

**The Bill Blackwood
Law Enforcement Management Institute of Texas**

**Having a Plan in Place: Law Enforcement and the
Need for a Clearly Defined Social Media Policy**

**A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College**

**By
Curtis Hamilton**

**El Paso Police Department
El Paso, TX
February 2019**

ABSTRACT

With the ever increasing use of social media by law enforcement personnel, both personally and professionally, a comprehensive social media policy needs to be present within law enforcement agencies. A social media policy allows law enforcement agencies to maintain a “branded” image that is portrayed to the public by providing clear guidance to employees as to what exactly can be posted on social media with relation to the agency. This also provides protections to both the employee and the agency with regard to the content associated with the agency’s brand. A social media policy also includes acceptable use standards for public interaction and legitimate investigation, providing clear guidance for agency employees. Following a social media policy allows an agency and its employees to use social media in a manner that will be socially and legally acceptable.

With a government entity limiting the speech of its employees, a counter-argument could be made that limiting employee speech infringes upon the first amendment rights of the employee. Fortunately, the courts have weighed in with regard to what speech is protected and provided guidance on protected speech. Speech that is directly related to working conditions is protected, while derogatory speech, which causes real harm and not related to working conditions, can be regulated by the employer. The use of social media is also so widespread that a social media policy could be so cumbersome as to be ineffective. Social media has been around long enough, however, that several agencies, and the IACP, have designed social media policies that can be used as examples for departments seeking to design their own.

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INTRODUCTION

In today's society, the use of social media as a way of communicating has become so prevalent that it is not seen as just an alternative form of communication for tech savvy kids, but is now being used by the President of the United States, Donald Trump, to communicate with the American people without the filters of the established mainstream media. He was very honest about this fact, feeling that the media had been dishonest in their coverage of him and his campaign. As of January 16, 2017, President Trump surpassed the 20 million mark in Twitter followers (Stelter, 2017). Social media is not just a presidential privilege. As of December 2016, there were 1.23 billion daily active users and 1.86 billion monthly active users on Facebook (2017) alone. This does not account for the users who utilize multiple platforms of social media.

Additionally, the criminal use of social media has skyrocketed over the past decade. Police in London have found that between 2007 and 2010, crime related to Facebook increased 540% (Knibbs, 2013). Police use social media as a tool to research criminal activity or locate suspects in criminal activity. On the other side of the same coin, police also use social media to send out public announcements, information on criminal activity and arrests, as well as traffic alerts and hazardous driving conditions (Knibbs, 2013).

With such widespread use of social media by all aspects of society, it is crucially important that police be conversant and proficient in social media use. Not only is it used in the day to day profession of law enforcement, whether for criminal investigations or the dissemination of crucial public safety information, but the same people who are using social media in the law enforcement profession are also using

social media in a personal, off-duty capacity. With law enforcement officers being increasingly in the public eye, this personal use of social media often bleeds into the professional realm by what is said both on and off duty. Being a law enforcement officer does not mean that Constitutional rights are lost, but there are some higher standards in place that can regulate some information a law enforcement officer can disseminate through social media. The widespread use of social media, both professionally and personally, brings with it inherent risks for both the officer and agency. Law enforcement agencies should have a clearly defined social media policy.

POSITION

A clearly defined social media policy allows the agency to maintain control of its “brand” in relation to its core values and goals. Personal identity is often associated with facial features, hairstyles, styles of dress, manner of speech, and other common characteristics that allow others to recognize the individual and develop an impression as to what they feel is important. Most people wish to portray positive personally identifying characteristics and downplay negative characteristics in order to be seen by others in the most positive light possible. Much like a personal identity, a corporate identity considers features that are readily identifiable that match what the company is seeking to project. This includes logos, color schemes, and mottos. When it comes to an online identity, these are also connected via the company’s webpage and social media feeds. A corporation’s digital identity is all the data available online that is attributable to the company and shows the relationships between the company and its products, customers, and employees (Gonzalez, 2014, pp. 55-56).

If one were to look at a law enforcement agency in the light of being an entity that provides services to the public, there is no difference between an agency's digital identity and a businesses' digital identity. Both are equally concerned with presenting their identifying attributes in a manner that most accurately reflects their agency values and goals. Corporate brands are researched and carefully marketed to ensure they are of the most value to the corporation (Gonzalez, 2014, p. 65). The agency can control what it puts out about itself, but identity and reputation are not interchangeable. An agency's reputation can be highly dependent upon the available digital information that is associated with the agency online (Gonzalez, 2014, p. 73).

