into the shooting.

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# APD settles for \$300,000 in fatal shooting

A1 Albuquerque News Crime Feds and APD News

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By Dan McKay and Nicole Perez / Journal Staff Writers

PUBLISHED: Tuesday, January 14, 2014 at 12:05 am

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The family of Jacob Mitschelen, who was shot in the back after a traffic stop in 2011, is set to receive a \$300,000 settlement under a tentative agreement reached with the city of Albuquerque.



MITSCHELEN: Money would go to his daughter

Mitschelen, 29, was carrying an unloaded handgun at the time, according to documents released by prosecutors who reviewed the shooting and decided not to charge the police officer who shot and killed him.

But detective Byron "Trey" Economidy did face discipline after reporters discovered that he had listed his occupation as "human waste disposal" on Facebook. The post resulted in a four-day suspension and became a rallying cry for activists pushing to overhaul Albuquerque Police Department and the city's Police Oversight Commission.

Mitschelen's family later filed a wrongful death and civil rights suit against Economidy and the city. It was scheduled for trial in federal court next month.

But the city and the family reached a preliminary agreement to settle the case for \$300,000, or about



**Kurtis Cook**

He needs to be praised for the good deed he has done.

Yesterday at 7:48 PM - Like - 1



**Elliott Brown**

Call Kurtis Cook at home [redacted] and tell him his racist comments are not acceptable. Or call the Mabank Fire Department ([redacted]) and tell them their firefighter, Kurtis Cook is making racist comments on Facebook and whatever else feels right to you. Be peaceful and kind even though his ignorance is hateful and angry.



"As of 1123 hrs, after an investigation in the allegations being made of Firefighter Kurtis Cook, the Mabank Fire Department Command Staff has terminated Kurtis Cook as a volunteer Firefighter permanently and has trespassed him from all Mabank Fire Department property. The Mabank Fire Department does not condone nor promote these type of actions or thoughts. On behalf of all members, the Mabank Fire Department offers our deepest apologies to all that were offended by his actions and comments."



H

## Firefighter Canned For Racist Facebook Comments



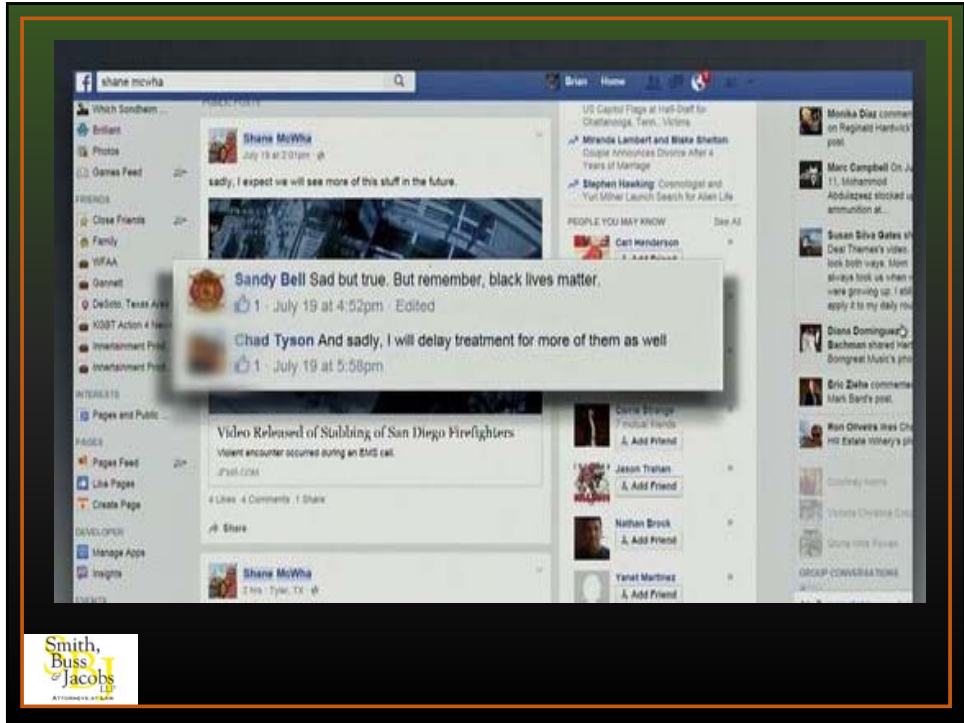
WOOD-TV

Hudson's posts were deleted from Facebook, but not before [Tarvinia took screen shots](#) and shared them online, according to WOOD-TV.

