

# Social Media for Social Good

## Legal & Policy Considerations for Governmental Use of Social Media



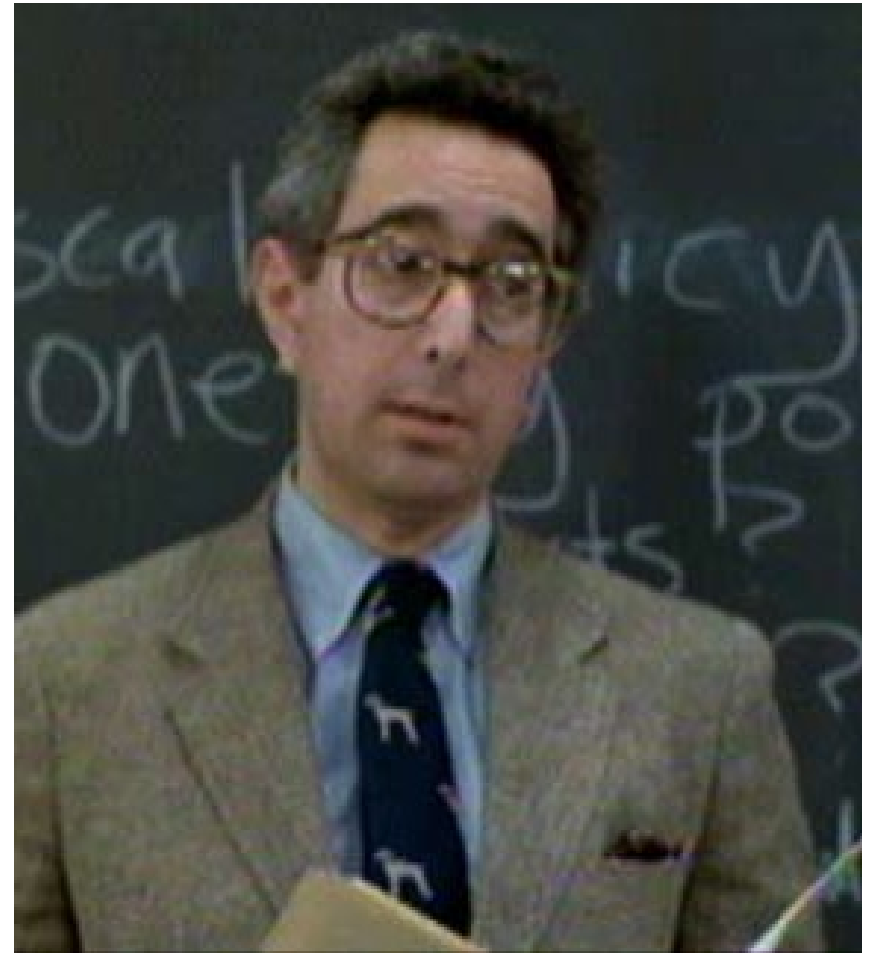
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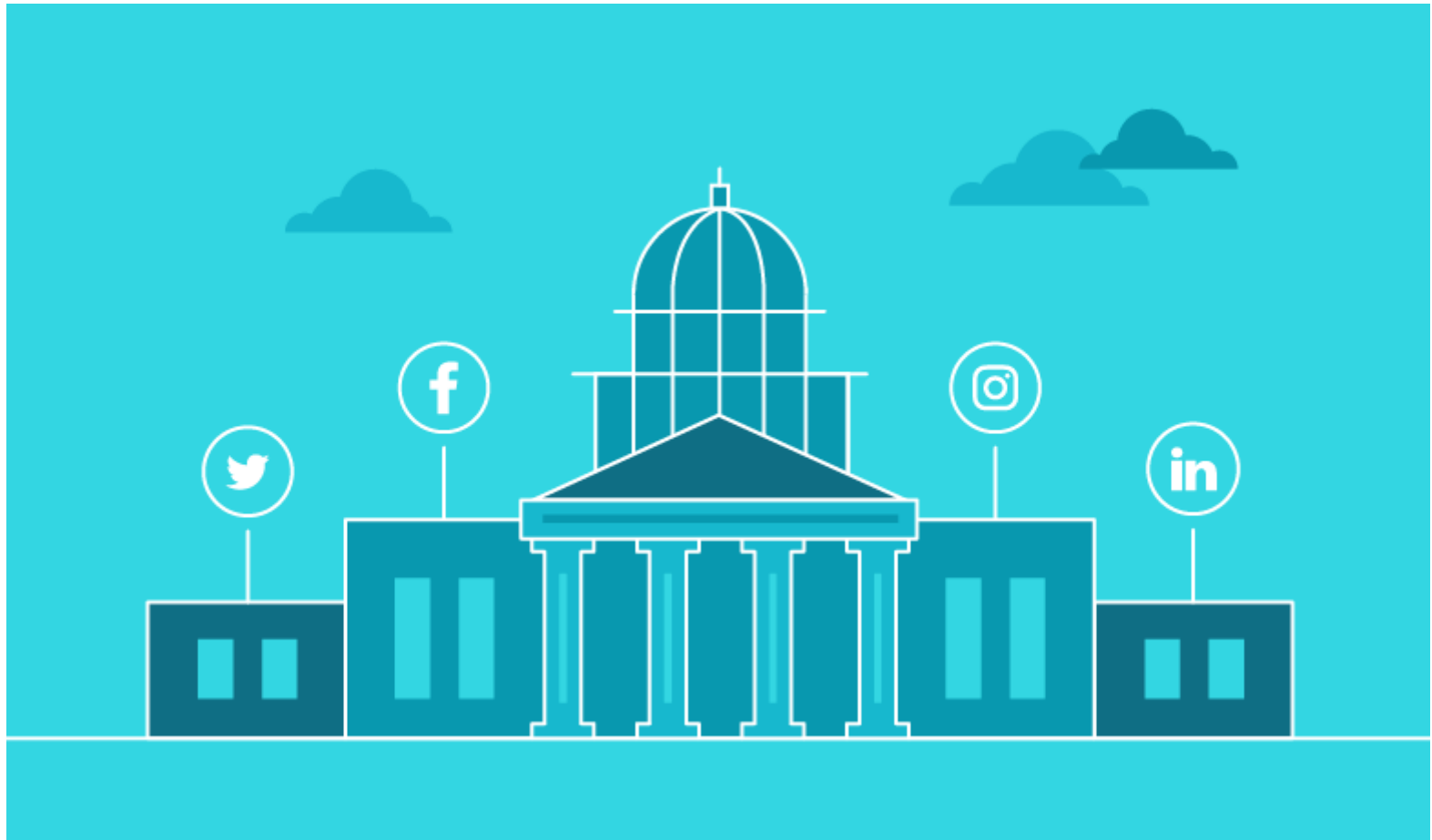
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# Common Questions

