

**WHEN CAN MY CITY DELETE A  
FACEBOOK COMMENT?**  
*(and Other Social Media Issues)*

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## I. What is Social Media?

“Social media” is defined as a form of “electronic communication through which users create online communities to share information, ideas, personal messages, and other content.” MERRIAM-WEBSTER (2018). Social media has revolutionized how individuals interact with each other. These networks have also revolutionized how elected officials interact with constituents. Many cities in Texas are using social media as a tool to communicate with citizens. Rather than waiting until a monthly council meeting to hear from citizens in the “public comment” section of the agenda, cities are able to constantly interact with citizens through their Facebook page, city Twitter account, or YouTube channel. To understand the proliferation of social media (and appreciate that ignoring usage by cities and their officials and staff is not an option), it is helpful to look at user statistics. In 2005, a mere 7% of American adults used social networking sites. Now, 68% of American adults are Facebook users. PEW RESEARCH CENTER, <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> (last visited May 15, 2018). While young adults (ages 18 to 29) are the most likely to use social media – 88% do – use among those 65 and older has increased exponentially since 2010. Today, 37% of those 65 and older report using social media, compared with just 2% in 2005. *Id.* Although this new technology can be a tool for cities to increase outreach and efficiency, social media use can create challenges for cities.

## II. Citizen Social Media Posts

The starting point for determining whether a social media post can be deleted from a city’s social media page is understanding what type of forum is created by the page. First Amendment protection is not just limited to physical forums. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). Courts recognize three types of government forums: the traditional public forum, the government designated or limited public forum, and the nonpublic forum. Traditional public forums are public areas, like streets or parks, that have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). A designated public forum<sup>1</sup> is a forum, like a city council chamber, that a city has created or opened for use by the public as a place for expressive activity. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). The Supreme Court has stated that it will look at the policy or practice of a governmental entity to determine if the entity intended to designate a place not traditionally open to assembly as a public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). A nonpublic forum is public property that is not by tradition or designation a forum for public communication, like a jail or airport terminal.

Courts have not yet definitively placed government social media pages in a particular forum category. The nature of social media sites as a means of sharing information or ideas makes it safe to rule out its characterization as a nonpublic forum. However, whether a social media page is a designated public forum or a public forum is an open question. The social media

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<sup>1</sup> For the purposes of this paper, I will use “designated” and “limited” public forums interchangeably. The author understands that courts have created some confusion in their First Amendment forum analysis in regards to this in-between type of forum.

cases that courts have analyzed are helpful in deciding whether to treat a city's social media page as a designated public forum or public forum.

*a. Hawaii Defense Foundation v. City and County of Honolulu, Hawaii*

The first lawsuit involving the deletion of a Facebook comment and associated First Amendment issues was filed in 2012, in Hawaii. *Haw. Def. Found. v. City & Cty. of Honolulu*, No. CV12-00469 JMS-RLP, 2012 WL 3642832 (D. Haw. 2012). The lawsuit claimed the Honolulu Police Department violated a citizen's First Amendment free speech rights by deleting his Facebook comment from the department's page. The plaintiff argued that because the city created and designated this Facebook page as the police department's "official" Facebook page, the page is a "traditional public forum." As such, deleting comments is unconstitutional censorship. The court did not have the opportunity to rule on these arguments. Instead, after the Hawaii Police Department and City and County of Honolulu changed their policies and procedures with regard to administration of their Facebook pages, the parties agreed to a dismissal of the case. *Haw. Def. Found. v. City & Cty. of Honolulu*, No. 12-00469 JMS-RLP, 2014 WL 2804445 (D. Haw. 2014.)

*b. Quick v. City of Beech Grove*

Two individuals who were blocked from the City of Beech Grove Police Department's Facebook page sued the City for injunctive relief. Complaint for Injunctive and Declaratory Relief, *Quick et al. v. City of Beech Grove*, No. 1:16-cv-1709 (S.D. Ind. 2016). Kymberly Quick and Deborah Mays-Miller are residents of Beech Grove and both were active in the community's crime watch program. They both followed the Beech Grove PD Facebook page and commented on what they viewed as inaccurate reporting of crime statistics. On multiple occasions, these comments were removed. Additionally, plaintiffs were also blocked from posting future comments. Before the district court could hear the case, the American Civil Liberties Union of Indiana and the City reached an agreement in the case. Plaintiffs received \$7,412.50 in costs and attorneys' fees and were able to post on the PD and City's pages again. "Beech Grove, ACLU reach settlement in Facebook case," <https://www.indystar.com/story/news/2016/08/04/beechn-grove-aclu-reach-settlement-facebook-case/88075666/> (Aug. 4, 2016). Additionally, the City agreed to change its policy on deleting comments and blocking users. Its policy now requires the City to issue warnings if its Facebook policy is being violated. After three warnings, the city's attorney will block the user. Though the settlement does not provide clarity on the forum categorization, because the policy was agreed to by the ACLU, it can be viewed as a model for acceptable moderating.