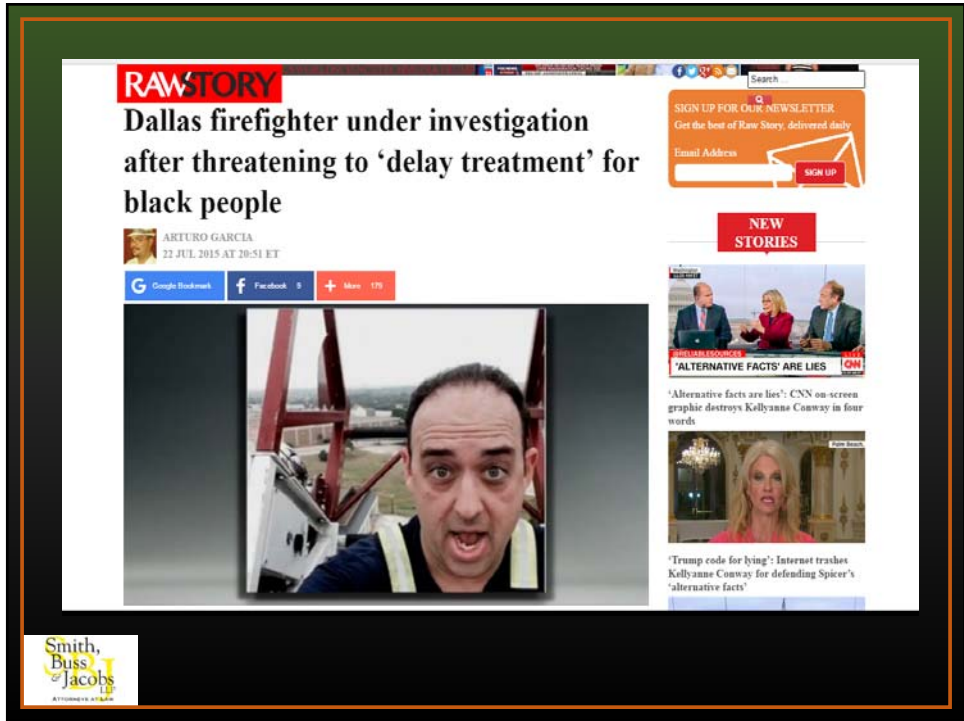
Moore quickly fired Hudson after seeing the comments, The chief told WXMI there can't be any question firefighters will do their job regardless of a citizen's skin color.



