EBOOK

The Comprehensive Guide to Public Record Keeping

For clerks and records managers

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The Purpose of This eBook

We've been listening and through conversations with many of you, we've heard that you need information and clarity on public records. They exist in a variety of formats and the obligations of clerks and records managers vary depending on the state, agency type, and ever-changing technology like social media.

We combined interviews with clerks and other public records experts along with our research to provide crucial institutional knowledge in the form of the eBook.

In this eBook we cover:

✓ **The current state of public records laws**

✓ **The challenges and responsibilities of social media records retention**

✓ **Solutions for public records management and social media archiving**

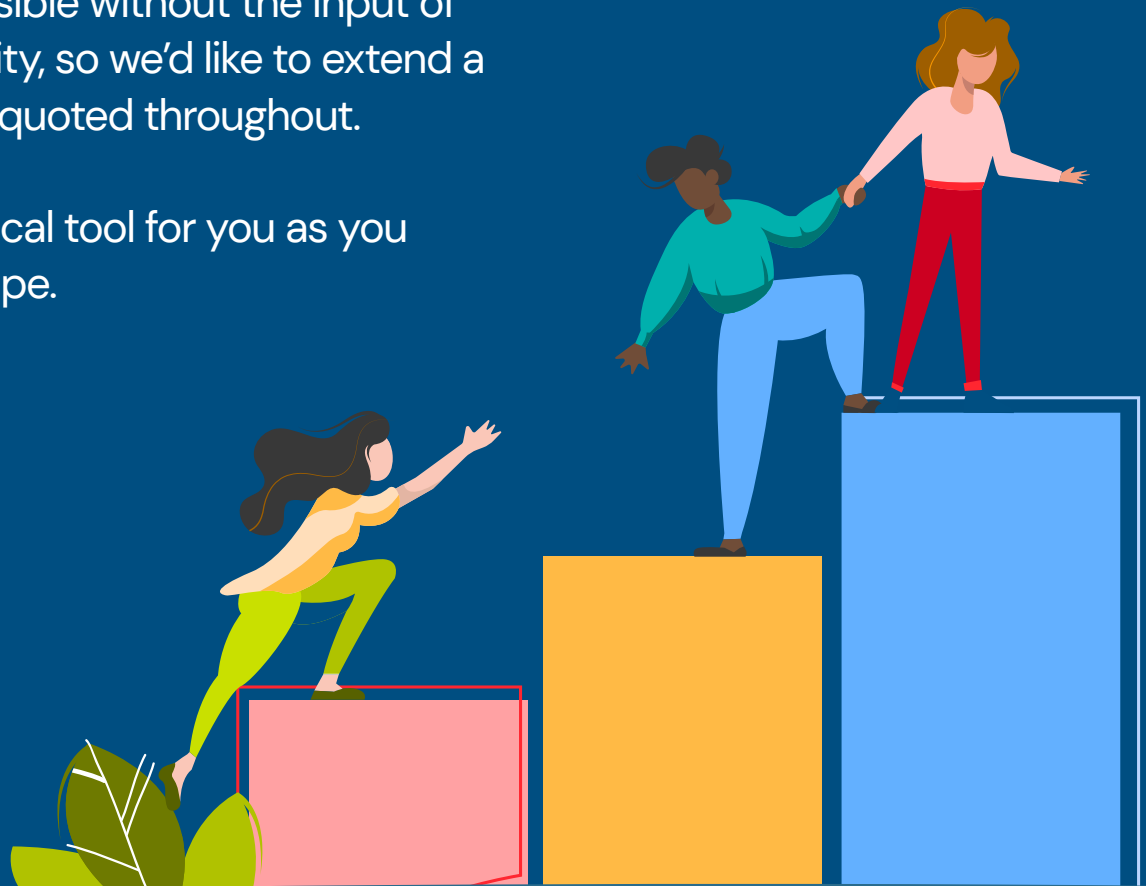✓ **Advice from subject matter experts and your peers**

This eBook wouldn't have been possible without the input of the records management community, so we'd like to extend a special thank you to those who are quoted throughout.

We hope this eBook can be a practical tool for you as you navigate the public records landscape.

– The CivicPlus® Team

The Current State of Public Records

What is a public record?

What's considered a public record is constantly changing as technology continues to evolve. Fifty years ago, fax messages and phone records would have been some of the latest documentation to be added to the umbrella of public records. Today, social media, text messages, and emails are also considered public records.

A public record refers to information that has been recorded and/or filed by a public agency. They are the product of the Freedom of Information Act (or FOIA) that was passed in the United States in 1966 with the intention of providing transparency to the American people regarding anything touched by a government worker or tax dollar at any level of government.

