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Newsletter | Spring 2024

Update on Public Law

SCOTUS Guidance About Social Media

By Michael G. Colantuono, Esq. & Mihir A. Karode, Law Clerk

In *Lindke v. Freed*, the U.S. Supreme Court recently held a public official's social media page is a "public forum" (from which others cannot be excluded) only if the official has authority to speak for government and appears to do so. This means officials should distinguish between "official" social media accounts and personal or private ones. To be able to block offensive commenters, it is best to label personal social media with a disclaimer denying that the account speaks for government. And officials may wish to be careful about what they post — they can speak about public events and agency news, but should not be the first to announce agency business via a social media account they wish to treat as private. Of course, officials who are comfortable allowing all-comers to comment on a social media page need not worry about these restrictions.

James Freed, City Manager of Port Huron, Michigan, created a Facebook account before his appointment. Until he became City Manager, his page was primarily for personal use. Afterwards, he made his page "public" and updated his biography to reflect his new role. Although he continued to post about his job and public issues, his page still remained mostly personal, including family pictures. However, because his profile was public, Freed received comments from acquaintances and strangers alike.

Freed posted regarding his city's response to the pandemic, attracting negative comments from Kevin Lindke. Freed initially deleted these comments but eventually blocked Lindke, who sued, arguing Freed's Facebook page was a public forum in which government officials cannot regulate content.

The federal trial court ruled against Lindke, explaining that the prevailing personal quality of Freed's posts, the absence of government involvement with his account, and the lack of posts conducting official business showed Freed managed the page in his personal capacity. The Sixth Circuit affirmed, holding that an official's activity is state action subject to the First Amendment rights of others only if the official is required by state law to maintain the account, uses

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Welcome, Sarah Pfeffer!

CHW is pleased to welcome Sarah Pfeffer as a 5th year litigator in Pasadena. She brings diverse experience ranging from consumer products liability to commercial contract and franchise disputes and arbitration of trust disputes.

Her BA in Arabic Language and Literature is from the University of Texas at Austin and her law degree is from UC Irvine, where she won a substantial scholarship and externed for Los Angeles Court of Appeal Justice Dennis Perluss. Current assignments include a dispute over CEQA mitigation measures.

Welcome, Sarah!

Court Allows PRA Request for Calendar Entries

By Meghan A. Wharton, Esq.

The Energy and Policy Institute made a Public Records Act request for calendar entries of Alice Reynolds, the Governor's Senior Advisor for Energy and future President of the Public Utilities Commission, evidencing Reynolds's meetings with 10 identified energy industry organizations in the year before her PUC appointment. The Governor's Office rejected the request, declaring the entries exempt from disclosure under the deliberative process privilege and *Times Mirror Co. v. Superior Court*, a 1991 California Supreme Court decision.

The Governor's Office cited the Public Records Act's "catchall" or "general balancing" exception, arguing the interest in withholding the entries clearly outweighs the public's interest in disclosing them. *Times Mirror* held Governor Deukmejian's interest in nondisclosure clearly outweighed the public's interest in disclosure of all calendars showing his daily activities for five years. The Supreme Court cited the deliberative process privilege and noted that disclosing whom the Governor met with would turn private conversations into politically fraught fishbowl events, might discourage meetings with controversial people, and might disclose the Governor's policy plans before he was ready to do so.

In the new case, the Los Angeles Court of Appeal held the Governor's Office must disclose records of meetings with the requested entities, including invitees, attendees, date, time, and location. The Office is not required to disclose substantive information regarding the meetings, such as agendas.

The Court of Appeal held *Times Mirror* does not absolutely protect public officials' calendars. The deliberative process privilege allows officials to withhold documents only if the interest in nondisclosure clearly outweighs the public's interest in disclosure.

The Court reasoned the interest in nondisclosure is low in this case because the request sought benign information regarding meetings with only 10 organizations with whom the Governor's energy advisor would be expected to meet. The Institute did not seek substantive information such as meeting agendas or notes. Therefore, the entries responsive to the targeted requests will reveal little about Reynolds' or the Governor's mental processes, deliberations, or policy positions. The Court also noted the Governor presented no evidence that disclosing the meetings would discourage future meetings with energy-industry stakeholders.

Weighing in favor of disclosure, the Court of Appeal recognized the public has an interest "in the extent to which the current CPUC president met with the CPUC and its regulated entities when she served as the Governor's senior energy advisor." Because the deliberative process exemption is rooted in the PRA's catchall exemption, the Governor must show the interest in nondisclosure *clearly* outweighs the public interest in disclosure.

Public officials should recognize that records of those with whom they meet or speak by phone or communicate in other ways are not entirely protected. If officials wish to maintain such conversations in confidence, they should avoid making records that are not needed, avoid retaining records longer than required by their agencies' records-retention policies, and make a record as to why particular meetings and meeting participants would be impaired if the fact of the meetings were known.