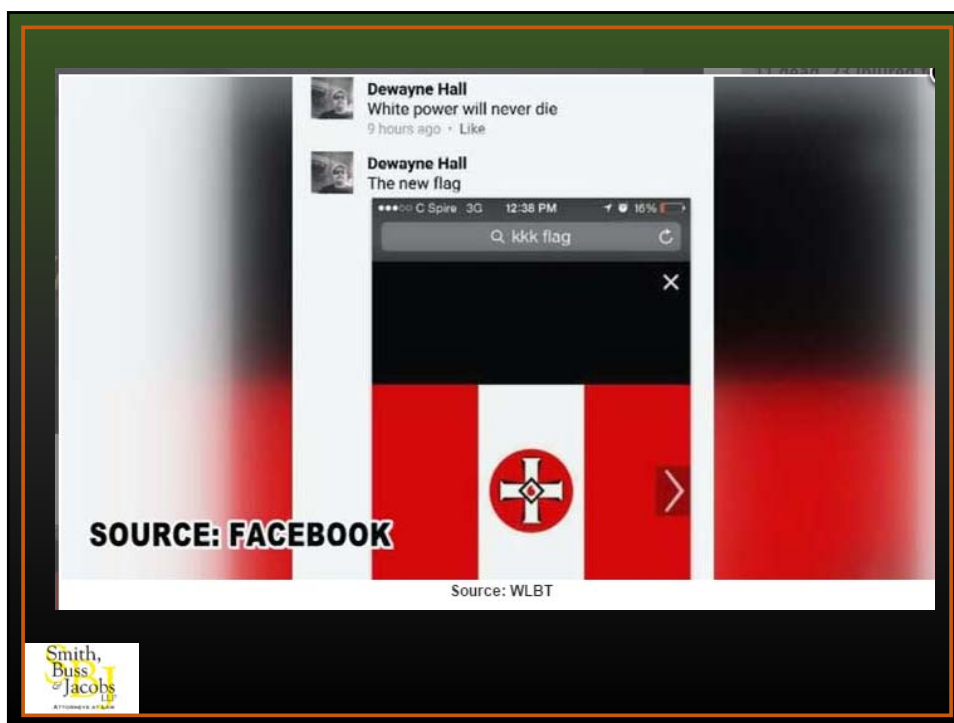




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Hall was placed on administrative leave. In a statement, the Richland fire chief said:

“We are aware of the issue and are looking into the matter in more detail. AMR does not tolerate discrimination of any kind and the actions of this person are not representative of the thousands of dedicated paramedics and EMTs who take care of our patients every day.”

# East Nashville News

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## Nashville Fire Department: Firefighters Taking Pics While Fighting Fires & Selfies at Scenes?

East Nashville News » Blog » Nashville Fire Department: Firefighters Taking Pics While Fighting Fires & Selfies at Scenes?

Call the Tip Line!

(615) 669-TIPS  
(615) 669-6475

We discovered an alarming trend over the past few days while researching the Nashville Fire Department, and the social media posts made by it's employees – who are mainly firefighters and medics that we depend on to save lives during emergencies and be 100% focused on the job in front of them. The trend that we have noticed is that it appears many of these medics and firefighters take the time during rescues, incidents, operations, and fighting fires, to take personal photos – and then they share them on social media – Facebook, Instagram, Twitter, Snapchat, etc... by the HUNDREDS!

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### Ga. Firefighter Who Took Crash Video Fired

AP Associated Press  
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Uploaded on Oct 29, 2010  
A Georgia firefighter who sent around personal cell phone video of a horrific crash has been dismissed. The father of the crash victim eventually received the video via text message from a friend. (Oct. 29)


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NorthJersey.com  
PART OF THE USA TODAY NETWORK

APRIL 1, 2016 LAST UPDATED: FRIDAY, APRIL 1, 2016, 10:31 AM

### Couple faces suspension from Garfield Fire Department over wedding invitation on Facebook



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*"On the Internet, nobody knows you're a dog."*

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## Adopting a Social Media Policy

### Members' Use of Social Media

- Personnel should be free to express themselves as private citizens to the degree that their speech does not impair working relationships of the department.
- Personnel should be prohibited from posting information to which they have access as a result of their position without written permission from the Chief or the President.



- Personnel should be permitted to speak on a matter of public concern as a spokesperson for the department only with written permission from the Chief or President
- Personnel should be prohibited from publicly discussing fire department matters that are confidential.
- Personnel should be prohibited from engaging in speech that is false, deceptive, libelous, slanderous, misleading or causes harm to others, ***including speech that constitutes hate speech, or harassment.***



## Compliance with State Records Laws

- Freedom of Information Law
- Record Retention Laws
- Open Meetings Law



## Freedom of Information Law

Public Officers Law Art. 6

Volunteer Fire Departments are Subject to FOIL even though they are private not-for-profit corporations

*Westchester Rockland Newspapers v. Kimball*  
NY Court of Appeals 1980

FOIL applies whether the records relate to governmental or non-governmental functions

*Hayes v. Chester Volunteer Fire Dept.*  
NY Supreme Court 2012



## Freedom of Information Act

- Definition of a "Record" -

"Record" means any information ... **in any physical form** whatsoever including, but not limited to ... **computer tapes or discs**.....