Individual states have different mandates around what is considered public record for their residents to be able to gain access to via a request, just as they have different required response times from agencies and different retention policies required.
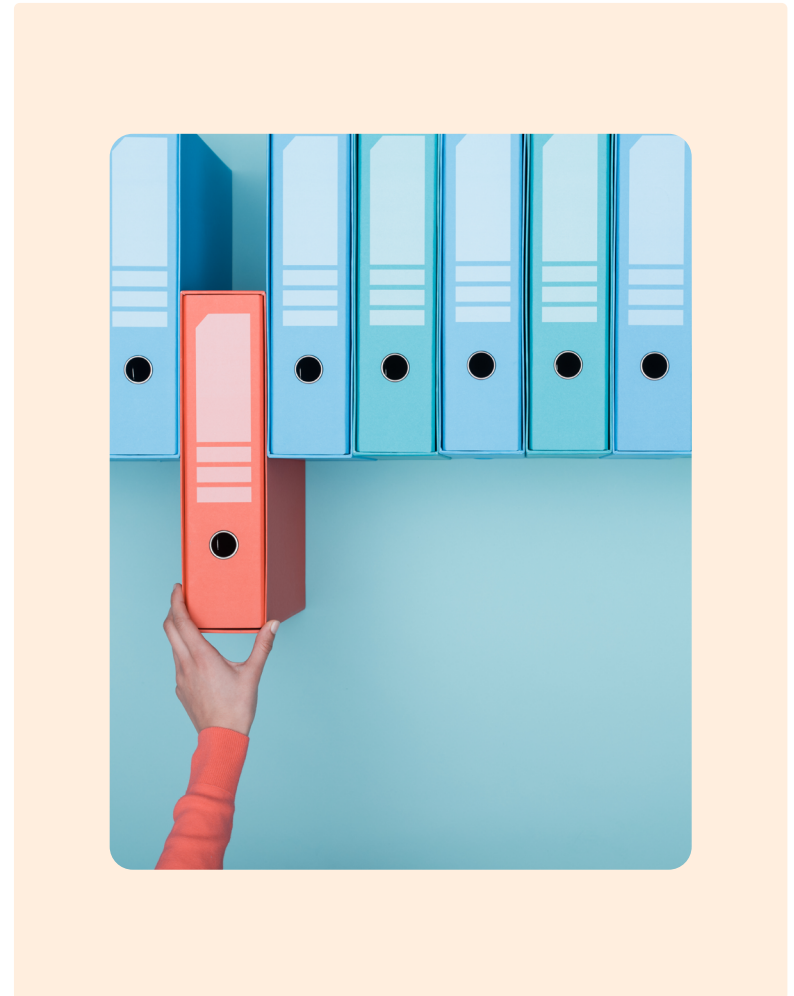
Social Media as a Public Record

Social media is one of the latest mediums to create questions around public records responsibilities. While this is an evolving area of law and practice, there's a large body of guidance from the states around social media and public records responsibilities.

Social media, especially when meeting in person isn't an option, has become a way for agencies to reach out to their community. It's a source of information and a means of communication between organizations, officials, and residents. Sources like social media posts, comments, blocked lists on agency social media profiles, and more are now part of a responsibility that agencies have to retain records of their social content.

Here are three critical areas where states have offered guidance:

1. Social media, like other forms of electronic communication, can generate public records.

2. Content generated on social media by constituents can create public records.

3. Your agency (not the networks) is responsible for retaining social media records.

"

"Everything on social media is subject to public records law. We started becoming aware of the fact that we needed to retain our social media records when we started becoming more active on social media. When that started happening in our town, our town clerk at the time said, 'Hey, wait a minute, we're not up to speed on our legal obligations on retaining that information."

Mary Ellen Dunn, CMC - Deputy Town Clerk, Clarkdale, AZ

How the COVID-19 Pandemic Affected Public Records

There is no question that the COVID-19 pandemic had a significant impact on human interaction. Everything from school and work to personal celebrations and city council meetings moved online. A 2021 CivicPlus (formerly ArchiveSocial) study on the State of Social Media in the Public Sector surveying over six hundred state and local governments, law enforcement agencies, and school districts, found that 75 percent of public agencies and school districts increased remote work operations as well as attention to digital services and resident experience.

But as attention to digital services accelerated, so did the toll it began to take on public communicators. As issues of widespread political unrest, racial inequality, and COVID-19 amplified levels of uncertainty online, agencies and school districts were forced to confront a huge spike in misinformation and troll activity. And with that avalanche of communication, came an increase in public records.

Public Records During a Pandemic

Although local governments and state agencies are doing all they can to mitigate the damage COVID-19 continues to bring, public records requests will continue being filed. Even with the peak of the pandemic behind us, the public records requests surrounding procedures are still around. From legal issues, audits, or simply research for future public health issues, these records will continue to hold vital information to improve future public health endeavors.

Timelines of when public records were considered to be in or out of compliance when responses were required. Some states passed temporary measures to expand more lawsuits and more records are being requested from public health agencies, schools, and state agencies. Public health departments of all shapes and sizes — county, local, and state, have been inundated with public records requests having to do with how the community has handled the pandemic.