With that in mind, a clearly defined social media policy allows an agency to give clear guidance to employees regarding what is acceptable for posting on social media, both at work and personally, when it comes to their associations with the agency. Within guidelines, an effective social media policy can restrict employees from certain posts that could negatively impact the reputation of the agency through their association with the agency. The National Labor Relations Board (NLRB), under the authority of the National Labor Relations Act (NLRA), has established that employees can express negative ideas regarding their work hours or pay (protected concerted activity), but negatively posting about the quality of the services provided, or the core values of the agency, are not protected (Wright, 2013). This can apply to both intentional expressions that openly disparage the agency brand or unintentional postings that can damage the agency brand by negatively associating the individual expression or action with the agency. Further, online postings of activity that do not align with the agency's tenets and values, such as drug use, intoxicated behavior,

illegal activity, or suggestive or sexually inappropriate behavior or dress, can have a direct impact on not only the individual's credibility, but, when associated with the brand, can negatively impact the agency's reputation as well. Warren Buffet, American business investor and philanthropist stated, "It takes 20 years to build a reputation and 5 min to ruin it. If you think about that, you'll do things differently" (Gonzalez, 2015, p. 54).

Establishing a clearly defined social media policy provides employees with the expectations of the agency regarding associations with its brand image. In researching her book, Wright (2013) spoke to labor attorney Eric Meyer who offered the following. Recently (June 2012 to January 2013), the NLRB has become increasingly more firm on corporate social media policies that are over broad and create a stifling effect on the protected concerted activity of its employees (Wright, 2013). While some negative expressions relating to protected concerted activity are specifically protected by the NLRA, a clearly defined social media policy should delineate those activities that are not protected, and thereby prohibited, so as to prevent the fear that employees' NLRA rights are being stifled. This allows the agency to protect its brand image, while providing clear guidance to employees as to what conduct is specifically prohibited.

Social media is becoming more pervasive in American society, whether it is online blogging, Facebook posting, or expressing ideas in 140 character Tweets. In a Pew Research Center study conducted between March and April 2016, surveys found that 68% of all adults in the United States use Facebook, 28% are on Instagram, 26% utilize Pinterest, 25% are LinkedIn users and 21% use Twitter (Greenwood, Perrin, Duggan, 2016). Social media has a use in both the personal lives of agency

employees, as well as in the professional interests of the agency itself. In a November 2014 LexisNexis survey, eight out of ten law enforcement agencies actively used social media as an investigative tool. Seventy-three percent of the respondents felt that social media as an investigative tool helped solve crime, and 67% said monitoring social media helped predict criminal activity. In contrast, less than half had a formal process delineating how to use social media for investigative purposes (Sakar, 2014). With the wide scale use of social media, the risks from both intentional and unintentional misconduct are present. Agency employees who post in their official capacities, or on agency social media pages, are clearly representatives of their agencies. In the 2006 United States Supreme Court decision in *Garcetti v. Caballos*, the court held that government employers can limit speech of employees who are acting in their official capacities (Pettry, 2013). In the absence of a clearly defined social media policy, the agency's current policy on off duty conduct is the only guidance given to on duty personnel operating in their official capacities. When these same employees post on their own social media outlets while off duty, their capacity as representatives of their agencies is less clear.

In February 2011, an Albuquerque, New Mexico police officer was involved in an on-duty shooting. His name and information were made public. Local news organizations quickly found his social media page which listed his occupation as "human waste disposal" (Goode, 2011, para.1). Although not criminal in nature, it did earn the officer some administrative desk time. In a similar vein, an Arkansas judge allowed photos of a law enforcement officer with guns, skulls, and the Punisher logo on his Myspace page into trial as evidence of the officer's character (Goode, 2011). In yet

another example, a New York Police Officer, while a witness on a criminal case, was questioned by the defendant's attorney about his social media postings. On the officer's Facebook page was the status "watching *Training Day* to brush up on proper police procedure" (Dwyer, 2010, para. 4). Each of these instances, while not necessarily related to the incident from which they arose, created risk to the officers, discredit to their agencies, and called into question the credibility and professionalism of both the agencies and the employees. A clearly defined social media policy, when implemented by law enforcement agencies, will make clear what is acceptable in both personal and professional use by employees in order to mitigate the risks to employees and the organization. A clear policy will help employees know what is expected regarding social media activity both on and off duty, providing guidance in an increasingly popular, but legally unsteady, online environment.

A clearly defined social media policy also includes a plan that allows for legitimate agency use of social media for investigative and crime prevention measures that conform to existing laws and statutes. A restrictive social media policy lets employees know what they cannot do regarding social media, but a comprehensive social media policy also establishes guidelines for legitimate law enforcement uses for social media. The International Association of Chiefs of Police (IACP) has provided significant guidance in this regard. The IACP recommends a three step process for agencies to establish a social media program (Accenture, 2013). After defining the goals of agency social media use, it is recommended that the agency seek approval from the key stakeholders. A policy will need to be established to define these goals and determine the roles of those assigned to utilize social media to achieve these goals.