- Can we restrict, limit, delete comments made on government-sponsored SM accounts?
- Are government SM posts public records?
- Must we archive comments, twitter posts, blog posts?
- Can we restrict employee behavior?



# Governmental Social Media Sites



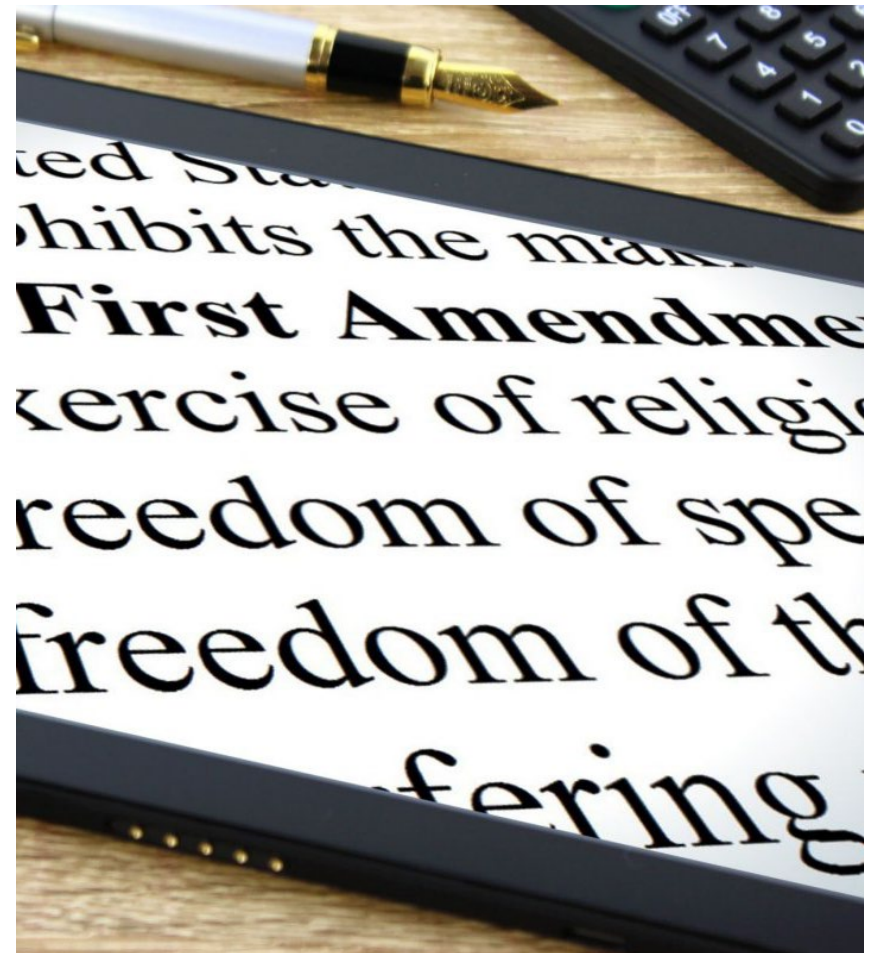
# Censor Me!