In more at-risk communities like those living in poverty, in rural areas, or dealing with high rates of the uninsured, public officials' roles are more important than ever. These states also have higher than average uninsured rates in their population, which has been consistent with more infection. Each state has its own time limits required for agencies to respond to public records requests. For most it is 10 business days, but the policies vary. If the requests are not fulfilled within the required amount of time the result is usually a lawsuit; either filed by an organization or a private resident.

COVID-19 Reporting

When new variants began to take over, many states started to shrink their COVID reporting. Public health departments had been reporting the rates of infection, vaccination, hospitalization, and other relevant information on a daily basis for the majority of the past year. But as times changed, states such as Florida, Nebraska, Iowa, and South Dakota changed their reporting to weekly. Nebraska actually stopped their reporting altogether for a few weeks and reporting could only be accessed through a public records request. They are now processing numbers again on a weekly basis. When states continue this trend of infrequent case reporting or cease in reporting altogether as Nebraska did, public health officials bear the burden.

Consequences

In May 2020, a lawsuit was filed by a media coalition of more than two dozen news outlets seeking a list of records related to how North Carolina's Department of Public Safety and Department of Health and Human Services were handling COVID-19. These records included the state's database of infected cases with personal information redacted, tracking requests of PPE to local hospitals and governments, and communication between Department of Health and Human Services (DHHS) and local health departments. The reason for the delay in records? Gov. Cooper says, "state employees are stretched to the max."

With rapid changes on every level of government about different reporting policies, masking debates, and more, small health departments are stretched thin and overworked. Health officials are left scrambling to try to continue protecting and educating their communities with key information about COVID-19. They are often responsible for everything from contact tracing and reporting to other agencies, to relaying information to local and national news as well as the Center for Disease Control (CDC). They plan vaccination drives, run public health information campaigns to combat misinformation, run social media accounts to communicate with the public, and so many other tasks we are not privy to because "when public health works", they're invisible.

Looking Ahead

The groundwork laid out by local officials and the communications and policies set forth by state agencies will be built upon for decades to come. The records of early contact tracing, infection rates, vaccination rates, and more will be requested by a wide variety of the public to use for further study. Researchers at universities will analyze different strategies in different communities to help improve upon in the future. News agencies will review documents for errors and reporting to hold government officials accountable. The public will request records for their own peace of mind.

Quiz: Public Records Request Scorecard

YES   **NO**

Does your agency track how many requests the receive?

Does your agency track the type of requests they get?

Is your records request process consistent and documented?

Does your agency conduct regular training on compliance?

Do you use digital redaction tools?

Do you publish commonly requested records online?

Does your agency track the type of requests they get?

Is your FOIA contact info publicly available online?

TOTAL YES

7-8: You're a Pro

You're doing great, but there's always places to improve.

4-6: Room for Improvement

You've got some important steps in place but need to do more.

1-3: Off the Rails

Whoa, come talk to us.

How Agencies Are Solving Public Records Problems

Public Record Laws

Individual states have their own laws and dictate how their agencies respond to public record laws. Sometimes known as Open Records laws or Sunshine laws in different states, FOIA laws typically have a required response time that can lead to fines if agencies do not comply.

There are 37 states that have a mandated response time for public records requests. Of these states, 10 allow agencies to extend response times in certain cases, while 27 states allow no exceptions.

Iowa and South Carolina allow agencies the longest possible response times for requests with a required response time of 10 days but that can be extended up to 20 days. Indiana and Mississippi have the shortest response times with organizations required to respond to most requests within 24 hours.

The Original Public Records Laws

While language may vary, all fifty states have wording that broadly defines public records as:

- Writings

- Sent or received

- That relate to public business

- "Regardless of physical form."

FROM THE EXPERTS

On Social Media as Public Record

"If it's created in the course of official business, then it's a public record just like any other document that would be generated in-house."

**Luke Britt, Public Access Counselor, State of Indiana**

Expansion to Electronic Communication

In most cases, state open records laws were drafted decades ago, but as technology has advanced, so have the laws' interpretations. Email, for example, is now universally considered a public record. Some states specifically name electronic communication in their guidance, while others use the original open records guidance to apply to electronic records as well.

Social Media Enters the Schene

While many states have guidance specifically pointing this out, communications across social media — like email — constitute public record under the existing public records laws in each state.