These roles include those who will be responsible for accessing and posting on social media, as well as the roles of those who are responsible for authorizing and reviewing content (Accenture, 2013). Following this guidance allows agencies to model their social media use and policies after an established, creditable law enforcement entity, thereby enhancing the credibility of the policy and mitigating some of the risks surrounding social media use.

Other agencies have built and expanded their social media policies from the IACP guidelines. The Philadelphia, Pennsylvania police department, for example, established guidelines for the official department use of Twitter, Facebook, and YouTube in February 2011 (Domizio, 2013). The department also sent 40 detectives to train with the FBI to learn how to obtain, process, and utilize surveillance video on social media. In October 2012, the department marked its 100th arrest based on information posted by department employees on social media (Domizio, 2013). Following a comprehensive social media policy, the Philadelphia Police Department was able to utilize social media for a legitimate, and successful, law enforcement purpose while providing clear guidelines to its employees.

In 2008-2009, the Boca Raton, Florida police department also undertook a social media campaign, but with the idea of creating a department brand (Economou, 2010). Boca Raton PD developed a policy and presented it to its stakeholders - the citizens of Boca Raton. After several community meetings, the Boca Raton PD developed a successful online image that imparted its values and strategies to the community it served. By using social media, Boca Raton PD was able to successfully engage the community, much like a business, and open two-way

communication between the agency and its customers (Economou, 2010). As evidenced by Philadelphia and Boca Raton, a comprehensive social media policy should also include direction on why, who, and how social media should be used to achieve the law enforcement agency's goals.

COUNTER POSITION

The first counter position, indicating that police social media policies infringe upon the first amendment rights of employees, is based upon the idea that restricting free speech, especially by a government entity, is clearly a violation of the Constitution. Being a government entity, restrictions on an employee's speech is not only an NLRA issue, but it becomes a Constitutional first amendment issue as well. The first amendment to the United States Constitution reads as follows: "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." The key provision that applies to police social media policies is with the government making no laws abridging the freedom of speech.

Since law enforcement agencies are a branch of state or local government, any policies that limit the speech of its employees would appear, by default, to be an act by the government to limit free speech. In fact, in December 2014, the Fourth Circuit Court of Appeals found the City of Petersburg, Virginia's Police Department social media policy to have violated the first amendment rights of two of its employees (Brocklin, 2017). The employees filed suit after being disciplined for criticizing the promotion process of the agency and the promotion of younger officers within the agency

(Brocklin, 2017). The appeals court found the policy to be overly broad and did, in fact, violate the employee's first amendment rights. The court did not fail to provide guidance, however.

Rather than finding all government agency social media policies unconstitutional, they referred to the 1995 Supreme Court decision in *United States v. Treasury Employees*. While only binding in the Fourth Circuit, it sets precedence for other courts when deciding first amendment issues on social media suits. The Fourth Circuit set the bar when evaluating prohibited conduct at the level that the government has to prove "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government" (*United States v. Treasury Employees*, 1995, para. 2). The harm suffered by the agency must be real in nature and not a hypothetical harm (Brocklin, 2017). Agencies must delineate specific areas in their social media policy that, if violated, would create direct harm to the agency and that the violation would have an impact on the operation of government. If that harm outweighs the interests of potential audiences and employee expressions on social media, then the prohibition is valid. Employees associating themselves with the agency and posting images or text of them violating the law, behaving inappropriately, making slurs relating to protected status, or releasing confidential information would fall within these constraints. Comprehensive social media policies, in and of themselves, do not violate first amendment rights of employees, but government agencies need to ensure that their policies fall within the guidelines provided.

An additional counter point to the thesis presented is that use of social media is so widespread that a policy governing social media will not be comprehensive enough to address social media use without being unnecessarily cumbersome. Trying to write a social media policy that covers all aspects of social media conduct, both off and on duty, is a daunting task. Court cases require specific conditions in order to limit government employee speech. When one includes the governing entities policy, agency policy, existing state and federal laws, and considering off duty and on duty conduct, social media policies can become out of control documents (Tung, 2014). Social media policies that become excessive are often so verbose and detailed that employees become confused regarding what is acceptable and expected and what is specifically prohibited (Tung, 2014). Fortunately, the social media revolution has been around long enough that many law enforcement agencies have developed and approved comprehensive social media policies. In addition, the IACP has also provided significant guidance in the social media realm.