The Governor's Office still has time to seek Supreme Court review in this case, so this may not be the last word. The law under the Public Records Act develops regularly with new cases and statutes. We will keep you posted!

For more information, please contact Meghan at mwharton@chwlaw.us or (530) 200-2030.

SCOTUS Considers Development Impact Fees

By Michael G. Colantuono, Esq.

In its latest regulatory takings case, the U.S. Supreme Court has ruled that legislation imposing a fee on development to mitigate its impacts is subject to the same analysis as a similar, one-off permit condition. This is the familiar analysis of the *Nollan* and *Dolan* cases, which require a permitting condition or mitigation measure to have a logical connection, or "nexus" with the impact to be mitigated (i.e., traffic fees mitigate traffic impacts) and to be at least "roughly proportionate" in extent to a development's impacts. California's AB 1600 (named after the 1987 statute which adopted it) already requires a nexus study to support new fees and annual and five-year reports to show the fees are properly collected and spent. Therefore, this new case may be of little significance in California. Still, the property-rights bar is calling it a big win.

George Sheetz proposed a modular home in unincorporated El Dorado County. The County conditioned the building permit on a $23,420 traffic mitigation fee — a development impact fee required by its general plan. Sheetz sued, backed by the property-rights bar. He argued the fee violated *Nollan* and *Dolan* because there was no showing that his modest project would trigger a need for countywide traffic improvements or that the amount of the fee was commensurate to the traffic demand his home would generate.

He lost in the California trial and appellate courts, which followed precedents holding that *Nollan* and *Dolan* apply only to one-off permit conditions, and not to legislative programs like AB 1600 fees. The California Supreme Court denied review, but the U.S. Supreme Court granted certiorari to resolve conflict among state high courts. The briefing in *Sheetz* raised the possibility the case might threaten impact fees and mitigation measures broadly, but oral argument made clear the Court was not headed there. El Dorado County conceded at argument the only point the Supreme Court would decide — that legislative fees and conditions on classes of developments are subject to *Nollan* and *Dolan* review.

The Court refrained from deciding "the validity of the traffic impact fee, including whether a permit condition imposed on a class of parties must be tailored with the same degree of specificity as a permit condition that targets a particular development." And Justices Kavanaugh, Kagan, and Jackson wrote separately to emphasize that the "decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels."

The case returns to state court to decide these issues and we'll keep an eye on it for you. But, for now, *Sheetz* is not a significant change for California local governments and the people they serve.

For more information, please contact Michael at mcolantuono@chwlaw.us or (530) 432-7357.

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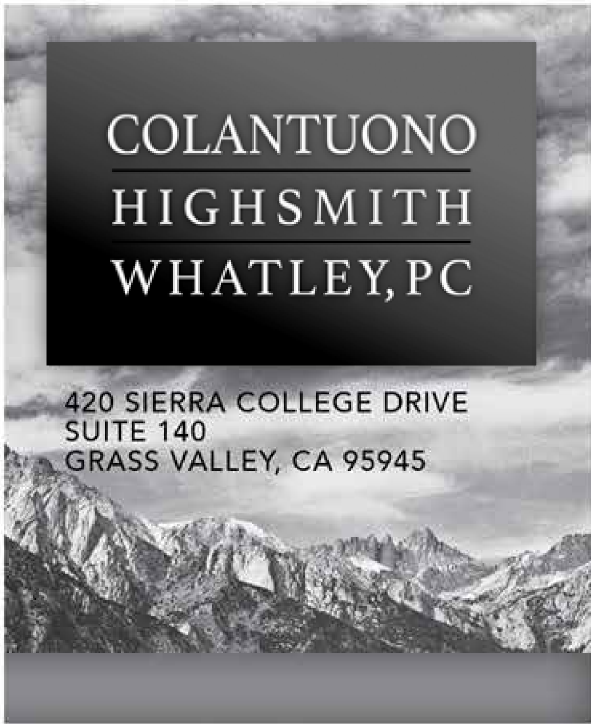
state resources to do so, or the account belongs to the office rather than an official. The U.S. Supreme Court rejected these analyses.

O'Connor-Ratcliff v. Garnier is a companion case involving California school board members who established social media pages while campaigning, and maintained them when sworn in, posting on school affairs. The Ninth Circuit ruled for a plaintiff commenter blocked from their pages, finding a "close nexus between the Trustees' use of their social media pages and their official positions." The Supreme Court remanded the case for further proceeding under *Lindke's* new rule.

This area of the law is developing rapidly. Stay tuned!

For more information, please contact Michael at mcolantuono@chwlaw.us or (530) 432-7357.



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