As with all forms of content produced by public agencies, certainly not everything on an agency's social media accounts constitutes long-term record requiring retention, but inevitably some of the conversations that happen on an agency's social media must be treated as public record and must be retained.
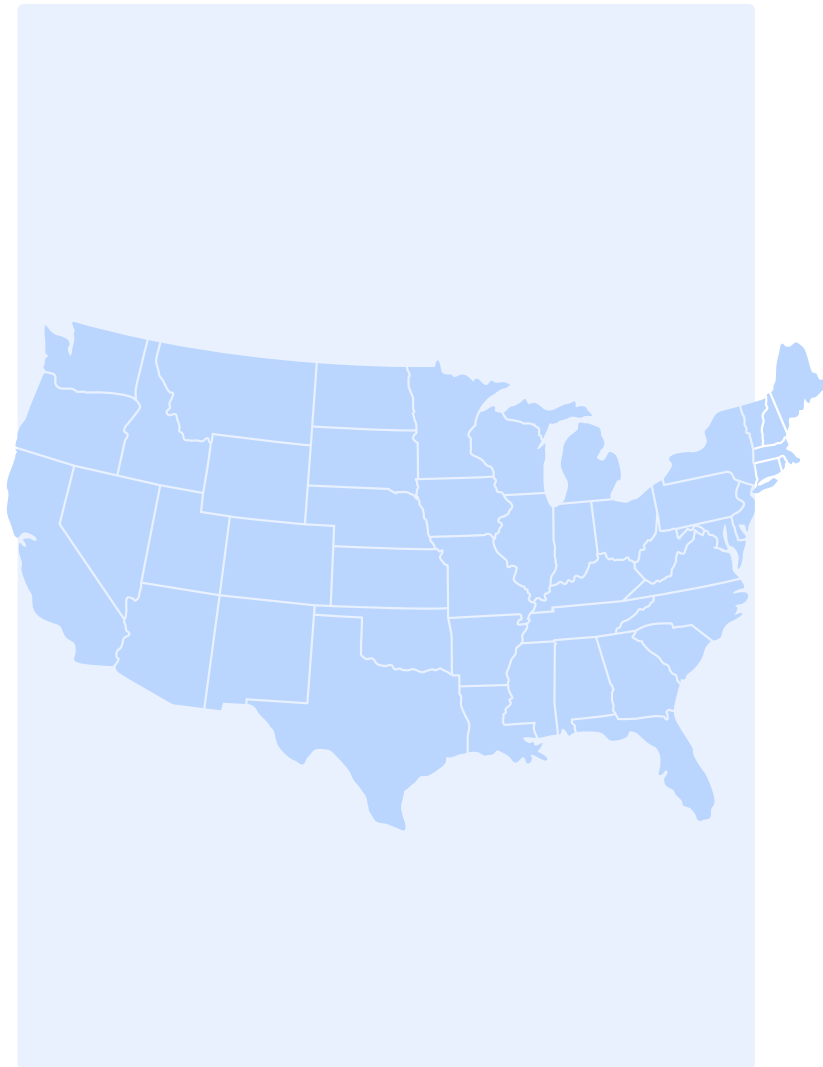
Guidance From the States

Example: Wisconsin

"If an authority makes use of social media…the authority should adopt procedures to retain and preserve all such records."
Wisconsin Public Records Law Compliance Guide[1]

Example: Washington

"…all content published and received by the agency using social media in connection with the transaction of the agency's public business are public records."
Guidelines and Best Practices for Social Media Use in Washington State[2]

Example: Texas

"…The general forms in which the media containing public information exist include…e-mail, internet posting, text message, instant message, other electronic communication."
Texas Open Government Act/SB 1368[3]

[1] https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf

[2] http://www.governor.wa.gov/sites/default/files/documents/GuidelinesAnd%20BestPracticesForSocialMedia.pdf

[3] https://capitol.texas.gov/tlodocs/83R/billtext/pdf/SB01368F.pdf

User–Generated Content

Content Generated by Constituents on Social Media Can Create Public Records

One of the major challenges with social media is the fact that constituents can create social media records. In the same way that both sides of an email conversation are critical to the public record, so too are both sides of a social media conversation. Many states have clarified this through guidance that says that all communication, both "sent" and "received" by agencies, is public record.

Sample State Guidance: Arizona

Arizona is an example of a state that has provided clear guidance on the issue of user-generated content and public records. The following guidance was provided by the Attorney General's office.

"Electronic messages sent or received by a government-issued electronic device or through a social media account provided by a government agency for conducting government business are public records."[1]

FROM THE EXPERTS

On Content Constituents Create On Social Media As Public Record

"You are responsible for retaining all of the comments you receive and people's interactions with you on the platforms you're communicating with them on."

Russell Wood, State Records Manager, Washington State Archives

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[1] https://www.azag.gov/opinions/i17-004-r15-026

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"Even if a user's comments are deleted in accordance with the agency's social media policy, the records would still need to be retained, based on the fact that the agency has dominion over the forum."

Luke Britt, Public Access Counselor, State of Indiana

Do the Social Networks Have Your Data?

4M RECORDS DELETED FROM THE SOCIAL NETWORKS

As of August 2020, we have seen a 44 percent increase of daily social media records for public agencies compared to pre-Coronavirus, and an 18-20 percent average increase in record volume growth since March. Additionally, upon reviewing 55 million records in our archive, we found that over 4M were deleted (that's roughly 1 in 12 records).