The worst  
part of  
censorship is



# Three Prong Test to Assess 1<sup>st</sup> Amendment Violation

- 1) Whether the defendants acted under color of law in operating their social media accounts
- 2) Whether the accounts were public forums
- 3) Whether the defendants engaged in prohibited discrimination



# Operating Under Color of Law

*The actor uses the account “for conducting official business” and has given the account “the trappings of office”*

- Official business may include disseminating official information, communicating with constituents, and using governmental staff and resources in operating the account
- Trappings of office may include the use of official titles, governmental language and imagery, links to official internet sites in the timeline, and frequent reference to official matters in the content

# Type of Forum Determines Government Control of Speech

## Traditional Public Forum

- Open to all types of expression
- Government limited to regulating time, place and manner

## Non Public Forum

- Not open for public expression
- Government can deny all access

## Limited or Designated Forum

- Government opens a nonpublic forum for specific purpose and defines acceptable use

# What Forum Type is Official Government SM?

- Based on recent case law, government established SM accounts are “at least limited or designated public forums
- Some argue it is a traditional public forum
  - Retired US Supreme Court Justice Stevens called it the “most public of spaces”
- Purpose statements and comment policies are needed





# Rules of the Game for A Limited/Designated Forum

- Government defines purpose and allowed expression.
- Courts defer to government's choices if rational in relation to the stated purpose.
- **Viewpoint discrimination is always prohibited.**

# Prohibited Discrimination

- Viewpoint Discrimination: Prohibited under any circumstance
- Content Discrimination: Only allowed when government satisfies strict scrutiny of restriction “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest”



**\*Less Restrictive Measures Offered by Social Media Platforms May Tip the Scales\***

# Because Laws (and Life) Are Never Simple



# Current Social Media Case Law

- Governmental Speech Determination Led to:
  - @realDonaldTrump Twitter account cannot block followers (First Amendment violation). *Knight First Amendment Institute v. Donald J. Trump*, 302 F. Supp. 3d 541 (2018)
  - Loudon County Board Chair’s Facebook page (“Chair Phyllis J. Randall”), cannot block followers or restrict comments that criticize official conduct of elected officials. *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3 702 (2017)
    - Judge Cacheris wrote “Such ‘criticism of . . . official conduct’ is not just protected speech, but lies at the very “heart” of the First Amendment.”

# Robinson v. Hunt County, 2019

- The Hunt County Sheriff Office posted a SM policy that stated “inappropriate” comments would be deleted. Ms. Robinson (citizen) posted a comment stating that “degrading or insulting police officers is not illegal, and in fact has been ruled time and time again, by multiple US courts as protected First Amendment speech,” and “just because you consider a comment to be ‘inappropriate’ doesn’t give you the legal right to delete it and/or ban a private citizen from commenting on this TAX PAYER funded social media site.”
- 5<sup>th</sup> Circuit Court ruled in her favor stating Robinson contends that the defendants’ actions constitute viewpoint discrimination regardless of whether they were motivated by her criticism of the Sheriff’s Office or a determination that her comment was otherwise “inappropriate.” We agree. “It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592 (1969); see also *Snyder v. Phelps*, 562 U.S. 443, 454–56 (2011). Official censorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination.

# EFF/PETA v. Texas A&M

- Fascinating case being settled out of court
  - Texas A&M used the expanded profanity filter option to include words like "PETA," "lab," and "cruel"
  - They also removed comments manually related to PETA type posts about their dog lab
  - Judge refused to toss case of viewpoint discrimination based on "content filtering"

# *Campbell v. Reisch*, No. 19-2994 (8th Cir.).

- First Amendment challenge to a Missouri state representative's blocking of a critic on Twitter
- Rep. Cheri Reisch blocked Mike Campbell from her Twitter account after Campbell retweeted a tweet that was critical of Reisch.
- Court analysis based on:
  - 1. Was Twitter used as an extension of her office?
  - 2. Did she open the account to expression by the public at large?
- **Status:** 2-1 decision, 8<sup>th</sup> Circuit held that Rep. Reisch did not violate the First Amendment when she blocked individuals from her Twitter account because, in the majority's view, the account was "used overwhelmingly for campaign purposes," not for her official duties.

# The Government's Speech and the Constitution

“But once the government chooses a platform that permits public comment, it has created a type of forum for nongovernmental parties’ speech, and it is now bound by traditional First Amendment principles when regulating the speech of the commenters...”

Helen Norton



# What About the “Govt Speech” Claim?

- Govt claims “one way communication of government speech”, but there are clear examples of general commentary on almost all sites so the claim falls short.
- Most governments appear to allow positive statements but hide or delete any negative statements, which is...

## Viewpoint Discrimination

- **Golden Rule of Social Media: if you don't want to have commentary from the public, then don't use social media for communication purposes (stick to your traditional website)**



Town of



Shannon

Home

Create



# Our Story



TOWN OF

· MONDAY, NOVEMBER 4, 2019 ·

This page is intended to be a nonpolitical communication tool for residents, property owners and others who are interested in the Town. We don't currently accept comments to posts, but if you have questions, please feel free to message us and we'll respond as soon as possible.

YouTube

Create a Page



have checked in



793 check-ins

About

See All





 **Town of ... NC** vernment, ...  
- November 1 · 🌐

Congratulations Captain Harry Humphries on your retirement! Thank you for 20 years of service with the Town of

👍❤️ 113 24 Comments 5 Shares

👍 Like    💬 Comment    ➦ Share    👤

Oldest ▾

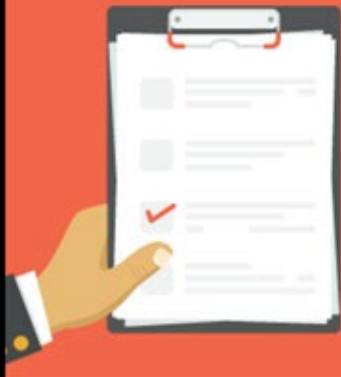
View 9 more comments

 **Jeff Harvey** Congratulations  
Like · Reply · 1w

 **Kevin Reynolds** Congratulations Harry.  
Like · Reply · 1w

 **Robert Joseph** Congratulations!  
Like · Reply · 1w

 Write a comment... 😊 📷 🗨️



# TAKE OUR SURVEY



Town of Cary  
NC

Government, ...

