

Memo

To: Commissioners

From: Wayne Barnett

Date: November 24, 2009

Re: Social media and the Ethics and Elections Codes

Introduction

The City Council is considering adopting a department policy regarding Web 2.0, or social media. The draft policy defines the term as “the use of third-party hosted online technologies that facilitate social interactions and dialogue.” Social media has been used to engage people in the work of City government who might not otherwise be engaged.

The Commission has been asked to opine on how the Ethics and Elections Codes apply to Web 2.0.

Law

Questions regarding City web sites, newsletters, or other tools for communicating with the public are all analyzed under both the Ethics Code and the Elections Code. (Use of social media also raises issues under the Open Public Meetings Act and the Public Records Act, although neither of those laws is within the Commission’s jurisdiction.)

The Ethics Code, at SMC 4.16.070.2.b, provides that a Covered Individual may not “[u]se or attempt to use, or permit the use of any City funds, property, or personnel, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose....”

Similarly, the Ethics Code at SMC 4.16.070.2.a provides that a Covered Individual may not “[u]se or attempt to use his or her official position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of the Covered Individual or any other person, rather than primarily for the benefit of the City....”

The Elections Code, at SMC 2.04.300 provides that:

No elected official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the

promotion of or opposition to any ballot proposition. Facilities of public office or agency include but are not limited to use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the officer or agency....”

Both the Ethics and Elections Code are to be liberally construed to effectuate their purposes. SMC 4.16.020.D and 2.04.150.B.

The Commission is charged with administering and enforcing the Ethics and Elections Codes. The Commission is not a policy-making body, but can recommend to the City Council changes to the Ethics or Elections Codes if it believes that changes are advisable.

Past interpretations

In Advisory Opinion 95-2E, a copy of which is attached, the Commission applied these three Code sections to a City Council Committee’s newsletter which was sent by mail. In Advisory Opinion 95-4E, a copy of which is also attached, the Commission applied these Code sections to content available on City web pages.

These SEEC interpretations are consistent with the interpretation of the state’s Executive Ethics Board. In an opinion that addressed the application of the state’s Ethics Code to web sites, the EEB held that “[m]aintaining or updating web sites requires agency equipment, including web servers, and the use of state employees during working hours to accomplish updates or to maintain the web site, including links. Therefore, state agency maintained web sites are a facility of the agency subject to” state law barring the use of public facilities for campaign purposes. EEB Advisory Opinion 04-01.

After holding that agency web sites are public facilities, EEB Advisory Opinion 04-01 went on to address links from those web sites to non-government web sites, writing that “using state facilities to provide a direct electronic link to a private web page which contains materials and advertisements that support, or oppose, passage of a ballot initiative would also violate” state law.

Other Jurisdictions

I have been unable to locate relevant opinions from other jurisdictions regarding this issue. I e-mailed my colleagues in Atlanta, Los Angeles, New York City, San Diego and San Francisco, and none of those jurisdictions had issued opinions addressing the application of the Ethics Code to social media, or links to non-governmental web sites generally. I then posted an inquiry on the Council on Governmental Ethics Laws site, which generated no replies whatsoever.

It may well be that Seattle is the first sizable municipality addressing the issue. Robert Wechsler blogged at Cityethics.org recently about Seattle’s nascent policy, saying: “Leave it to Seattle to be at the forefront of web government ethics.” And on November 20, Kate Flack and I participated by telephone in a public sector roundtable organized by the Markkula Center for

Applied Ethics at Santa Clara University to discuss social media. Seattle's draft policy was the focus of the discussion.

Discussion

Here are some propositions around which the Commission can structure a discussion of the application of the Ethics and Elections Code to social media. Based on the Commission's agreement or disagreement with these propositions, staff can craft an advisory opinion for the Commission's formal adoption.

- 1. City web pages and electronic communications from City employees and officials acting in their official capacity are City property for the purposes of SMC 4.16.070.2.b and City facilities for the purposes of SMC 2.04.300. Under the Ethics Code, these resources must be employed to serve City purposes, and under the Elections Code, they may not be used for campaign purposes.**

City web pages are housed on City computer servers and maintained by City employees. The Commission opined in 1995 that City web pages were City resources for the purposes of the Ethics and Elections Codes and I recommend that the Commission reaffirm that holding.