- CivicPlus Study Conducted 2020

Three things to know about losing your records:

It's a surprisingly big problem. Government agencies are losing an average of 400 records per month.

It's not your employees; it's users. While agencies themselves (and their employees) tend to avoid deleting content, citizens can delete content at any time. And their power to make you lose your records goes beyond individual comments and posts — users can also decide to leave Facebook altogether and delete their entire profiles and social media histories. Think about what you would do if a user whose records you needed for a legal challenge chose to "quit Facebook," and you didn't have their records.

It affects large and small agencies. If your agency has a social media presence and are not archiving, you are likely losing records each month that you're legally responsible for.

Responsibilities of Social Media Retention

Your agency (not the social networks) is responsible for retaining social media records.

One of the most critical misconceptions is that agencies can just go to the social networks if they need to find and produce records.

The Challenge:

Relying on Facebook and X (formerly Twitter) assumes that the social networks will retain all of the content you need, and then provide it to you.

Limitations:

® **No legal obligation.** The social networks are not bound to public records laws, and have no legal obligation to retain and provide your records.

® **No ability to download critical records.** While the social networks do offer some semblance of a "download" feature, they intentionally exclude critical records such as comments and posts received from residents in an effort to protect user privacy.

® **No assistance producing edited and deleted content.** Residents are able to edit and delete communications sent to you at any time without your awareness. The vast majority of social networks have stated that they will not assist with producing deleted content.

® **No tracking or reporting of edited and deleted content.** Most social networks do not provide a history of edits, and none of the social networks track or report deletions when content is removed.

While not all states have addressed the specifics of how agencies should retain social media records, several states have issued clear guidance on actions agencies should take to ensure their social media record keeping is compliant with state regulations.

Sample State Guidance: Missouri

Missouri offers guidance stating that agencies using social media are responsible for keeping social media records and should not rely on the social networks to perform this function for them. The Missouri Secretary of State's guidance makes it clear that social media companies' Terms of Service can be incongruent with public records regulations and explicitly says agencies must have a plan to retain records independent of the social networks.

The guidance states:

"Social media companies … are not obligated to respond to agency requests – only to what is agreed upon in the Terms of Use or Terms of Service … If the site shuts down, crashes, or the vendor arbitrarily changes the Terms of Use, those potential records could be at risk … Agencies must have a plan and process in place for how records will be saved."

Sample State Guidance: Massachusetts

In Massachusetts, the Secretary of the Commonwealth offers guidance cautioning agencies that social media content exists on servers that are outside of their control and warns that agencies can't rely on social media service providers to retain records in a manner that satisfies the Massachusetts Public Records Law.

The guidance states:

"Public entities have limited control over the functionality or business practices offered by [social media] sites and the legal terms to which they are subject. These terms may impact adequacy of accessibility for … recordkeeping requirements, records management responsibilities, and records disposition … While third party social media providers will most likely save the public entity's content for some period of time, they generally will not save it indefinitely … To the extent that the social media provider's policies are inconsistent with the Statewide Records Retention Schedule, the public entity is obligated to take affirmative steps to retain copies of social media posts."

Manual archiving is time consuming and doesn't capture the records you need.

"If I'm trying to release something for someone who says, 'I want a records request of all your social media records pertaining to a subject,' and all I have is a screenshot and there were changes to the record, then I'm not meeting that records request."

Norma Alley, CMC, City Clerk, Palmer, Alaska

The Challenge:

While it's better than taking no action at all, manually preserving records raises critical challenges.

Limitations:

® **It's time consuming and inefficient.** Can you imagine taking the time to screengrab all of your social media pages every time someone posts something?

® **It doesn't capture changes to content over time,** such as deleted, edited, and hidden content. As your agency and constituents hide, delete, and edit content.

® **Screengrabs are not searchable.** Trying to locate relevant records without a search feature is extremely difficult.

® **Often not admissible in legal situations.** Screenshots can be edited with image-editing software, making them potentially inadmissible in court.

"

"For municipalities that are just relying on Facebook and X as their way of preserving records, there's a legal concern. Those platforms can be erased, or there could be issues where those records could be destroyed."

Edward Purcell, Attorney and Trustee of the New Jersey Institute of Local Government Attorneys

What Is Metadata
(and why does it matter)?

In the event of a lawsuit involving activity on your social media accounts, it's important to have complete electronic records preserved in an authentic manner.

Metadata

- Is electronic information that contains important details about your social media posts, such as user IDs and timestamps

- Is critical for authenticity in legal situations

- Contains much more than just the words or images of the posts (126 characters = 2,308 characters of metadata)

Sample State Guidance: Arizona

The Arizona Agency Handbook offers specific guidance on metadata as public record. "A public record 'maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata…'"

https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_6_corrected.pdf

The Takeaway for Records Managers

Social media record keeping is challenging, and agencies need to find a way to preserve the dynamic and vital conversations occurring on their social media accounts.

