



City of Largo Agenda Item 17

Meeting Date
12/18/18

Presenter: Alan Zimmet, City Attorney

Department: AD – Administration

TITLE:

USE OF SOCIAL MEDIA AND HOW IT CAN BECOME A LIMITED PUBLIC FORUM

The City Attorney prepared the attached memorandum to advise the City Commission of legal issues related to the use of social media by the City and its officials. The memorandum explains the first amendment issues that arise when elected officials or the City use social media that allows for responses to social media posts. The memorandum also discusses public records issues that have arisen from the use of social media by local governments and their officials in Florida. The City Attorney will discuss these issues further during the City Commission meeting.

Budgeted Amount: \$0.00 **Budget Page No(s):** N/A **Available Amount:** \$0.00 **Expenditure Amount:** \$0.00

Additional Budgetary Information: Not applicable

Funding Source(s): N/A **Sufficient Funds Available:** Yes No **Budget Amendment Required:** Yes No **Source:** N/A

City Attorney Reviewed: Yes No N/A **Advisory Board Recommendation:** For Against N/A **Consistent With:** Yes No N/A Not Applicable

Potential Motion/ Direction Requested: STAFF REPORT: INFORMATIONAL ITEM

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Attachments: Memorandum dated 11/29/18

MEMORANDUM

To: Honorable Mayor and City Commissioners
From: Alan S. Zimmet, B.C.S., City Attorney
Cc: Henry Schubert, City Manager
Date: November 29, 2018
RE: Use of Social Media and How it Can Become a Limited Public Forum

Given the prevalence of social media in this day and age, this memorandum is intended to inform you of some recent legal developments regarding the use of social media by elected officials. The use of social media by local governments and local government officials raises two primary legal concerns: 1) does the use of social media pages implicate first amendment rights such that the public has the right to comment or respond to postings on social media; and 2) what are the implications under the Public Records Law.

Social Media, Public Forums and the First Amendment

In determining the public's first amendment right to free speech generally, the Supreme Court first looks to the location of the exercise of the right to free speech. At locations where public discourse has traditionally been allowed, such as City Hall, the first amendment rights of the public are the greatest. Besides traditional public forums, government, by its actions, can create what the courts refer to as a limited public forum. A limited public forum is a location that traditionally has not been available for public discourse, but that the government allows for discussion of certain government-related topics.

The courts have treated social media sites where the government or a government official has communicated publicly about government issues as limited public forums and therefore, subject to first amendment requirements. *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016). Viewpoint discrimination (discrimination based on the content of the speech) is prohibited on limited public forums. This means that members of the public must be allowed to comment on those social media sites that are a limited public forum, and cannot be barred from commenting by the government or a government official.

Content of the Social Media Page Determines Whether the Page is a Public Forum

The first question that must be reviewed to determine if a social media page is a limited public forum is the actual usage of the site. Generally, if a social media page is maintained by the City and it allows comments, it is going to be considered a limited public forum. A social media page maintained by an elected official either on behalf of his/her campaign or in his/her personal capacity will still be considered a limited public forum if the social media postings relate to City business. Therefore, the relevant question is: are the postings to the social media site done “in connection with the official’s duties”? If so, the social media page is going to be considered a limited public forum and the official is going to be restricted in any attempt to limit public discussion on that social media page.

Courts look to a number of factors to determine whether a social media account is considered to be public or private, including: the title of the page, the circumstances surrounding the creation of the page, whether the page contains links to governmental websites, whether personal information and photographs are included on the page and the subject matter of the posts. See *Davison v. Loudoun County Board of Supervisors*, 227 F.Supp.3d 605 (E.D. Va. 2017); *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (2017).

For example, a Florida District Court recently held a county clerk’s office’s Facebook page on which members of the public could post comments was a limited public forum. *Jordan v. Bell*, Order Granting Summary Judgment on Liability, Case No. 4:17-cv-004373-RH-CAS (N.D. Fla. 2018). The court determined that the clerk maintained the Facebook page in her official capacity, inviting comments from the public, and therefore, selectively responding to posts but deleting others on the same topic, sometimes blocking those users from making further comments, violated the first amendment. *Id.*

Additionally, President Trump’s personal Twitter account, @realDonaldTrump, was held to be a governmental account because the President uses it to conduct public business. *Knight First Amendment Institute v. Donald J. Trump*, 302 F.Supp.3d 541 (2018).

Viewpoint Discrimination

If a social media page is a limited public forum, first amendment protections apply. Blocking or deleting comments or posts because of their content on a social media page that is considered a limited public forum is likely to be considered viewpoint discrimination and thus, a violation of the first amendment.

For example, where a government official maintained a Facebook page in her capacity as a chairperson of the county board of supervisors and banned one constituent’s comments on the page simply because his comments were critical of the chairperson’s actions and those of other governmental officials, such action was considered viewpoint discrimination and was impermissible. *Davison v. Loudoun County Board of Supervisors*, 227 F.Supp.3d 605 (E.D. Va. 2017).

However, the government may set boundaries for comments even on a limited public forum. *Davison v. Plowman, Loudoun Commonwealth's Attorney*, 247 F.Supp.3d 767 (E.D. Va. 2017). In *Plowman*, Loudoun County established a social media comments policy, which provided that the “purpose of the Facebook page was to present matters of public interest in Loudoun County” and reserved the right to remove comments deemed “clearly off topic.” *Id.* at 776. When the city’s attorney posted an article he had written concerning special prosecutors as part of a program to increase the public’s understanding of the criminal justice system, a constituent responded by posting a lengthy comment that did not respond to the article posted but rather pressured the attorney to act on the constituent’s concerns about alleged perjury by another county official. *Id.* at 777. When the attorney deleted the “off topic” comment because the comment “did not comport with the purpose of the forum, and the restriction justifying its removal was both viewpoint neutral and reasonably related to the purpose of the forum,” the court found such conduct did not constitute viewpoint discrimination. *Davison v. Plowman, Loudoun Commonwealth's Attorney*, 247 F.Supp.3d 767, 777-78 (E.D. Va. 2017).

Are Social Media Pages Subject to Public Records Law?

Social media pages, whether public or private, can be subject to Florida’s public records law. “[I]f the posts relate to the conduct of government and are prepared within a public official’s scope of employment or official capacity,” then the posts are public records. *West v. Puyallup*, 410 P.3d 1197 (2018).

Conclusion

For the most part, speech on social media is treated the same way as other speech and is entitled to the same first amendment protections. Government officials should understand that their personal social media pages may be considered limited public forums, thus allowing the public to comment on those pages.