



# Acceptable Website Use

## A Risk Management Perspective

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## Introduction

There has been a recent surge in popularity of websites as a venue for information provided by various public entities, from counties to soil and water conservation districts. It's even possible to find blogs posted by employees of the public entities. Is there reason to be concerned about blog content or about public comment? Should the public entity disseminate policies and procedures related to content and posting? MCIT has the following risk management suggestions related to the development of a website and access procedures. There are several state and federal laws that apply, as well as some constitutional considerations.

## Political Speech:

Minn. Stat. § 211B.09 prohibits the use of official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity.

A public entity should include appropriate language prohibiting any use of computers for political activity that could be interpreted to conflict with this statute. The County Attorney may be able to provide additional assistance on this matter.

## First Amendment-Freedom of Speech

A public entity must establish parameters for the type of information that will be published on its website. When establishing those parameters, the entity should consider potential first amendment implications.

Generally speaking, a government entity's ability to restrict public speech will depend on the type of "forum" that the website creates. Generally there are three types of forums: traditional public forum, designated public forum and a non-public forum.

A traditional public forum consists of places which have by tradition been devoted to open assembly and debate. Streets, sidewalks and parks are typically included in this category. If the government is regulating speech in a traditional public forum, the government's ability to do so is limited. Reasonable time, place and manner restrictions are permitted, but any restriction based on the speech's content must be narrowly tailored to serve a compelling government interest. Restrictions

may also be appropriate where the expressive activity being regulated is outside the protection of the first amendment, such as obscenity.

Government entities can create a “designated public forum” in places where the government property has not traditionally been regarded as a public forum, but where the government entity creates the forum. In these situations, the government’s ability to restrict speech is the same as in a traditional public forum. An example of a restriction is restricting street protesters during certain times to avoid legitimate societal concerns such as traffic congestion and crowd control. The restriction is content neutral, i.e., it applies equally to all protestors versus protestors with a certain viewpoint and/or message.

Government entities may also create non-public forums that are limited to use by certain groups or dedicated solely to the discussion of certain subjects. Examples of non-public forums are street-light posts, prisons, military bases, polling places, a school district’s internal mail system and airport terminals. In these forums, a government entity has greater ability to place restrictions on the use of such forums. The government entity may impose restrictions on speech that are reasonable and viewpoint neutral. An example of a valid restriction may be to restrict information pertinent to a government entity’s established “official business.” The restriction is content neutral, i.e., it does not discriminate based on the viewpoint of the information.

Apart from the free speech concerns, government entities will also have to be mindful of other rules and regulations, such as the requirement to comply with the US Constitution’s Establishment Clause (i.e., separation of church and state.) Government entities will also need to differentiate between policies of restricting speech of others versus “government speech.” Generally “government speech” is not restricted by the free speech clause. Typically when the government entity is speaking for itself, it is engaging in “government speech.”

## **Putnam Pit Inc. v. City of Cookeville, Tennessee**

A review of the case Putnam Pit Inc. v. City of Cookeville, Tennessee, 221 F.3d 834 (6th Cir. 2000) illustrates how the first amendment may be implicated by a government entity’s website policies.

The Putnam Pit is a small free tabloid and web page edited by Geoffrey Davidian, a self-appointed eye on government corruption for the City of Cookeville. Mr. Davidian sued the city alleging in part that the city had violated his first amendment rights when it refused to establish a hyperlink from the city’s website to his own. At the time of Mr. Davidian’s request, the city permitted several for profit and not for profit entities to hyperlink to its website. The city had no written policy regarding adding hyperlinks to its website; rather, the decision whether to add a hyperlink was made by the city’s computer operations manager. Upon receiving a request from Mr. Davidian to add the contested hyperlink, the city established a policy that only websites that promoted the economic welfare, tourism and industry of the city would be added as hyperlinks.

The court concluded that the city’s website was a “non-public forum.” The city reviewed requests for hyperlink access on a case by case basis. It did not allow open access to any specified group of users. The website also did not allow free and open dialogue between the users. It primarily served the purpose to convey information to the reader, which was consistent with the city’s stated goals for the website.

A government entity’s regulation of a non-public forum must be reasonable in light of the government’s interest and may not discriminate based upon a speaker’s viewpoint. Accordingly, a

government entity could restrict access to those who participate in the city's 'official business,' but the restriction may not be based on the speaker's viewpoint.

The court noted that the city's establishment of a policy to limit the pool of persons who might be linked to the city's webpage was reasonable. However, the court ruled that because the policy was implemented, in part, to deny Putnam Pit's hyperlink request, a material issue of fact existed as to whether the city's policy was viewpoint neutral. It remanded the case to the district court for a fact determination.

Although this case would not be binding on a Minnesota court, it illustrates the type of analysis a Minnesota court would likely use and provides some valuable risk management tools.

1. If the website permits a free exchange of ideas, such as in a chat room or open blog, an argument could be made that the government entity created a designated open forum. If this was the case, a government entity would be extremely restricted in its ability to regulate the speech on that website. It could only impose viewpoint neutral reasonable time, place and manner restrictions. It likely could not limit the subject matters discussed.
2. The public entity should establish objective policies and procedures for its website. Considerations should be given to:
  - a. The entity's statutory purpose and obligations
  - b. The stated goals and obligations of its local, state and federal government partners
  - c. Data practices concerns
  - d. Public perception of government funds being used to disseminate certain data
  - e. Restrictions on government entities regarding political and religious speech
3. If the website allows hyperlinks to external websites or processes third party requests for posting of data, the entity should have clearly established policies surrounding the evaluation of such requests. The policy should:
  - Use clear and definite language
  - Use objective criteria
  - Support the websites stated policy and objectives
4. When reviewing third party requests for permission to post information on the website, the public entity should ignore from whom the request is made. The request should be evaluated in light of the entity's objective stated policies and procedures.
5. Website policies and procedures should be established prior to requests being made. If such policies and procedures are implemented to deny certain requests, a government entity may be running afoul of the first amendment.

6. The policies should be adopted by the governing body of the public entity. Pertinent staff should receive training on the policies and violations of the policies should be disciplined in accordance with the entity's personnel policy.

## **Freedom of Speech-Restriction on Employee's Speech**

MCIT recommends that all policies and procedures relating to employees acceptable use of government computers and posting information on any government website be established. A government entity should always be cognizant that information posted by its employees may be attributed to the entity itself.

A question may arise regarding an employee's right to free speech under the constitution. Generally an employee must demonstrate that he was not speaking pursuant to his official duties to claim First Amendment protection. To be afforded protection by the first amendment, the employee must:

1. Prove that the speech was on a "matter of public concern" and is not required by his/her job duties;
2. Demonstrate that his interest in speaking outweighs the public employer's interest in efficient public service.

What speech is protected may be very fact specific and MCIT strongly recommends consulting counsel prior to taking disciplinary action for employee speech. Furthermore, employees may have greater speech protections under PELRA. Accordingly, even if the speech is not protected under the First Amendment, it may be protected under PELRA or other state regulation, anti-discrimination laws (Title VII and Minnesota Human Rights Acts) and/or labor relation laws, if applicable.

A public entity should consult with its attorney before developing website policies and procedures. This information is provided for educational purposes only and should not be considered legal advice.

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