Public Officers Law §86(4)

- Requirement to Make Records Available

- Obligation to Produce



## Record Retention

Arts and Cultural Affairs Law Art. 57-A

Definition of a "Record" is Different – Broader than FOIL's

"Record" means any book, paper, map, photograph, **or other information-recording device, regardless of physical form or characteristic**, that is made, produced, executed, or **received** by any local government or officer thereof pursuant to law or in connection with the transaction of public business.

Arts and Cultural Affairs Law §57.17(d)(4)



## What the Law Requires

It shall be the responsibility of every local officer

- to maintain records ...
- .. for so long as the records are needed for the conduct of the business of the office;
- to adequately protect such records;
- to pass on to his successor records needed for the continuing conduct of business of the office.

Arts and Cultural Affairs Law §57.25



## Legal Issues for Record Retention Law

NYS Archives:

"Because the technology is new, it's not yet clear to what extent traditional records retention and disposition practices apply to social media content."

[http://www.archives.nysed.gov/a/records/mr\\_social\\_media.shtml](http://www.archives.nysed.gov/a/records/mr_social_media.shtml)





The screenshot shows a news article from The Seattle Times. The page header includes the newspaper's name, 'Local News', and a navigation menu with categories like Transportation, Crime, Politics, Education, Eastside, Health, and Obituaries. The article title is 'Shoreline public-records case ends after 7 years'. It is attributed to Brian M. Rosenthal and includes a section sponsor for 'SUMMER HIGHWAYS'. The article text discusses a public records lawsuit that ended with a judge ordering the city to pay over \$400,000 in legal fees. A quote from an attorney states, 'It was nice to finally have some closure on a case that has dragged on for so long.' The article is accompanied by a large green graphic with a yellow 'O' logo and a 'CLICK TO EXPLORE IF' button.

**Shoreline public-records case ends after 7 years**

Originally published June 28, 2013 at 9:19 pm | Updated June 28, 2013 at 11:31 pm

By Brian M. Rosenthal

Nearly seven years after a puzzling statement at a Shoreline City Council meeting triggered an unusual Public Records Act lawsuit, the case ended Friday when a judge ordered the city to pay more than \$400,000 to cover the plaintiffs' legal fees.

The \$438,555 judgment means the city will pay a total of \$538,555, plus its own attorneys costs, for violating the state Public Records Act by not releasing the electronic version of an email to the deputy mayor.

"It was nice to finally have some closure on a case that has dragged on for so long," said Michelle Earl-Hubbard, an attorney for those who sued the city.

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## Open Meetings Law

Public Officers Law Art. 7

Open Meetings Law §103(a):

"Every meeting of a public body shall be open to the general public..." [exception for executive sessions].

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## Legal Issues for Open Meetings Law

Issues:

- When do interactions of public officials on social media sites constitute meetings in accordance with the NY Open Meetings Law.
- What if a majority of a public body's members post on a local government's social media site on a matter before them?

No NY case law - No NY opinions



If you have any questions  
please ask now, or contact me:

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**A SAMPLE SOCIAL MEDIA POLICY  
FOR FIRE DISTRICTS/DEPARTMENTS\***

1. Purpose. The purpose of this Policy is to define and regulate the use of social media by Department employees and volunteers. This policy applies to the use of personal social media relating to an employee's or volunteer's duties, and to social media on Department social media sites.
2. Definitions. "Social media" means all forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content. The term social media includes, but is not limited to, social networking sites such as Facebook, Instagram, LinkedIn, Twitter, and YouTube. "Department social media site" is a social media site created, maintained and controlled by Department. "Personal social media" is a social media content maintained and controlled by an individual employee or volunteer member of Department.
3. Use of Social Media by Members. When engaging in social media or social networking activities, all personnel will maintain a level of professionalism both on-duty and off-duty that is consistent with the reputation and mission of the Department.
4. Use of and Posting on Department Social Media Sites. Department social media sites shall not be created without the approval of the Chief or the President. All content posted on Department social media sites shall be approved by the Chief or the President. All content on Department social media sites shall adhere to all applicable laws, regulations and policies including the records management and retention requirements set by law and regulation.
5. Personal Social Media. No information, videos or pictures gathered while on Department business (including emergency calls, meetings, drills, details, trainings or otherwise) may be shared or posted in any format without the written approval of the Chief or the President. Speech that impairs the performance of the Department, undermines discipline and harmony among co-workers, or negatively affects the public perception of Department is prohibited and may be sanctioned. Social media content shall adhere to all applicable laws, regulations and Department policies.
6. Use of Personal Social Media. Every member must abide by the following: (a) do not share confidential or proprietary information of the Department; (b) do not display Department logos, uniforms or similar identifying items without prior written permission; (c) do not publish any materials that could reasonably be considered to represent the views or positions of the Department without authorization.
7. Ownership of Data and Monitoring. The Department owns the right to all data files in any Department owned computer, network, cell phone or other information system. The Department reserves the right to monitor electronic mail messages (including text and instant messaging systems) and their content created, viewed or accessed on Department networks and cell phones.
8. Noncompliance. Inappropriate use of social media may result in disciplinary actions, up to and including termination as an employee or volunteer member of Department.

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\* Adapted from the San Juan County, New Mexico, social media policy, at [www.sjcf.net](http://www.sjcf.net).

**CUBA JOINT FIRE DISTRICT**  
**SOCIAL MEDIA TECHNOLOGY USE POLICY**

**POLICY STATEMENT**

The use of technology in the fire and emergency services provides several useful benefits including training and the acquisition of advantageous information for the agency and its members. It also allows for the dissemination of information to the public for recruitment, safety education and public relations purposes. As such, it is the policy of the Cuba Joint Fire District ("Fire District") to use technology, including social media technology, for those purposes which benefit the mission of the Fire District.

While the value of such technology is recognized by the Fire District, the Fire District must also protect the dissemination of information obtained in the course of its operations and other activities, when the release or distribution of such information may violate personal or other privacy concerns or portrays the Fire District in an illegal, offensive or negative manner, whether intentionally or unintentionally.

This Policy establishes the use and dissemination of social media technology by the Fire District and all members under its jurisdiction and authority.

**DEFINITION**

Social media technology includes but is not limited to instant messaging, texting, paging, email, social networking sites such as Facebook, MySpace, LinkedIn, Twitter, YouTube and other information-sharing services, websites and/or blogs.

**POLICY**

It is the Policy of the Fire District that no information, whether written, video, audio, pictures or otherwise which are obtained while on-duty, including without limitation emergency calls, meetings, drills, details, trainings or otherwise, shall not be disclosed, disseminated, distributed, shared, posted or otherwise disbursed in any format, whether by instant messaging, texting, paging, email, social networking sites or other information-sharing services, websites and/or blogs, or otherwise, without the express prior written approval of the Fire Chief or the Public Information Officer, where one is appointed.

Where the device used to communicate such information is used is owned by the Fire District, the Fire District owns the rights to all data and other files and reserves the right to monitor electronic mail messages (including personal/private/instant messaging systems) and their content, as well as any and all use of the Internet and of computer equipment used to create, view, or access e-mail and Internet content.

Electronic messages sent and received using Fire District equipment are not private and are subject to inspection, viewing, downloading, release, and archiving by authorized Fire District personnel without restriction.

Violation of this Policy by any member may result in disciplinary action.

A SAMPLE POLICY\* ON  
ELECTRONIC MEDIA GATHERING AT INCIDENTS  
FOR FIRE DISTRICTS/DEPARTMENTS

From time to time the Fire Department authorizes use of cameras on emergency scenes for the cataloging of our involvement with emergencies, meetings, social events and community service work details.