October 24 · 🌐

TAKE THE 1-MINUTE FREEMAN PARK SURVEY!

The Town of Cary has created a brief survey to collect information from Freeman Park visitors, and would like your input. Click on the link below to participate:

<https://www.surveymonkey.com/r/RPJD8WL>

👍 12

11 Comments 23 Shares

👍 Like    💬 Comment    ➦ Share    👤

All Comments ▾



👑 Top Fan

**Beth Pfau Stynchula** Carl Stynchula

Like · Reply · 2w



Write a comment...



# Plot Twist!



- Facebook has now created an option for “Pages” to disable comments (as of April 1, 2021)
- If you don’t want comments, then change “Who Can Comment?” setting as soon as you make the post.
- Don’t start by allowing comments and then turn them off once you dislike the speech being engaged in!

**Who can comment on your post?** [X]

- Public
- Pages you follow
- Profiles and Pages you mention

Your choice only affects this post. [Learn more](#)

**Done**

# Back to Your Comment Policy

- Create a robust, **legal**, and routinely enforced comment policy.
- Create a policy that states all comments must be related to items within the authority or jurisdiction of your governmental entity.
  - This allows some of the “nutty” stuff to be removed (like Area 51 comments, etc)
- You **cannot** create a broad policy that creates viewpoint discrimination ever!
  - If you delete commentary that is not related to your entity’s jurisdiction or authority, you must delete all such commentary, not just the items that you disagree with.
-

# Model Policy Language

The XXX City/County uses social media to interact with residents, businesses and visitors about public issues related to our jurisdiction. Please note this is a moderated online discussion site and subject to North Carolina Public Records Laws, and e-discovery laws and policies. All comments and content shared on our government-sponsored social media sites must pertain to items within the jurisdictional control or authority of our governmental unit.

XXX City/County reserves the right to delete submissions that do not meet the purpose of this site as set out above. The following are examples of unacceptable social networking content and comments. Please note this list is not intended to be all-inclusive:

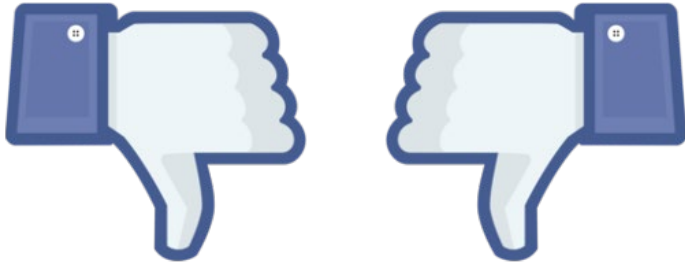
1. Any content or comments that do not relate to the jurisdiction or authority of the jurisdiction itself.
2. Profane or obscene language or content as determined by the profanity filters offered through each social media platform (such posts result in the comment/content being blocked through the social media's profanity filter).



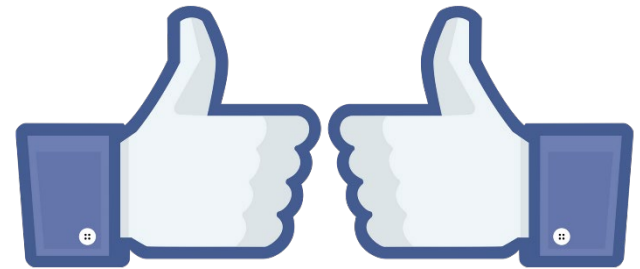
3. Content that promotes, fosters, or perpetrates discrimination on the basis of race, creed, color, age, religion, gender, marital status with regard to public assistance, national origin, physical or mental disability, or sexual orientation, or any other protected class of people. \*(use your own non-discrimination policy language)
4. Duplicate posts by the same author (the original post will be left intact assuming it follows the guidelines of acceptable comments or content).
5. Solicitations of commerce and/or, including content that contains gratuitous links (links or references to other relevant governmental webpages or official government sites are acceptable).
6. Promotions or content related to political organizations of any type.
7. Advocation of illegal activity; or those that compromise safety or security of the public.
8. Infringement on copyrights or trademarks.
9. Confidential or non-public information, including but not limited to any personally identifiable medical information and any content that violates the legal rights of the owner of said content.

Please note that the opinions and comments expressed on this social media site do not reflect the opinions and positions of the XXX government, its officers or employees. If you have any questions concerning the operation of our social media platforms and the moderated discussion rules, please contact the XXX.

# Can We Restrict Negative Commentary Related to Individual Employees?



No, if the comment is related to something within the authority or jurisdiction of the government and does not violate any other comment policy items



Yes, if the comment is outside the jurisdiction's authority/jurisdiction and/or violates comment policy items

# Hiding vs. Deleting Comments?



- There is no legal (First Amendment) difference between hiding and deleting comments

# More Golden Rules

- Consider your social media platforms along the lines of a public meeting to analyze legality of your actions
- Consider a policy addition that requires notice to commentor when said comment violates policy and will be removed, along with a 3 strike policy in order to block them.
- If you don't want negative public comments, don't use Facebook or set your posts to "No Comments except by those tagged in the post".

# Standard Government Policy



We welcome you and your comments to our Agency's Facebook pages.