*c. Packingham v. North Carolina*

In *Packingham v. North Carolina*, the Supreme Court looked at a North Carolina law that made it a felony for a registered sex offender to access a social networking site where the sex offender knows that the site permits minor children to become members. 137 S.Ct. 1730 (2017). Lester Packingham was a registered sex offender barred under this law from joining a site like Facebook. In 2010, Packingham received a traffic ticket that a court dismissed. Afterward, he logged onto a Facebook profile as "J.R. Gerrard" and posted a message thanking God for his

ticket being dismissed. At the time, Durham, NC police were investigating sex offenders thought to be violating the “social media law.” By checking court records, the police department determined that a traffic citation for Packingham had been dismissed around the time of the post. Evidence obtained by search warrant confirmed Packingham was using the profile name “J.R. Gerrard,” and Packingham was indicted by a grand jury. Packingham appealed. Ultimately, the North Carolina Supreme Court upheld the social media restriction on sex offenders. The Supreme Court granted certiorari.

In an opinion written by Justice Kennedy<sup>2</sup>, the Court explored the widespread use of social media and the purpose of social media. (“On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos.”) The opinion concluded that the North Carolina law barred access to “the principal sources for knowing current events, checking ads for employment, **speaking and listening in the modern public square**, and otherwise exploring the vast realms of human thought and knowledge.” Going even further, the opinion stated:

These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’

(quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844,  
870 (1997)).

While Justice Kennedy did not explicitly state “Facebook is a public forum” in the opinion, it can be inferred from the language he used that he would likely characterize Facebook as a traditional public forum. This language did not sit well with three justices. Justices Roberts and Thomas joined in a concurring opinion written by Justice Alito. In the concurrence, Alito announced: “I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.” *Packingham*, at 1738.

The *Packingham* decision was an 8-0 decision with Justice Neil Gorsuch not taking part. When predicting the outcome of a Supreme Court decision on the question of categorizing a social media platform, it is easy to envision a 5-4 decision classifying a social media platform as a traditional public forum. However, a change in the court’s composition could easily change that outcome.

#### *d. PETA v. Young*

People for the Ethical Treatment of Animals (PETA) recently filed suit against the President of Texas A&M University (TAMU) for violating PETA’s First Amendment rights. Complaint for Declaratory and Injunctive Relief, *PETA v. Michael Young*, No. 4:18-cv-01547

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<sup>2</sup> “Given his entire body of decisions regarding the freedom of speech over his quarter century on the Court, no Justice on the modern Court has been more consistently protective of the First Amendment freedom of speech than Justice Kennedy.” Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Speech*, 49 San Diego L. Rev. 693, 723 (2012)

(S.D. Tex. 2018). PETA alleges that content they attempted to post on TAMU’s Facebook page failed to appear on the page where it had in the past. PETA’s Complaint also details PETA Staff utilizing different accounts with different combinations of words to see which posts would show up on TAMU’s page. They found that posts containing words like “PETA,” “cruel,” “cruelty,” “abuse,” and “torture” were automatically hidden from public view. PETA alleges that TAMU is using an automatic Facebook filter to exclude visitor posts that contain certain words. TAMU’s response to the lawsuit acknowledged that it had

taken reasonable steps to manage the University Facebook account in light of online attacks on our platform organized and encouraged by PETA. We have taken these steps only after these attacks of PETA and its supporters became so extreme that they significantly interfered with University business, the ability of our communications employees to perform their duties and the ability of other members of the Texas A&M community to have meaningful access to our Facebook platform.

*Texas A&M Sued for Social Media Censorship*,  
<https://www.texasmonthly.com/politics/peta-sues-texas-am-for-social-media-censorship/> (May 17, 2018).