Additionally:

- **The nature of social media invites frequent changes to public records, by individuals who are often not part of your agency.**

- **Relying on social networks and manual archiving are not viable records retention options.**

- **On a daily basis, as your agency uses social media as a key communication channel — and as elected officials, residents, and city employees comment and engage — public records are being created.**

Social Media Archiving Helps Solve the Records Management and Compliance Challenge

The Benefits:

Social media archiving captures more records than any other method without requiring any additional effort, and allows records professionals to achieve the highest level of compliance possible.

Social Media Archiving:

✓ Captures records continuously. The solution runs in the background and captures records in near-real-time, regardless of how or when content is posted.

✓ Retains changes to content over time. This includes hidden content, deleted content, and edited content.

✓ Archives records in their native format.

✓ Makes it easy to respond to records requests through advanced searching and filtering techniques.

✓ Captures metadata to ensure authenticity of records to meet legal and compliance requirements.

"Quite often, we get asked about what we're using at the Secretary of State's office to retain records. The answer we give is that we use a social media archive."

Russell Wood, State Records Manager
Washington State Archives

The Compliance Risk

Records management is critical for agencies, as there are consequences around the country, ranging from fees to legal challenges. Some of the fines issued can be costly.

Example: Social Media Records Lawsuit

- In Washington County, FL, a resident filed a First Amendment lawsuit against the Washington County Clerk after they deleted her comment on Facebook.

- She then filed a second suit when the agency could not produce records of her comment.

- To settle the lawsuit, the agency decided to pay over $10,000.

There are ways to combat this from happening to your organization. Records request management systems can streamline your workflow so your agency can speed up response times and save money. With capabilities like assigning roles to employees, maintaining audit trails, a built-in invoicing system, NextRequest helps towns, cities, and agencies of all sizes across the country to manage their records request efficiently.

FROM THE EXPERTS

On Content Residents Create on Social Media as Public Record

"It's just bad business to destroy the trail of the job you're doing as a public official. The retention schedules are there for a reason, and they should be followed accordingly."

**Luke Britt, Public Access Counselor State of Indiana**

The Tools Agencies Are Using

Records request management

Whether your agency receives just a few or a few thousand, records requests are a reality for every public agency. In a time where residents are asking for transparency more than ever, records requests have only increased year over year. Most agencies are too small to have a designated FOIA officer or records request manager on the team, which can lead to days of slogging through documents to respond.

The records request process can be confusing and sometimes tedious for both parties, the public, and government officials. Missing information from a requester, unclear forms, or confusion over who is responsible for a task is a nightmare for everyone (and can lead to legal trouble).

One city in 2021 ended up with over $100,000 in legal fees over a failure to respond to a records request in a timely manner. Delayed responses are frustrating for everyone and can lead to legal battles, an unnecessary (and costly) headache for agencies that could be resolved with a simplified records request process.
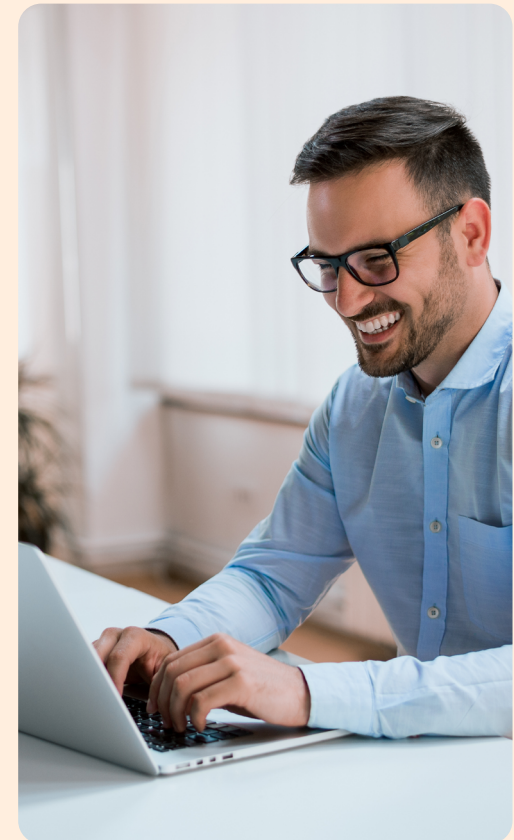
An all-in-one records request management platform like NextRequest can redefine processes and simplify your workflow. When looking for a records request management platform, make sure it has these capabilities:

✓ Custom reporting capabilities

✓ Receive and fulfill requests in one place

✓ Track and process with as many departments as needed

✓ Release records securely

✓ Redact sensitive information

✓ Built in payment system

The best platforms will go above and beyond, like NextRequest's Risk Module feature which utilizes pattern matching and machine learning to understand, identify, and mitigate your agency's risks around the unintentional release of sensitive information.