In October 2010, the IACP partnered with Department of Justice, the Bureau of Justice Assistance, and the Office of Justice Programs to create the Center for Social Media ("IACP Center for Social Media," n.d.). The Center for Social Media provides information on setting up a social media policy, developing social media strategies for community outreach, conducting social media investigations, and provides a sample Social Media Policy to create a base for agencies developing their own policies (See Appendix). These resources are law enforcement specific and have been reviewed to be the industry standard for law enforcement agency social media policies and updated for the newest technology and practices ("IACP Center for Social Media," n.d.). What

initially appears to be an overwhelming task that will confuse more than clarify an agency's social media strategy can be painlessly guided into an effective plan to ensure that agency goals and strategies are clear and employees are confident in what is acceptable both on and off duty.

RECOMMENDATION

With the increasingly widespread and prevalent use of social media by law enforcement personnel, both on and off duty, the risks to both the officers and the agencies have also increased. Law enforcement agencies should have a clearly defined social media policy. A policy that delineates conduct both on and off duty allows the department to establish its public image. What an agency portrays on its web page and social media outlets should be a carefully planned and executed public image campaign. What the agency puts out should match the agency's core values and mission, while showing the public exactly what the agency stands for. Hand in hand with this "brand" image should be a policy that lets employees clearly know what they can and cannot do regarding social media.

A clearly defined social media policy also applies this policy to off duty statuses that align themselves with the agency or its brand. Misconduct through social media postings, whether intentional or careless, has been allowed in court proceedings with regularity. What agency employees post on social media without careful consideration has come back to paint the employee, or the employing agency, in a negative light. With the heightened scrutiny on law enforcement, officers and agencies cannot afford to project a negative public image.

A clearly defined social media policy also describes the strategies for the use of social media, who is specifically authorized to access the agency's social media outlets, and who has the authority to approve what is released to the public via social media. Some agencies use Twitter and Facebook to notify the public of hazardous situations, public announcements, and traffic patterns. Both platforms are quick to disseminate information in a rapid manner. Facebook and a department webpage are often used to project the long-term image of the agency, clearly stating the core values, mission statement, and the "brand" image the agency wants to project. Establishing this information and who has the ability to present this information should be clearly defined in a written social media policy.

A law enforcement agency is not only a public employer; it is government employer. As such, it not only falls under the purview of the National Labor Relations Act, but being a government entity, is also covered by the United States Constitution. An argument can be made that any censorship of an employee by the agency is an intrusion by the government on that employee's first amendment rights. Fortunately, some guidance has been provided by the National Labor Relations Board and the federal courts. They have held that speech that is protected concerted activity- related to work conditions- with other employees is not subject to prohibitions, but social media content that aligns itself with the employer and specifically denigrates the brand image or core values can be restricted. The federal courts have further limited social media policies, but provided a legal guideline to gauge the level of social media content. If the content can create a real harm to the employer and affect the operations of government, and the harm to the employer outweighs the "interests of both potential audiences and a

vast group of present and future employees in a broad range of present and future expression” (United States v. Treasury Employees, 1995, para. 2). Posts exhibiting unpopular opinions would not likely create a harm that outweighs the interests of employees, but posts depicting illegal activity, sexually suggestive material, or actions that go directly against the core values and mission of the department most likely would.

It can also be said that, in today’s litigious climate, a clearly defined social media policy would have to be so vast and cumbersome that it would be overwhelming for any employee to understand and abide by. Fortunately, the idea of a social media policy is not brand new. Several agencies have created social media policies that clearly define expectations without violating the rights of employees. The International Association of Chiefs of Police have also gotten involved in the social media game. In conjunction with the Department of Justice, the Bureau of Justice Assistance, and the Office of Justice Programs, created the Center for Social Media (“IACP Center for Social Media,” n.d.). The Center for Social Media provides resources on what is needed to establish a social media policy, how a solid policy is developed, and what a solid policy covers. They have even provided a sample social media policy from which agencies can build their own clearly defined social media policy (Appendix). While appearing daunting and complex on the surface, resources are available to make the generation of a social media policy less onerous.

Law enforcement agencies should develop a clearly defined social media policy. In doing this, the policy should provide a clear vision on what the agency’s social media strategy should be, along with the image that they would like to portray. After getting buy-in from the stakeholders in the social media policy, a policy should be developed to

meet the social media strategy, to include who is responsible for accessing the agency's social media voice, as well as what that voice wants to portray to the public.

Researching other agencies' social media pages, and using the IACP sample policy as a base layer, agencies can create a policy that is solid, clearly defined, and understandable. Having such a policy in place and training all employees on that policy reduces the risk to both the agency employees and the agency itself.

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APPENDIX

A comprehensive sample social media policy, provided by the International Association of Chiefs of Police, attached below, can also be located at:

<http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/SocialMediaPolicy.pdf>



SocialMediaPolicy.pdf