A decision in *PETA v. Young* will help provide clarity for Texas cities in how to treat social media accounts. It is a case that cities struggling with how to treat social media accounts should monitor closely.

Where do these cases leave us as attorneys advising our city clients eager to engage with citizens on social media? Without a clear answer. Until the Supreme Court definitively provides guidance, the most conservative approach is to consider a city or city department’s social media page a public forum and enact rules regarding comment moderation with this classification in mind.

Another option is to operate a social media account as a designated public forum. A city will want to include a disclaimer and acknowledgement on the social media account that the page is a “designated public forum.” Additionally, the city will want to include guidelines for citizen comments from the city’s social media policy on the social media platform. City staff with access to the accounts should be trained on consistently and uniformly moderation social media accounts in line with city policies.

### **III. Council Social Media Posts**

City officials regularly use their social media accounts to engage with citizens. With this increased engagement, though, has come increased scrutiny. Not only should city officials be aware of the public outrage and political repercussions involved with social media posts but also their legal obligations and restrictions when using social media. *See, e.g.,* Claire Ballor and Valerie Wigglesworth, [Plano councilman apologizes for anti-islam post that prompted mayor to call him “unfit to represent us,” DALLAS NEWS, https://www.dallasnews.com/news/plano/2018/02/14/plano-councilmans-facebook-post-suggests-trump-banislam-schools](https://www.dallasnews.com/news/plano/2018/02/14/plano-councilmans-facebook-post-suggests-trump-banislam-schools) (Feb. 14, 2018). Recent litigation has focused on whether

moderating comments or banning users from a government official's social media account is a violation of an individual's First Amendment rights.

a. *Knight First Amendment Institute v. Donald Trump*

Seven individuals were blocked from seeing tweets from the @realDonaldTrump account after tweeting critical messages of the President or his policies in reply to tweets from the account. The Knight First Amendment Institute, a 501(c)(3) organization that works to defend and strengthen the freedoms of speech and the press in the digital age, together with the seven individuals filed suit in July 2017 seeking declaratory and injunctive relief and naming the President, the White House Social Media Director and Assistant to the President, the White House Press Secretary, and the White House Communications Director as defendants. The district court in the Southern District of New York heard oral argument on both plaintiffs' and defendants' summary judgment motions on March 8, 2018. On May 23, 2018, the Court issued an order granting in part and denying in part both motions. *Knight First Amendment Inst. At Columbia University, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-05205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018).

The question for the Court to resolve was whether a public official may, consistent with the First Amendment, "block" a person from his Twitter account in response to the political views that person has expressed. The Court looked at a number of factors in analyzing this question. These factors should serve as guidance when advising city officials on social media use. This particular opinion was limited to the Twitter platform, but its application would likely apply equally across social media platforms.

The Court limited its forum analysis to the @realDonaldTrump account; it did not analyze Twitter as a platform. The @realDonaldTrump twitter account was established in March 2009, before the President's inauguration. Though past history or characterization of a forum is relevant, the court instructed that does not mean the present characterization of a forum should be disregarded. The Court found the present use weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump. The Court looked at these factors to determine that the account is governmental in nature, and thus, subject to the First Amendment:

- The account is used as a channel for communicating and interacting with the public about his administration;
- The Twitter bio page identifies him as 45<sup>th</sup> President of the United States of America;
- The account is a public account;
- The account is used to announce, describe, and defend his policies; to promote the Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair;
- Sometimes the account is used to announce matters related to official government business before those matters are announced to the public through other official channels (i.e. that he intended to nominate Christopher Wray for the position of FBI director).

The Court also looked at whether the account is under governmental *control*. Though Twitter is a private company, the Court found that the following aspects showed that the government did, in fact, exercised control over the account:

- The account is registered to “Donald J. Trump, 45<sup>th</sup> President of the United States of America;”
- Tweets are considered presidential records that are retained by the government;
- The account has been used in the course of the appointment of officers, removal of officers, and the conduct of foreign policy;
- The President and Staff control the content of the tweets that are sent from the account; and
- The President and Staff prevent other Twitter users, through blocking, from accessing the @realDonaldTrump timeline and from participating in the interactive space associated with the tweets sent by the account.