"It's the best thing created for all public records responders. NextRequest is the simplest and most convenient way to receive and track all public requests for both the requester and responsive staff."

Karen Ang, City of Vallejo
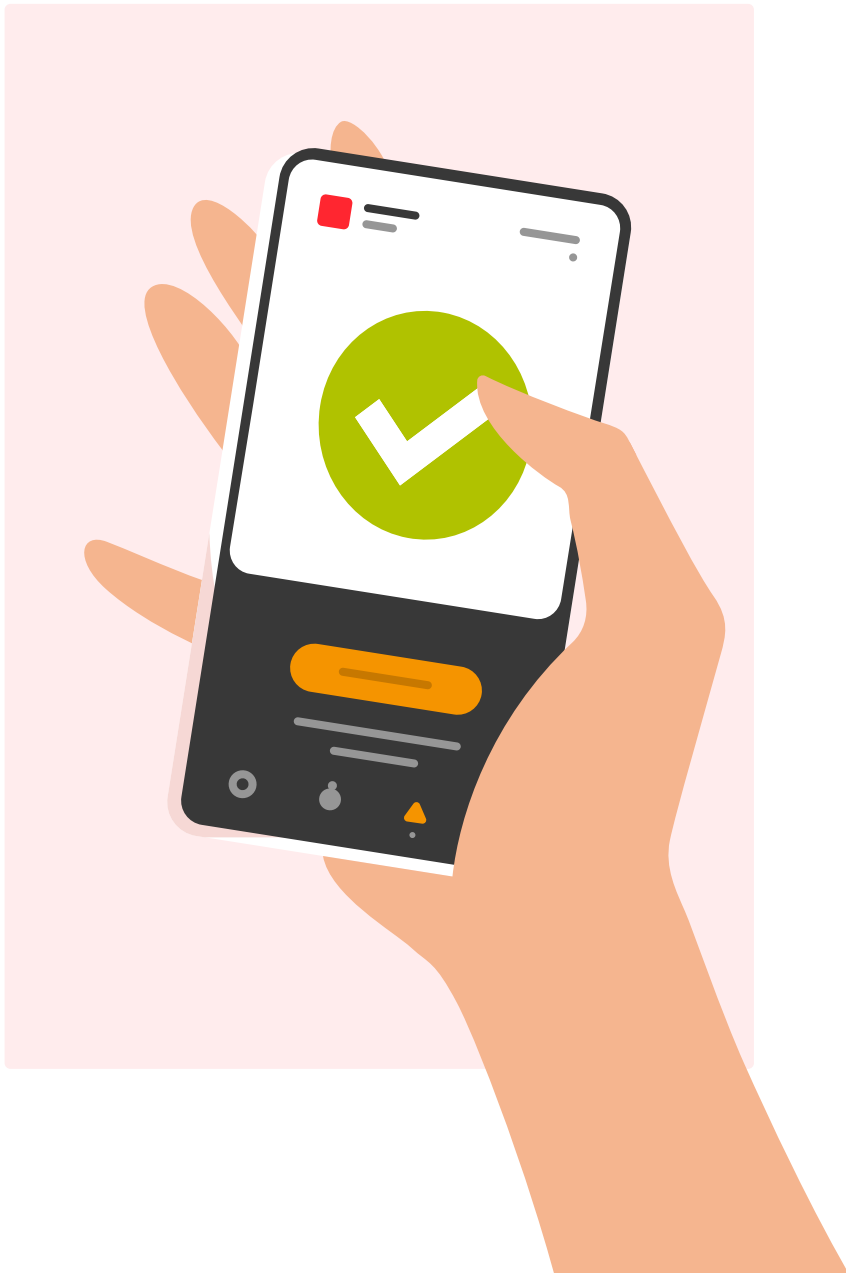
# Social Media Archiving Makes It Easy To Respond to Records Requests

A social media archive captures your content across the major social media networks, archiving not just the original posts, but changes to the content over time (including hidden content and edits to content). While each of the 50 United States has specific and unique laws on public records, social media is considered a public record in every state. Accurate recordkeeping for compliance includes preserving meta-data, comments (even if edited or deleted), and original content exactly as it happened across all of your social media platforms and website pages.

Complying with these laws can cost thousands a year and endless hours of time. But managing your entire online presence doesn't have to be hard. By automatically capturing and preserving your data in one secure location, you'll never miss a post or comment, and can quickly find and respond to records requests, in the exact formats you need. Saving dramatically on public records costs, and increasing your transparency.

