

**MEMO**

DATE: November 30, 2017

TO: Craig Lindholm

FROM: L. Stanton Lowry  
Cathy Cunningham

RE: Social Media Policy – Council members

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The current state of the law in regard to elected officials and social media is evolving. Whether or not “common sense” will ultimately prevail is hard to say at this point.<sup>1</sup>

Evolving Federal Cases

The question of the role of social media in public discourse is much more visible today, especially since the President uses his private Twitter account (which existed as a personal account and was used by him prior to the election). On July 11, 2017, the Knight First Amendment Institute and seven individuals who had been blocked from the President’s Twitter account filed a lawsuit against the President, the Press Secretary and the White House Director of Social Media. The most recent substantive document that I find in that lawsuit is a Motion for Summary Judgment filed by the Defendants. It does not appear to have been ruled upon at this time.

In the lawsuit, the Plaintiffs allege that blocking people because they disagree with the President constitutes viewpoint discrimination in violation of the First Amendment.<sup>2</sup> The Defendants respond that there is no cause of action based upon a number of procedural grounds,<sup>3</sup> that there is no state action – blocking is available to any Twitter user, it is not an action based upon federal authority, even if it is government action, it is “government speech” not a public forum, the Twitter account is not government property or a forum for the speech of others.<sup>4</sup>

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<sup>1</sup> “In Portland, the question is whether a councilmember’s Facebook page and posts are a public record. Tracy Reeve, the City Attorney, has been asked to look into the issue cogently, Tracy wrote: “The mere fact that a public employee posts information on a private social media page which refers to the public body does not transform that private social media page into a public record. Before Facebook, councilmembers talked to constituents in stores, at coffee shops and on the phone – those conversations weren’t public – let’s put some common sense into our public records laws.”

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See also:

[http://www.oregonlive.com/politics/index.ssf/2017/11/portland\\_commissioner\\_chloe\\_eu.html](http://www.oregonlive.com/politics/index.ssf/2017/11/portland_commissioner_chloe_eu.html)

<sup>2</sup> Complaint for Declaratory and Injunctive Relief, Case No. 17-cv-5205

<sup>3</sup> No standing due to no cognizable injury, relief not requested that could be granted by all Defendants, equitable relief not available against the President (separation of powers argument)

<sup>4</sup> Memorandum of Law in Support of Motion for Summary Judgment filed by Counsel for Defendants.

At this point, I would not make a prediction as to what the ultimate holding of the case will be,<sup>5</sup> but I will predict that regardless of the trial court's ruling, the case will be appealed and we will not see a final decision for some time.

### Public Forum or Not?

The federal lawsuit is important due to the possibility that it might better define – one way or the other – whether or not social media accounts are going to be considered by the Courts as public forums. Why does that matter? Public forums are considered by the courts to be areas where people can communicate freely – and if an area is a public forum, it would be very difficult to block someone from access to that forum. So if the social media of a council member becomes a public forum, and is not considered to be a private, personal account, the council member (or the municipality) could incur legal consequences if the council member tries to terminate someone from their social media. In other words, if a council member's personal Facebook account is a public forum, then you would not be able to “unfriend” anyone (with some possible exceptions for certain defined behavior), if a Twitter account is a public forum, you could not block anyone (again with some limited exceptions). You would not be able to terminate someone for just insulting you or disagreeing with you.

If the courts do eventually decide that social media sites are public forums, other issues will arise.

### Texas law – Open Meetings Act

Regardless of how the federal law on this topic may be decided, there are state law concerns for Council members. For example, a Facebook discussion of a future Council action could be joined by other Council members, thus violating the Texas Open Meetings Act.<sup>6</sup> “The dynamic nature of social media and the sheer volume of posts may make it difficult to track who is involved in the discussion and detect when the open meetings line has been crossed.”<sup>7</sup>

Even if other Council members do not comment on a post, they could see it, or reference it to other Council members in such a way as to create a rolling quorum. The same concern could be stated about a Council member's blog that comments upon city business or tweets about city business.

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<sup>5</sup> There have been some articles, such as “Supreme Court Hints that Trump Can't Legally Block You on Twitter” that the recent U.S. Supreme Court case, *Packingham v. North Carolina*, indicates that the Court may find in favor of the Plaintiffs. That case overturned a North Carolina law that provided that registered sex offenders cannot be on Facebook or Twitter. The majority held: “It is well established that, as a general rule, the Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’ [Cites omitted.] That is what North Carolina has done here. Its law must be held invalid.” Beyond the holding, language in the opinion seems to carry the suggestion that the Court will find a Twitter account a public forum. “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the Internet’ in general [cites omitted] and social media in particular.” The Court also notes “And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner.”

<sup>6</sup> Texas Government Code chapter 551

<sup>7</sup> “Building Local Government Social Media Policies,” National League of Cities, Risk Information Sharing Consortium

Generally, Council members should not speak on city business on social media, particularly on business that may come before them at a future date. The risk of violating the Open Meetings Act is not just a risk that the action could be considered voidable, or could subject the City to an argument that there is some municipal liability (for example, a due process concern that the Council member did not fairly consider the issue, but their opinion was pre-set) – the risk to an individual Council member is also personal, as there are criminal penalties for violations of the Open Meetings Act.

#### Texas Law – Public Information Act and Retention Requirements

In addition to Open Meetings Act concerns, the postings could be held to be public information and subject to the Public Information Act.<sup>8</sup> The Texas Public Information Act defines public information broadly. The definition reads:

Sec. 552.002. DEFINITION OF PUBLIC INFORMATION; MEDIA CONTAINING PUBLIC INFORMATION. (a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;  
or

**(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.**

(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

(a-2) The definition of "public information" provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.

(b) The media on which public information is recorded include:

(1) paper;

(2) film;

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<sup>8</sup> Texas Government Code chapter 552

- (3) a magnetic, optical, solid state, or other device that can store an electronic signal;
  - (4) tape;
  - (5) Mylar; and
  - (6) any physical material on which information may be recorded, including linen, silk, and vellum.
- (c) The general forms in which the media containing public information exist include a book, paper, letter, document, e-mail, Internet posting, text message, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory.  
[Emphasis added.]

Under that definition, it would not be hard to imagine a Court holding, for example, that a blog discussing the future development of the City fits within the definition of public information, thereby subjecting it to all the requirements of the TPIA and retention requirements.

The TPIA also has criminal penalties.

#### Conclusion

This area is an evolving area of the law. Future case law or legislation could alter the conclusion of this memo.

For now, an individual Council member should not utilize social media or engage in on-line discussions or posting concerning matters that may come before the City Council. Doing so could subject the Council member to personal risk, require other Council members to take precautions so as not to be subject to personal risk (that is, to take care not to see any such postings) and could expose the City to known and unknown risks for liability.