While the content of the President’s tweets is considered government speech (not susceptible to forum analysis), the **access to the interactive space** is not government speech. “When a user is blocked, the most significant impediment is the ability to directly interact with a tweet sent by the blocking user.” Having concluded that the forum analysis should be applied to the interactive space, the Court characterized the space as a designated public forum because: (1) access was generally acceptable to the public at large without regard to political affiliation or any other limiting criteria (not a private account), (2) members of the Administration regarded the account as a means through which the President communicates directly with the American people; and (3) the Twitter platform is designed to allow users to interact with other users.

The Court then looked at the question of whether a government official may block users in a designated public forum. Regulation of a designated forum is subject to the same limitations as a traditional public forum: the restriction is permissible only if narrowly drawn to achieve a compelling state interest. The Court notes that shortly after the individual plaintiffs posted tweets that criticized the President or his policies, the President blocked each of the plaintiffs. This exclusion of plaintiffs based on their viewpoint is impermissible under the First Amendment.

The Court did point out that nothing in the First Amendment requires government policymakers to listen or respond to communications on public issues. The opinion then points out the differences between the Twitter functions of “blocking” and “muting.” Muting allows a user to remove an account’s tweets from the user’s timeline without unfollowing or blocking an account. Muting allows a user to ensure that tweets from the muted account do not show up on a user’s timeline while the muted account is still able to reply directly to the muting account. Blocking goes further, though. Blocking precludes a blocked user from seeing or replying to the blocking user’s tweets and is impermissible under the First Amendment. The Court declined to provide injunctive relief but offered a declaratory judgment and stated they assume that the President and his staff will remedy the blocking held to be unconstitutional.

Of note, the opinion stated “No one can seriously contend that a public official’s blocking of a constituent from her purely personal account – one that she does not impress with the trappings of her office and does not use to exercise the authority of her position – would implicate forum analysis, but those are hardly the facts of this case.” This statement certainly suggests that a government official can have a purely personal account not subject to First Amendment restrictions.



*b. Davison v. Loudon County Board of Supervisors*

Brian Davison is a local watchdog and activist. He attended a town hall discussion held by the Loudoun County Board of Supervisors and Loudoun County School Board. During the panel discussion, Davison asked the chair Phyllis Randall a question on her campaign proposal on ethics. Randall later posted about the panel discussion on her Facebook page. Davison then commented on the post. Randall took issue with Davison's post and deleted her original post then blocked Davison from her Facebook page. Davison brought suit against the Loudoun County Board of Supervisors for the actions taken by Chair Phyllis Randall in violating his free speech rights. *Davison v. Loudon County Board of Supervisors*, 267 F.Supp.3d 702 (E.D. Vir. 2017), *appeal docketed*, No. 17-2002 (4th Cir. Aug. 29, 2017).

In determining whether Randall's Facebook page was a government page, the court looked at these factors:

- The title of the page includes Randall's official title ("Chair");
- The page is categorized as that of a government official;
- The page lists as contact information Randall's official county email address and the telephone number of her county office;
- The page includes the web address of the official county website;
- Many of the posts are expressly addressed to "Loudoun," Randall's constituents;
- Randall has submitted posts on behalf of the Loudoun County Board of Supervisors as a whole;
- Randall asked her constituents to use the page as a channel for "back and forth constituent conversations; and
- The information posted has a "strong tendency toward matters related to" Randall's Office.

Interestingly, the Court quoted the *Packingham* decision in noting that "When one creates a Facebook page, one generally open a digital space for the exchange of ideas and information." However, the Court refrained from declaring the page a public forum. Instead, because the Court found that banning Davison from the Facebook page consisted of viewpoint discrimination and viewpoint discrimination is prohibited in all forums, the Court determined it was not necessary to provide a forum analysis.

In its opinion, the Court did not find the fact that Randall occasionally posted regarding more personal matters changed the character of the page from governmental to personal. However, the Court did acknowledge that Randall had adopted no policy limiting the types of contents permitted. This seems to indicate a policy statement on what types of posts would be deleted and which speakers would be banned might change the Court's analysis. Ultimately, the Court concluded that banning Davison violated his First Amendment rights and entered a declaratory judgment. The Court indicated that moderation was "necessary to preserve social media websites as useful forums for the exchange of ideas" and suggested this could be achieved through neutral and comprehensive social media policies.