Similarly, electronic newsletters and other communications that are prepared by City employees using City time or technology, or which are transmitted by City of Seattle technology, are City property for the purposes of the Ethics and Elections Codes.

Just as it would violate the Elections Code for a City officer or employee to encourage passage of a ballot measure on a City web page, or in a newsletter, it is a violation for them to use City facilities to facilitate access to content encouraging passage of that ballot measure. If a City Councilmember cannot promote the passage of, for example, the Pike Place Market levy, then he or she should not be able to include a link or the address of the campaign committee promoting the levy on his or her web site. In both cases, the City resource – the web page – is being used to promote the ballot measure.

Similarly, non-political links must also serve a City purpose. A link to a single roofing company from the Office of Housing's web site, for example, would be improper on a City web site. (A link to every roofing company that provided services in Seattle, though, would likely be permissible.) It follows, then, that a link from the Office of Housing's web site to a blog touting a single roofing company would also violate the Ethics Code. This same rule applies to non-profit advocacy as well. It is improper to use more than minimal City resources to further the work of non-profits other than Combined Charities, the Heart Walk, and Fill the Boot, all of which are recognized as City purposes by ordinance or resolution. Accordingly, users should not be able to access content from City sites that promotes one non-profit to the exclusion of other worthy causes.

2. Because of the interconnectivity of the Internet and social media, the Ethics Code and the Elections Code should not apply to all content that users can access starting from a City web site. At the second “click,” continued surfing should not be imputed to the City.

Five clicks from the City’s home page, a user can watch highlights of the first game of the 2009 World Series on YouTube. With this level of interconnectivity, City officers should not be responsible for where web users go after they’ve left the site to which they’ve been directed from a City facility. The Office for Housing, for example, includes links to organizations which provide counseling to homeowners at risk of foreclosure. Putting Seattleites in touch with services is a City purpose. If one of those organizations endorses candidates or ballot measures elsewhere on its web site, the Elections Code should not be interpreted to require the Office of Housing to sever the link.

This interpretation is on all fours with the EEB’s Advisory Opinion 04-01, and creates a bright line rule that should prove easier to administer than a multifactor balancing test. If City officers and employees appear to be manipulating this bright line rule to accomplish goals that in the eyes of the Commission thwart the intent of the Ethics or Elections Codes, the Commission could revisit this interpretation.

3. Web pages that are maintained by City officers and employees, although not prepared on City time or using City facilities, or otherwise accessible through City resources, are not subject to the Ethics or Elections Codes.

While personnel rules or other City, State or Federal laws may address City employees or officers’ use of social media when they are away from work, such uses are not actionable under the Ethics or Elections Code unless either:

- The officer or employee makes some use of City resources or otherwise represents that they are a City officer or employee acting in their official capacity. (The latter would raise issues under the section of the Ethics Code that bars employees from misusing their City position.)
- The officer or employee discloses confidential information in violation of the Ethics Code.

If City officers or employees want to use social media unimpeded by the Ethics or Elections Codes, they may always elect not to provide access to such tools from official City sites.

4. City resources should not be used to direct users to web pages or other tools that a City officer or employee will use in the future for purposes that would violate the Ethics or Elections Codes.

City officers and employees cannot provide a means for visitors to City web pages to access non-City sites when they plan to use those non-City sites in the future for purposes that would not be permissible under the Ethics or Elections Codes. If an elected official’s blog is accessible from a City facility, severing that link in an election year and using the blog for

campaign purposes would raise serious issues under the Elections Code. The elected official would have used City resources to familiarize the voting public with his or her blog and to build interest in the blog. The official would have used City resources to assist his or her campaign in violation of the law.

5. It is the responsibility of City officers and employees to monitor content posted by users to ensure that City facilities are not used for purposes that violate the Ethics or Elections Codes.

Just as it would violate the Elections Code for a City officer or employee to authorize a campaign rally in a City conference room, so too would it violate the Elections Code if a City officer or employee permitted the public to hold a virtual campaign rally in the comments thread on a blog accessible from a City site. In both cases, City resources are being used for unlawful purposes, which the City official has authorized.