The purpose of this site is to present matters of public interest in the jurisdiction, including its many residents, businesses and visitors.



We encourage you to submit your questions, comments, and concerns, but please note this is a **moderated online discussion site and not a public forum.**

Once posted, the Jurisdiction reserves the right to delete submissions that contain:

1. profane language;
2. personal attacks of any kind;
3. offensive comments that target or disparage any ethnic, racial, or religious group.

Further, the County also reserves the right to delete comments that are:

(i) spam or include links to other sites

(ii) clearly off topic;

(iii) advocate illegal activity;

(iv) promote particular services, products, or political organizations;

(v) infringe on copyrights or trademarks;

(vi) use personally identifiable medical information; We recommend you not share any of your medical information on our Facebook Pages.

# Recommended Model Policy Language

The XXX City/County uses social media to interact with residents, businesses and visitors about public issues related to our jurisdiction. Please note this is a moderated online discussion site and subject to North Carolina Public Records Laws, and e-discovery laws and policies. All comments and content shared on our government-sponsored social media sites must pertain to items within the jurisdictional control or authority of our governmental unit.

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1. Any content or comments that do not relate to the jurisdiction or authority of the jurisdiction itself.
2. Profane or obscene language or content as determined by the profanity filters offered through each social media platform (such posts result in the comment/content being blocked through the social media's profanity filter).





[writewright7.blogspot.com](http://writewright7.blogspot.com)

# Unprotected Speech

- **Child Pornography:** 18 USC 2256(8) (defining child pornography) other sections within that title criminalize the means of accessing, producing, or distributing child pornography, obscenity, and obscene depictions of children. See also, *Ferber v. New York* 458 U.S. 747 (1982). At the State level, I.C. 35-42-4-4 criminalizes child pornography.
- **Obscenity:** *Miller v. California*, 413 U.S. 15, 24 (1973) (defining a three-part obscenity test that asks “(a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”
- **Material Harmful to Minors:** At the federal level Congress has enacted legislation to prevent minors from exposure to obscene or harmful materials on the internet, see 47 U.S.C. 223(d) and 47 U.S.C. 231. see I.C. 35-49-2-2.



**Pardon the Interruption**

**Back to Our Model Policy...**

3. Content that promotes, fosters, or perpetrates discrimination on the basis of race, creed, color, age, religion, gender, marital status with regard to public assistance, national origin, physical or mental disability, or sexual orientation, or any other protected class of people. (\*use your govt's non-discrimination ordinance, not this one)
4. Duplicate posts by the same author (the original post will be left intact assuming it follows the guidelines of acceptable comments or content).
5. Solicitations of commerce and/or, including content that contains gratuitous links (links or references to other relevant governmental webpages or official government sites are acceptable).
6. Promotions or content related to political organizations of any type.
7. Advocation of illegal activity; or those that compromise safety or security of the public.
8. Infringement on copyrights or trademarks.
9. Confidential or non-public information, including but not limited to any personally identifiable medical information and any content that violates the legal rights of the owner of said content.

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# More Golden Rules

- Consider your social media platforms along the lines of a public meeting to analyze legality of your actions
- If you don't want negative public comments, don't use Facebook.

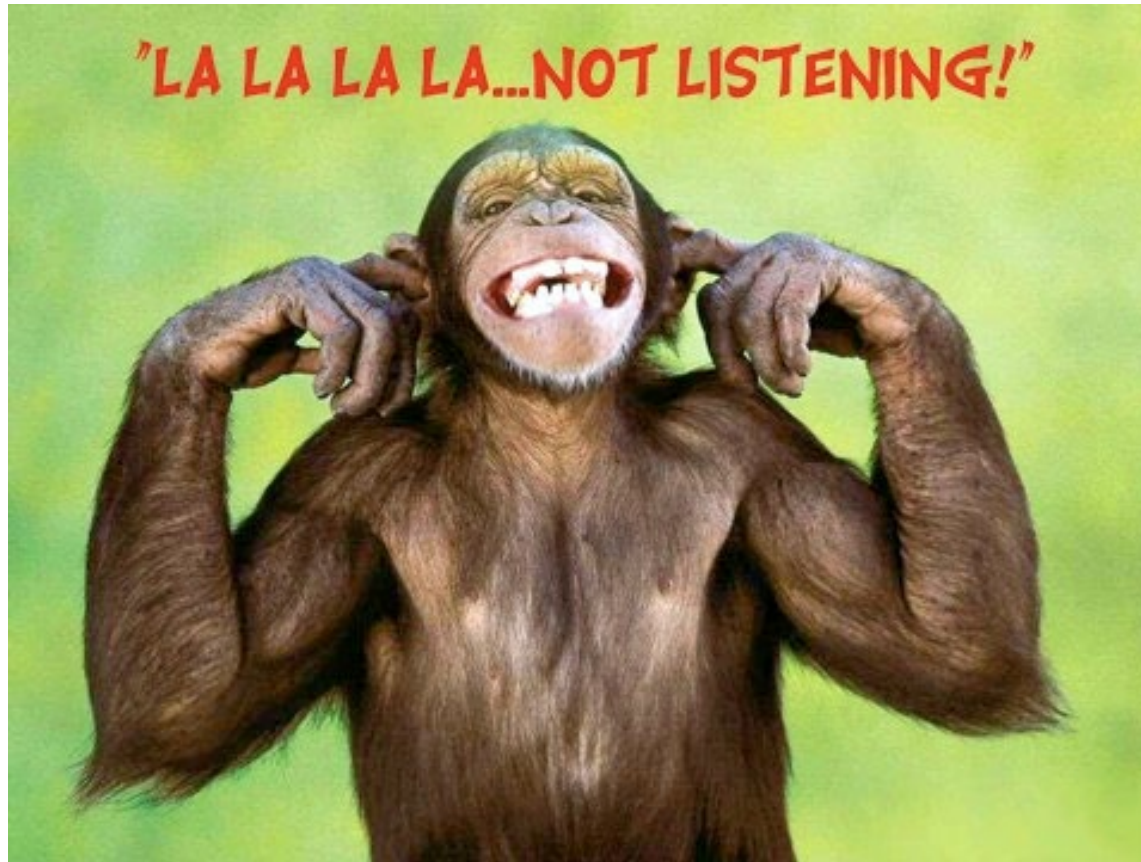
# Facebook Postings and Public Records Guidelines