c. *Karin Leuthy v. Governor Paul LePage*

Plaintiffs Karin Leuthy and Kelli Whitlock Burton filed suit against Maine Governor Paul LePage for deleting comments they posted and banning them from the Governor's Facebook page. Complaint Declaratory and Injunctive Relief Requested, *Leuthy et al. v. LePage*, No. 1:17-cv-00296 (D. Me. Aug. 8, 2017). Plaintiffs argue that the Governor's operation of the Facebook page constitutes a limited forum under the First Amendment, and the Governor's actions constitute unlawful, viewpoint-based exclusion. In Governor Page's Motion to Dismiss, he argues that the Facebook page is personal to LePage and was created nearly a year before he became Governor. Defendant's Motion to Dismiss, *Leuthy et al. v. LePage*, No. 1:17-cv-00296, 2017 WL 8890800 (D. Me. Oct. 13, 2017). Thus, LePage is not acting "under the color of the law" when deleting comments. Alternatively, the Motion argues that the moderation of comments constitutes government speech. Following the *Knight* decision (discussed above), the Plaintiffs filed notice of the Fourth Circuit Court of Appeals' decision. Plaintiffs' Notice of Supplemental Authority, *Leuthy et al. v. LePage*, No. 1:17-cv-00296 (D. Me. May 23, 2018). The Court has not yet set a hearing on the motion, so this is a case to continue monitoring.

The decisions in *Knight* and *Davison* should guide city attorneys in advising city council members on whether or not their social media accounts are considered to be limited forums subject to First Amendment protections. If a council member intends to have a private account, where the member can control all of the content posted, then the account:

- Should be set to "private," not public;
- Should contain a statement that the account is private and identifying what type of content is disallowed;
- Bio page should not use an official title or identify the account as belonging to a city council member;
- Should not be categorized as any type of government account;
- Should not be used to announce or describe policies; to promote a legislative agenda; or to announce matters related to official city business;
- Should provide personal contact information, not an official's city email address or phone number; and
- Should not be used to solicit constituent feedback.

If council members intend to have official public accounts, then it is important city officials understand that they are prohibited from blocking users except under limited circumstances. A limited forum allows a government to restrict the scope of the topic or use reasonable time, manner, and place restrictions. Blocking a user for disagreeing with the council member would be considered viewpoint discrimination. Whereas, blocking a user for:

- Sending obscene or pornographic material;
- Threatening the official (or another person);
- A response unrelated to the purpose and scope of the account;
- Using profanity or abusive language; or
- Advertising a commercial entity, product, or service

would all likely be permitted restrictions with the caveat that a city official must be *consistent* in restricting access. My conservative advice is to err on the side of not blocking a user except under extreme and egregious circumstances in violation of one of the restrictions mentioned above.

#### IV. Other Considerations

Though these topics are beyond the scope of this particular paper and presentation, it is important to be aware of social media issues surrounding these areas of municipal law:

- a. Texas Open Meetings Act: Social media creates a new, exciting opportunity for council and board members to violate the Texas Open Meetings Act. TEX. GOV'T CODE ch. 551. Walking quorums may be created via Twitter replies, Facebook posts, and Instagram comments. It is important to remind city council members who enjoy engaging on social media that a “meeting” can occur through a social media exchange. Consider creating an Online Message Board to allow council members to safely exchange ideas through an internet platform. *See* Tex. Gov't Code § 551.006.<sup>3</sup>
- b. Texas Public Information Act: Section 552.002(a-2) of the Government Code clarifies that the definition of “public information” includes “any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.” The Act also provides that general forms where media containing public information exist include email, Internet posting, text message, instant message, and other electronic communication. TEX. GOV'T CODE § 552.002(c).

Clearly, tweets or posts from a city or city department's account are subject to the PIA. But, what about a city council member's tweet? If the tweet is in connection with the transaction of official business, it is subject to disclosure under the Texas Public Information Act. Information is in connection with the transaction of official business if it pertains to official business of the city, and it is created by, transmitted to, received by, or maintained by an officer or employee of a city in the officer's or employee's official capacity or as a person performing official business on behalf of the city. TEX. GOV'T CODE § 552.002(a-1). “Official business” under the Act means any matter over which a city council has any authority, administrative duties, or advisory duties. TEX. GOV'T CODE § 552.002(2-a).

The difficult part, of course, is obtaining these social media posts from city officials. The good news is that at least one court has concluded that the PIA provides no real “teeth” to force an official to turn over public information. The Austin Court of Appeals addressed this question in *El Paso v. Abbott*. 444 S.W.3d 315 (Tex. App. 2014), review denied (June 12, 2015). The case is essentially about a city councilmember refusing to give the city emails from a private account, and the court concludes that:

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<sup>3</sup> The City of Austin has an active Online Message Board available at <http://austincouncilforum.org>. I am happy to discuss how the City uses this technology.