This policy is specifically developed for our members and formulates rules restricting the use of photography cameras, cellular phone cameras, cellular phone video and any pictures or voice recordings taken in the course of fire department operations whether on duty or off duty while a member of the Fire Department.

While you are a member of the fire department, your conduct, use of these devices and posting of photos taken in the course of your duties is governed by Fire Department policy. The Fire Department maintains all rights to photos, videos and recordings taken using its equipment while acting in the capacity as a member of the Department and as such is subject to use and review by the Chief.

A Fire departments operations' are carried out in the public domain and as such are open to public scrutiny and the free exercise of people's rights to photograph us in action or at any time that we are performing our duties. These policies govern our conduct and limitations while performing own duties in order to protect the privacy of the public and for the effective management of the fire department.

**POLICY:**

1. The installation, attachment or use of unauthorized camera's on fire department turnout gear or equipment is prohibited.
2. The use of any photographic equipment by members actively engaged in firefighting or rescue operations is PROHIBITED unless authorized by the Chief or the Incident Commander.
3. Posting images of victims, graphic material of emergency scenes, the interior of private dwellings or pictures of identifiable people by fire department members on any web sites of personal use such as but not limited to Facebook, Instagram, Twitter and/or other social media is prohibited
4. Members will not interfere with any private person or news organization performing photography whether public or private. Members who feel photographers are interfering with their duties shall immediately report such interference to their incident commanders for referral to the police or modification of the operational plans.
5. Pictures of fire department operations, equipment and personnel are permissible for purposes of training, historical documentation of the department and improvement of service delivery. Photographs and videos taken by members of the department and used to embarrass or demean other members of the department that are called to the departments' attention can be a basis for determining the conduct of the offending member.

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\* Adapted from the policy of the City of Willington CT.



## David A. Menken Of Counsel

David Menken is a member of the Fire/EMS and Business Law groups of Smith Buss & Jacobs LLP.

David counsels not-for-profit corporations, including in particular fire and EMS departments and benevolent associations, on a full range of New York and Federal legal issues to help them operate effectively and satisfy their corporate and operational legal requirements. Among other tasks, he reviews and drafts corporate by-laws, advises on issues such as tax exempt status and on the foreign fire tax, conducts in-house social media and data security training, and assists with development and review of standard operating procedures and guidelines. As part of his representation of non-profits, he provides specific guidance on the New York Non-Profit Revitalization Act of 2013 which modernized New York non-profit law and strengthened governance through compliance with certain best practices that all non-profits must consider.

David also represents clients in a variety of corporate law, intellectual property and information technology matters. He negotiates business transactions, including corporate control agreements, mergers and acquisitions, and business development agreements. He also provides legal assistance regarding, among other things, information technology licensing and protection, trade secret protection, software development and data security issues. David has achieved certification as an Information Privacy Professional, with a specialty in US privacy laws and policies, through the International Association of Privacy Professionals, and advises clients on data breach/security and privacy laws and policies.

David has represented government entities in matters such as inter-municipal negotiations and on issues matter involving compliance with open meetings and record retention laws. As a former Village Attorney for Mount Kisco, Chair of the Bedford Zoning Board of Appeals, member of the Westchester County Planning Board, and Vice Chair of the Westchester Charter Revision Commission, David uses his government, municipal and land use experience to effectively represent both government entities and those whose business involves zoning, land use and municipal law.

David is a graduate of Johns Hopkins University in Baltimore and received his law degree from New York University School of Law. He is a member of the Information Technology Law Association and the New York and Westchester County Bar Associations, and is admitted to practice in New York State. David also serves as Bedford NY Town Justice and has served on municipal boards and commissions for Westchester County, Bedford NY and Mount Kisco NY.

David is the current President of the Bedford Village (NY) Volunteer Fire Department, where he volunteers as a firefighter and an EMT. He also writes a Fire and EMS law blog at [www.menkenfirelaw.com](http://www.menkenfirelaw.com), discussing contemporary legal issues facing the fire and emergency medical services communities.

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