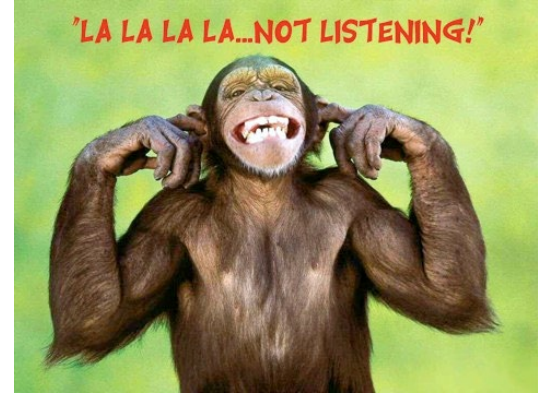
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# Is it a public record?



# Is it a public record?



1. Work-related texts, emails, documents, voicemails, etc., sent/received over work-owned devices?
2. Personal texts, emails, etc., sent/received over work devices?
3. Work-related texts, emails, etc., sent/received over personally-owned devices?
4. Work-related social media postings sent/received on work-sponsored social media accounts?
5. Work-related social media postings sent/received on personal social media accounts?



# Definition of a Public Record (NCGS 132-1)

- All documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.
- Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

# Basic Information

- Government-sponsored social media postings are public records.
- The retention period for the record is determined by the content of the posting (not the type of media).
  - The schedule related to website retention does not apply to social media postings.
- Most social media postings will be of short-term value or considered under the Routine Correspondence and Memoranda.
- Retention requirements under litigation holds (e-discovery) are different than public records requirements.
- Metadata associated with social media postings remains a concern, as most archiving methods do not capture it.

# Records Retention

- [Records retention schedules](#) dictate what must be kept, and for how long and provide legal authority to destroy
- Records of “short term value” need not be retained
  - Personal messages (including electronic mail) not related to official business.
  - Records that do not contain information necessary to conduct official business, meet statutory obligations, carry out administrative functions, or meet organizational objectives.
- Local governments, in conjunction with local governing board, must set retention policy for areas noted as “when reference value ends”

# Sample Legal Application per NC Law



# Repost Rule Applies to This Post

## \*No Need to Retain\*



Catawba County, North Carolina

Check out the new Catawba County Parks Spring eNewsletter!



Catawba County Parks

[enewsletter.catawbacountync.go](http://enewsletter.catawbacountync.go)

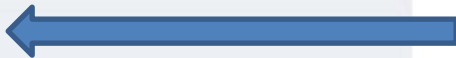
v

Spring signals profound changes in both our flora and fauna here in the North Carolina foothills. Our area, which has seen an especially cold winter this year, is getting ready to burst into life! It is exciting to know that the natural world is about to come full circle and begin itself anew—and

Monday at 1:24pm · Like · Comment · Share

4 people like this.

Write a comment...



The “likes” would either be considered public records of “Short-Term Value or “Routine Correspondence and Memoranda” per the County/Municipal Agency retention schedules. The record can be destroyed when administrative value or reference value ends.

Sheriff Office & Municipal Law Enforcement Retention Schedule: pages x and 3

\*Reposts don't have to be retained

# Content-Based Retention Example: Citizen Complaints & Service Requests



## Catawba County, North Carolina

Public Health brings flu immunization to 2500 students after cases increase in schools.

In early February, after flu cases in school spiked in late January, Public Health worked with all three local school systems to offer flu vaccines free of charge to children enrolled in pre-kindergarten through twelfth grade.

[http://www.catawbacountync.gov  
/events/schoolflu.pdf](http://www.catawbacountync.gov/events/schoolflu.pdf)  
[www.catawbacountync.gov](http://www.catawbacountync.gov)

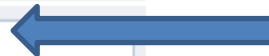
Monday at 9:04am · Like · Comment · Share



**April Williams** Seems like it would have been nice to have offered the shots before the spike in flu. By the time they were given, my child already had the flu and missed 3 days of school.

Monday at 9:38am · Like

Write a comment...



