

## **INFORMATION REPORT**

**INFORMATION REPORT:** Discussion of Proposed Action to Amend and Restate the Code of Conduct for Members of the Board of Port Commissioners in Resolution No. 01397 to Address Social Media Issues. **(Port Attorney)**

**MEETING DATE:** 1/23/2020

**AMOUNT:** No Revenue Impact

**PARTIES INVOLVED:** The Board of Port Commissioners

**SUBMITTED BY:** Michele Heffes, Port Attorney

**APPROVED BY:** Danny Wan, Executive Director

**ACTION TYPE:** None

### **EXECUTIVE SUMMARY**

On October 2, 2001, the Board of Port Commissioners (“Board”) adopted Resolution No. 01397 approving a Code of Conduct (“Code”). The Code specifically applies to Board members and contains ten sections that address topics such as, for example, conflicts of interest, loyalty, and confidentiality. The Code, however, is silent on the use of personal social media by Board members. This is an Information Report on a proposed future adoption by the Board of an Ordinance that would amend the Code by adding a section on social media that will apply to Board members who use their personal social media while acting in their capacity as Board members.

### **BACKGROUND**

As adopted by the Board in 2001 by Resolution No. 01397, the Code of Conduct provides general requirements for Board members in the performance of their duties. In addition to the Code of Conduct, there are a number of state laws and Board policies that govern the conduct of Board members. For example, the Political Reform Act addresses conflicts of interest; the Brown Act discusses the requirements related to public meetings; and the Public Records Act deals with the public’s access to public records, which include emails and text messages that relate to the agency’s business. Another state law, Government Code Section 8314, prohibits the use of public resources for personal purposes or for campaign activities. The applicable Board policies include, but are not limited to, the Board’s By-Laws and Administrative Rules (Port Ordinance No. 4542) a Conflict of Interest Policy (Port No. Ordinance 2392), a policy limiting employment or contracts with the Port for former Board members (Port Ordinance No. 3667), and the Port’s Sunshine Ordinance (Port Ordinance No. 4265). Social media use by Port employees is addressed separately in Administrative Policy 554.

With the prevalence of social media as a form of communication, Board members need to be cognizant of their use of social media when acting in their capacity as Commissioners and how it may impact the Board and/or any matters to be addressed by the Board.

This is an Information Report that addresses a proposed future amendment of the Code of Conduct to include a Social Media Policy (“Policy”) that would establish requirements for Board members and their use of social media. If the Board so desired, staff would come back to the Board at a future Board meeting for the Board to consider a proposed amendment to the Code of Conduct to bring it more in line with similar policies adopted by other public agencies.

## **ANALYSIS**

A social media policy must necessarily consider the First Amendment rights of the users of social media. An individual, whether a public official or not, has free speech rights to use social media platforms to express ideas and opinions and to communicate with others. When such use is by an individual acting in their capacity as a public official, the individual’s social media may become a limited public forum and create free speech protections for those who wish to respond via social media.

The proposed Social Media Policy balances the First Amendment rights of users with the obligations of a Commissioner, and is narrowly tailored to protect both.

For example, the proposed Policy’s expectation is that Commissioners will refrain from using their personal social media (i.e., any digital platform that allows a Commissioner to create and share information with other users or audiences) during a quasi-judicial or evidentiary hearing (such as hearing a formal appeal of a Port land use determination to the Board) to ensure that the Commissioner is able devote their full attention to the matter at hand and satisfy a fundamental due process principle that “he who decides must hear.” Likewise, the proposed Policy provides that a Commissioner refrain from communicating on personal social media about a quasi-judicial matter pending before the Board if doing so could reasonably be construed as evidence of bias, prejudice, or personal interest. These expectations are narrowly tailored because they apply in the context of Board meetings.

First Amendment rights may be implicated by a Commissioner’s use of personal social media to comment on Port business, which may create a limited public forum. Under such a scenario, the proposed Policy expects a Commissioner not to deny access to a user based on the content or viewpoint expressed by the user.

Under certain conditions in the proposed Policy, and when communicating in their official capacity, Commissioners may remove content from their personal social media if such content, for example, is profane, harassing, abusive, or discriminatory.

If a Commissioner decides to use their personal social media to comment on Port business, the Policy requires the Commissioner to add a written notification that the views expressed are personal opinions and not those of the Port.

The proposed Social Media Policy is modeled after other similar public agency social media policies. For example, the City of West Hollywood's Code of Conduct for Elected and Appointed Officials encourages officials to minimize the use of electronic devices during public meetings and prohibits communications through social media with any other person regarding a public hearing during that hearing. Other agencies, such as the City of San Gabriel and the Town of Atherton, prohibit actions that respond to or "like" social media postings in a way that would constitute a serial meeting prohibited by open meeting laws. The City of Brisbane proposed a social media policy for its City Council that stated members "should refrain" from posting on social media concerning any topic "within their subject matter jurisdiction," but the policy was never adopted. Finally, the City of Medford, Oregon, has a policy that encourages members of its governing body to refrain from commenting on pending applications in quasi-judicial proceedings, such as land use proceedings.

This is an Information Report. If the Board so desires, Port staff will come back to the Board with an Agenda Report proposing to amend and restate the Code through an ordinance by adding a Social Media Policy as Section 11. Attached is the proposed revised Code with Section 11 highlighted for consideration and discussion by the Board. Other than adding Section 11 to the Code of Conduct, no further substantive changes were made. If adopted at a future Board meeting, all or a portion of this Code (as well as other related Board policies) may be memorialized in a future amendment to the By-Laws and Administrative Rules or some other Port ordinance addressing similar issues.

## **OPTIONS**

- Direct staff to prepare an Agenda Report recommending that the Board adopt an ordinance amending and restating the Code of Conduct to include a Social Media Policy as described herein.
- Direct staff to prepare an Agenda Report recommending that the Board adopt an ordinance amending and restating the Code of Conduct to include a Social Media Policy that contains different provisions from those described herein.
- Direct staff not to move forward with any Social Media Policy.