- the PIA does not authorize a requestor to file suit for a writ of mandamus compelling a governmental body to make information available when the city has made reasonable efforts (i.e., is not refusing or unwilling) to comply with the PIA;
- other than requiring that information be produced promptly for inspection, duplication, or both, the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available to the public information requested; and
- a city does not have to resort to suing an individual in district court under the Local Government Records Act when it is believed that the person holds, but has not provided, a responsive document.

A city can and should have a policy outlining how the city intends to obtain records from officials. However, at this time, all a city can and is required to do is to ask an official to turn over responsive documents from his or her private accounts.

- c. Record Retention: Local government records include records in an electronic medium. TEX. LOC. GOV'T CODE § 201.003(8). Thus, a city social media post is considered a government record subject to the Local Government Records Act. Many times, though, social media content is **not** required to be maintained because the information contained is duplicated or exists in a different format. A government is not required to retain duplicated or identical copies of information. TEX. LOC. GOV'T CODE § 201.003(8)(A). Additionally, information shared that is cursory and minimal with no lasting importance or need beyond its initial purpose of informing do not require capture and retention. 13 Tex. Admin. Code § 6.91(8) (2000). An example of a transitory social media post is a Facebook post advertising an upcoming event. The content shared is of short-term value, especially once the event is over.

When deciding whether a social media post is a record that should be maintained in accordance with the city's records retention schedule, there are four important questions to ask:

- Does this document government business or provide evidence of an important action?
- Is this a unique record?
- Does the information exist elsewhere in a different record or format?
- Does it fit into my government's definition of a social media record?

Megan Carey, *FAQ: When is Social Media a Record*, Texas State Library & Archives Commission Blog (Mar. 17, 2016), <https://www.tsl.texas.gov/slrn/blog/2016/03/faq-when-is-social-media-a-record/>

- d. Political Advertising: The Election Code prohibits an officer or employee of a political subdivision from knowingly spending, or authorizing, the spending of public funds for political advertising. TEX. ELEC. CODE § 253.003. Violating this provision is a Class A misdemeanor with a maximum punishment of confinement in jail for a year or a \$4,000 fine. To date, there have not been instances of Texas government officials

or employees being prosecuted for this based on social media posts, but it is a provision to be aware of, especially in the context of a ballot proposition that the entity may “support.” Governmental entities are prohibited from using public funds to support a measure on a ballot, meaning there should be NO mention of support or opposition of a proposition on a city’s social media platforms. Individual city officials or employees are able to use their personal social media accounts to support or oppose a proposition. However, it should be clear in the entity’s social media policy that the individuals are prohibited from doing so on a city device or while on the clock.

- e. Social Media and Employees: A recent Fourth Circuit Court of Appeals case looked at disciplinary action taken by a city employer for off-duty social media activity. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016). Plaintiffs Herbert Liverman and Vance Richards challenged disciplinary action taken by the City of Petersburg Police Department based on the Department’s social networking policy. The policy prohibited the dissemination of any information “that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees.” The Fourth Circuit Court of Appeals concluded that the City’s policy was overbroad unconstitutional. The City failed to establish a “reasonable apprehension that plaintiffs’ social media comments would meaningfully impair the efficiency of the workplace.” (Other cases to look at: *Gresham v. Atlanta*, 2011 WL 4601020; and *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013))

In Texas, a former executive assistant for Texas Court of Criminal Appeals Judge Kevin Leary is suing the Texas Court of Criminal Appeals and Judge Leary for terminating her because posts she made to her personal social media accounts were critical of Republican state leaders and supportive of Democratic candidates. Plaintiff’s Original Complaint, *Zuniga v. Texas Court of Criminal Appeals*, 1:18-cv-434 (filed May 22, 2018).

## V. Conclusion

Social media platforms can be both a blessing and a curse to cities. The bottom line, though, is that social media usage will continue to increase and cities must utilize social media tools to meaningfully engage with citizens. The most important thing we, as government law practitioners, can do is to have social media policies in place and to revisit these policies on a regular basis to ensure that city policies are keeping up with emerging technologies. After ensuring these policies are in place, it is important to continue educating our city officials and staff to comply with and apply with policies consistently.