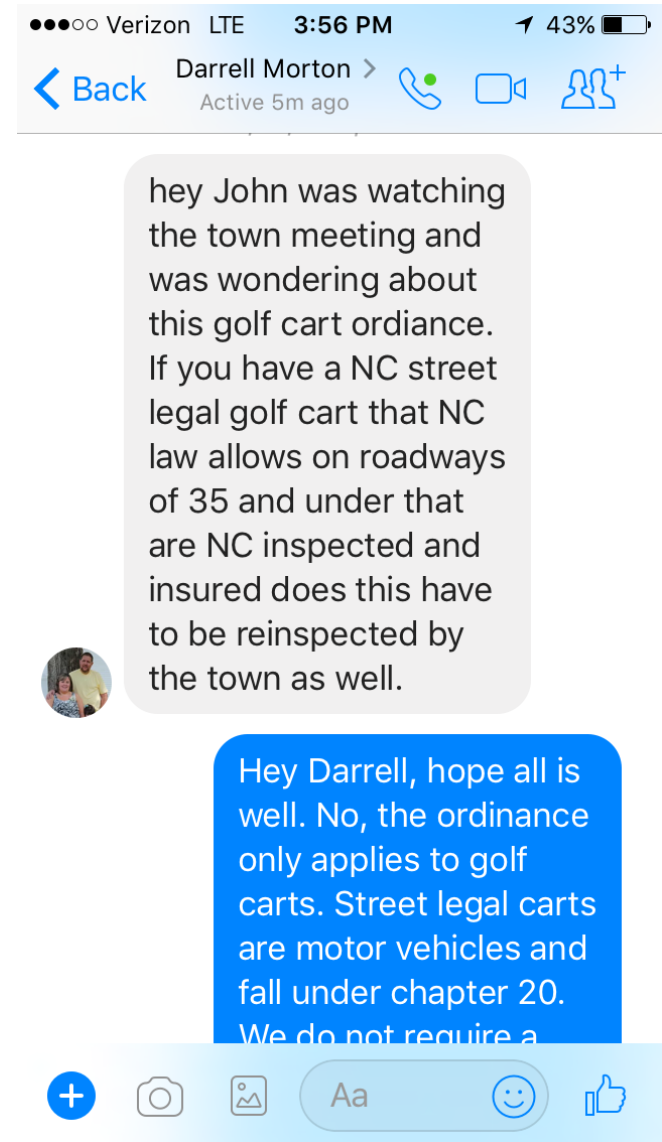
In NC, this comment could be considered a citizen complaint and would be categorized under “Citizen Complaints and Service Requests”. The record can be destroyed one year after resolution of the complaint.

# What About My Personal SM Accounts/Personally Owned Phone Messages & Public Records?



# And here we go...

- If you are transacting public business, then it constitutes a public record, be it a FB post and comments, private message, etc.





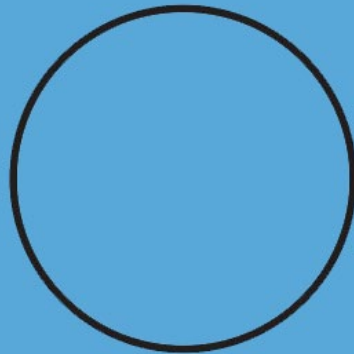
# How To Retain the Public Record

- Archiving services
- Download features on SM platforms
- Plain Ole Print/Screenshot (with time/date stamps)
- Log of record, if allowed (paper or electronic)



# Personal Pages and Opinions

**CIRCLE OF TRUST**



*YOU* →

# Regulating Employee Behavior



# First Amendment

- Three prong test (Pickering, Garcetti cases)
  - Is the issue a matter of public concern?
  - Is the employee speaking as a function of their job duties?
  - Whose interests are more important—government or individual?
    - Location/time of posting matters
    - Position matters
  - Two blog postings at [sog.unc.edu](http://sog.unc.edu)

**To determine if a public employer unlawfully retaliated against an employee for the employee's speech, recent court decisions ask three questions:**

1. Whether the employee engaged in protected speech?
2. Whether the action taken against the employee would discourage an individual of 'ordinary firmness' from engaging in the activity that led to their discipline?
3. Whether the employee's protected speech was 'a motivating factor' behind the adverse action taken against the employee?

# Conduct Becoming

- The more important you are, the more your behavior matters
  - Key issue noted in Bennett vs. Metro of Nashville was the employee's low-level position
- Blurring of personal and professional lines
- Many issues are emerging
  - Judicial behavior
  - Teacher actions
  - Public safety professionals (Savannah firefighter case)
- Policies governing speech/behavior cannot be overly broad

# CONSIDER

## **Case:**

Female government employee gets her nipple pierced and documents the process on personal SnapChat.

A Commissioner is shown a screenshot of said activity.

Commissioner calls for employee to be terminated.

Other Commissioners believe it is illegal to fire her.

They have no written conduct policy.

***What do you advise?***

# Analysis/Recommendation:

## *Legal Perspective*

1. Piercings and tattoos not protected speech (generally speaking)
2. Depends on their specific employment contract
3. Presence of policies related to employee conduct during non-work hours

## *Practical Perspective:*

1. Event coordinator is not operating in an official capacity on that social media platform (meaning it is her personal snap chat site and not one set up for the town)
2. She doesn't tie herself to the jurisdiction on that site expressly
3. The organization has no conduct policy in place

**Not advisable to fire or discipline:** sit down and have a chat about Snap Chat how her posts might create situations for her in your organization (or other organizations)



# Formal, Written Conduct Policy



# Sample PD Social Media Policy

## Section V. Personal Use

### A. Precautions and Prohibitions

Barring state law or binding employment contracts to the contrary, department personnel shall abide by the following when using social media.