An archive helps you respond to records requests by allowing you to:

- ✔ Search and filter by keywords

- ✔ View your records in their original context

- ✔ View changes to social media over time (including edits, deletions, and hidden content)

- ✔ Generate PDF reports that accurately reconstruct the entire social media conversation surrounding the keywords relevant to the records request

- ✔ Have authenticated records for legal submissions

- ✔ Preserve records for as long as necessary with built-in retention schedules
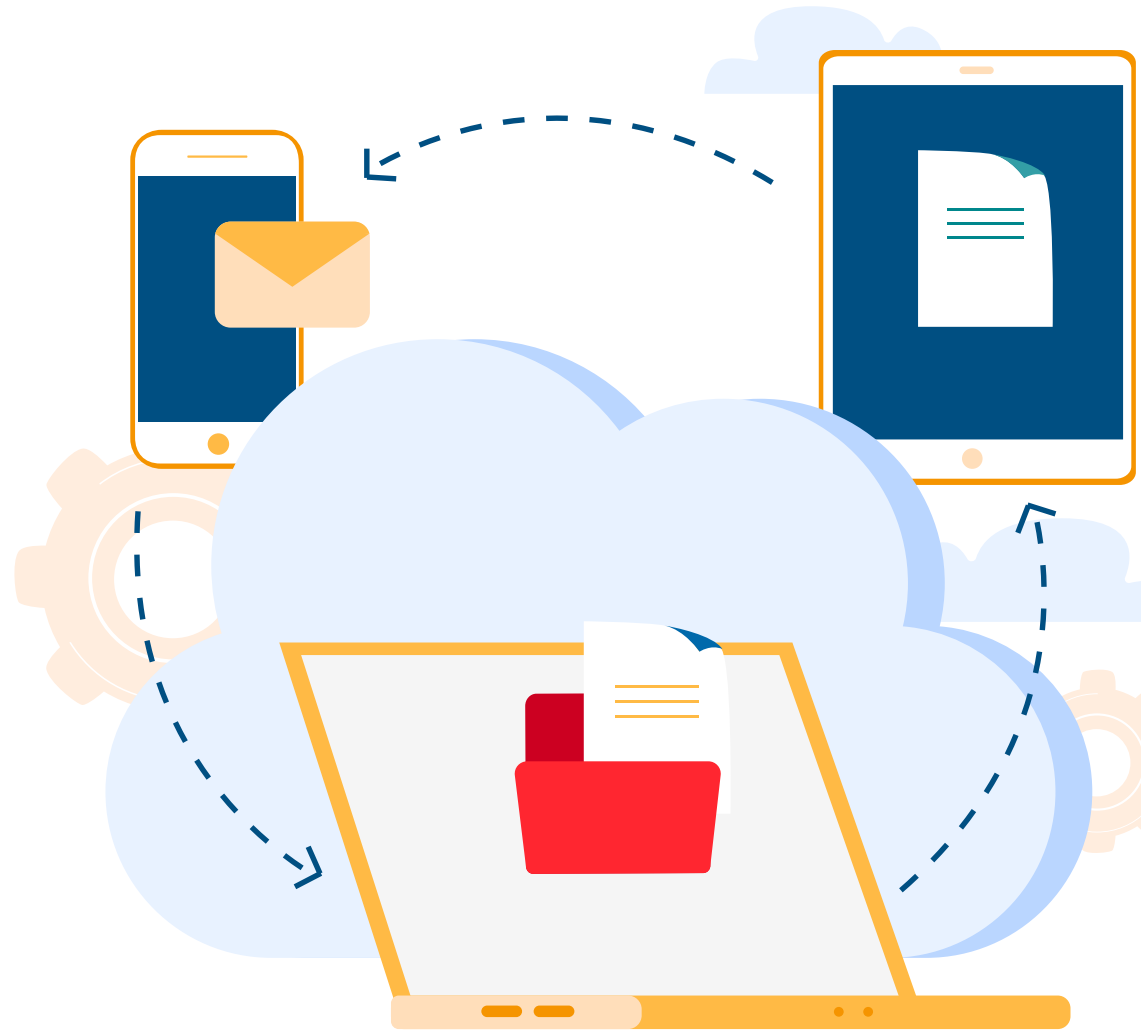
About the Author

CivicPlus is a trusted technology company dedicated to empowering government staff and powering exceptional digital experiences for residents. With a comprehensive suite of solutions that combine to form THE Modern Civic Experience Platform, we strive to create one-stop, frictionless, interactions that delight residents and help staff collaborate and work efficiently. As a result, government administrations that choose CivicPlus realize greater trust and satisfaction among their community members.

 Backed by over 25 years of experience and leveraging the insights of more than 950 team members, our solutions are chosen by over 12,500 global entities and are used daily by over 340 million people in the U.S. and Canada alone. For more information, please visit civicplus.com.

About CivicPlus Social Media Archiving Software

The only dependable social media archiving software for record retention compliance and risk management.

About NextRequest Powered by CivicPlus

Our records request software empowers government organizations of all sizes to collaborate remotely and asynchronously.

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