1. Department personnel are free to express themselves as private citizens on social media sites to the degree that their speech does not impair working relationships of this department for which loyalty and confidentiality are important, impede the performance of duties, impair discipline and harmony among coworkers, or negatively affect the public perception of the department.

2. As public employees, department personnel are cautioned that speech on- or off-duty, made pursuant to their official duties—that is, that owes its existence to the employee’s professional duties and responsibilities—is not protected speech under the First Amendment and may form the basis for discipline if deemed detrimental to the department. Department personnel should assume that their speech and related activity on social media sites will reflect upon their office and this department.
  
3. Department personnel shall not post, transmit, or otherwise disseminate any information to which they have access as a result of their employment without written permission from the chief executive or his or her designee.

4. For safety and security reasons, department personnel are cautioned not to disclose their employment with this department nor shall they post information pertaining to any other member of the department without their permission. As such, department personnel are cautioned not to do the following:
  - a) Display department logos, uniforms, or similar identifying items on personal web pages.
  - b) Post personal photographs or provide similar means of personal recognition that may cause them to be identified as a police officer of this department. Officers who are, or who may reasonably be expected to work in undercover operations, shall not post any form of visual or personal identification.

5. When using social media, department personnel should be mindful that their speech becomes part of the worldwide electronic domain. Therefore, adherence to the department's code of conduct is required in the personal use of social media. In particular, department personnel are prohibited from the following:
  - a) Speech containing obscene or sexually explicit language, images, or acts and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, any religion, or any protected class of individuals.
  - b) Speech involving themselves or other department personnel reflecting behavior that would reasonably be considered reckless or irresponsible.
6. Engaging in prohibited speech noted herein, may provide grounds for undermining or impeaching an officer's testimony in criminal proceedings. Department personnel thus sanctioned are subject to discipline up to and including termination of office.

# Apply the Policy: Round 1



# Officer A's FB Posting

“Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in today's world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's and even as instructors...”

# Officer B's FB Response

Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. It's disgusting and makes me sick to my stomach DAILY.

...

Perfect example, and you know who I'm talking about..... How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? ...

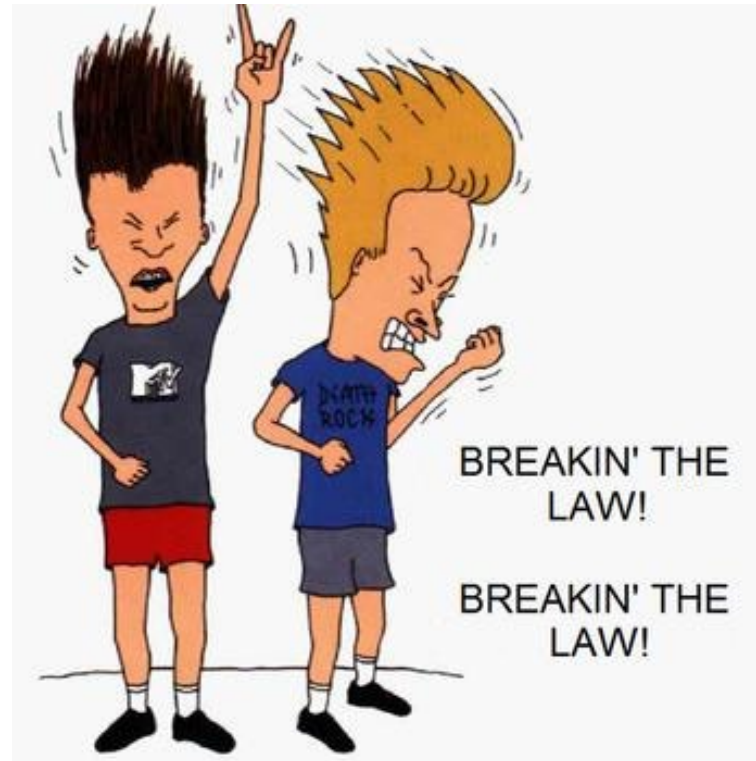
It's a Law Suit waiting to happen. And you know who will be responsible for that Law Suit? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll to begin with.



# Policy Violation?



# Policy can still violate the law



# Apply the Policy: Round 2



## FB Profile Picture



Posted by Town on their FB Page



Undercover Officer Posted on Personal SM Page

# Policy Violation?



**Policy must be routinely and equitably enforced**

**INVALID**

# Apply the Policy: Round 3



# My Apologies in Advance

These are a police officer's public FB postings





# Policy Violation?



# Apply the Policy: Round 4



# Profile Pictures



[Redacted], 26  
4 miles away

Ever shouted, "F---k the Police"? Well, here's your chance



# Policy Violation?



# Other Items

- Requiring employees to identify their association with the agency whenever they are commenting on official services/products as part of official job duties (example: FB engagement)
- If postings are not officially sanctioned and reviewed by agency Executive, then the employee should be required to use clear disclaimers that his/her views do not represent the views of the agency
- Use caution when posting photographs and names of co-workers or citizens (i.e. gain consent from co-workers/citizens)
- Reminder that agency has the right to lawfully and respectfully monitor employee social media postings and other online activities for compliance with agency policies. This monitoring usually occurs if the agency staff have “friended” one another or if a citizen brings in material from a person’s postings

