



# Social Media & Its Effect on Public Officials: Top Ten Things You Need to Know



UNC  
SCHOOL OF GOVERNMENT

Shannon Tufts

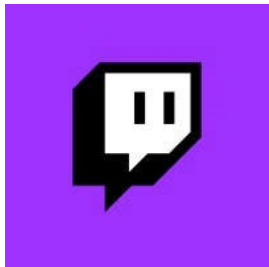
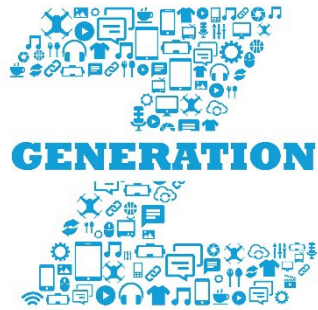
# Top Ten Things You Need to Know

1. Communicating through social media: Upsides.
2. Communication through social media: Downsides
3. Is your social media platform public or private? How can you tell?
4. What rules apply to public social media sites?
5. What rules apply to private social media sites?
6. Comment policies and blocking comments
7. Public records on social media vs. campaigning, constituent communication
8. Board communications and open meetings
9. Retention requirements
10. Ethics and social media

# facebook



# Apps





# 1. Social Media: Upsides

- Social media may engage the government's digital following and **better understand the topics that are important to residents.**
- Allows government to **foster a relationship with a different demographic of residents** who play a role in shaping the government's story and approach to engagement.



Who  
are  
you  
trying  
to  
reach?

## Use of different online platforms by demographic groups

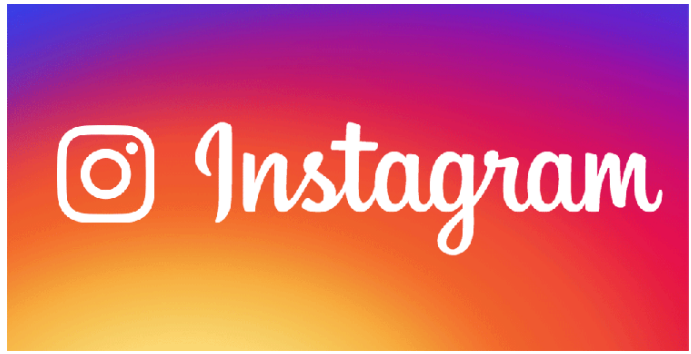
% of U.S. adults who say they ever use the following online platforms or messaging apps

	YouTube	Facebook	Instagram	Pinterest	LinkedIn	Snapchat	Twitter	WhatsApp	Reddit
U.S. adults	73%	69%	37%	28%	27%	24%	22%	20%	11%
Men	78	63	31	15	29	24	24	21	15
Women	68	75	43	42	24	24	21	19	8
White	71	70	33	33	28	22	21	13	12
Black	77	70	40	27	24	28	24	24	4
Hispanic	78	69	51	22	16	29	25	42	14
Ages 18-29	91	79	67	34	28	62	38	23	22
18-24	90	76	75	38	17	73	44	20	21
25-29	93	84	57	28	44	47	31	28	23
30-49	87	79	47	35	37	25	26	31	14
50-64	70	68	23	27	24	9	17	16	6
65+	38	46	8	15	11	3	7	3	1
<\$30,000	68	69	35	18	10	27	20	19	9
\$30,000-\$74,999	75	72	39	27	26	26	20	16	10
\$75,000+	83	74	42	41	49	22	31	25	15
High school or less	64	61	33	19	9	22	13	18	6
Some college	79	75	37	32	26	29	24	14	14
College+	80	74	43	38	51	20	32	28	15
Urban	77	73	46	30	33	29	26	24	11
Suburban	74	69	35	30	30	20	22	19	13
Rural	64	66	21	26	10	20	13	10	8

Note: Respondents who did not give an answer are not shown. Whites and blacks include only non-Hispanics. Hispanics are of any race.

Source: Survey conducted Jan. 8-Feb. 7, 2019.

PEW RESEARCH CENTER



VERSUS

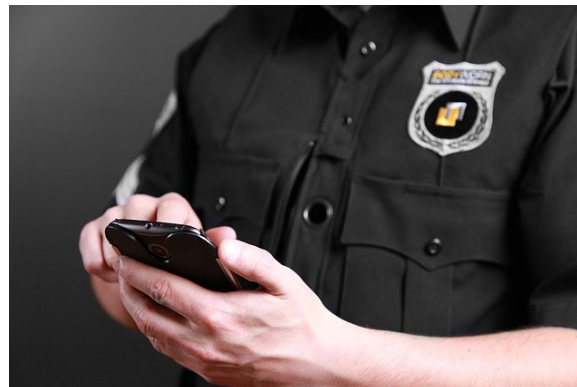
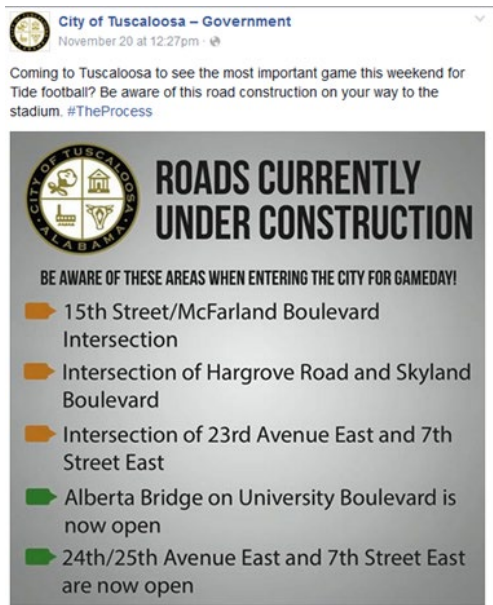


- Instagram has surpassed **1 billion active users**
- **71%** of U.S. business use Instagram
- **59%** of 18-29 year-olds use Instagram

- Facebook is still the most popular social media app: 2.3 billion users
- Facebook usage has been slowly declining—but still 2x larger than other SM apps

# More Upsides

- Public safety, transparency, and responsiveness





# More Upsides

## ■ Transparency



TOWN OF CHAPEL HILL



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Businesses >

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## COUNCIL MEETING AGENDA

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Copies of the agenda and related reports, ordinances and resolutions generally become available in the Communications and Public Affairs Department by Thursday afternoon before a Monday night Council meeting. See the [Council Meeting Agendas, Minutes and Videos](#) page for the online agenda.

To receive copies of the Council's agenda or individual agenda items, contact the Communications and Public Affairs Department by email at [clerk@townofchapelhill.org](mailto:clerk@townofchapelhill.org) or at 919-968-2743.

For additional information about items on a Town Council agenda, please call the Manager's Office or the Communications and Public Affairs Department at 919-968-2743.

### Related Topics

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### AGENDAS

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<a href="#">2009</a>	<a href="#">2008</a>
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<a href="#">2005</a>	<a href="#">2004</a>
<a href="#">2003</a>	<a href="#">2002</a>
<a href="#">2001</a>	<a href="#">2000</a>

Top 10

## 2. Social Media: Downsides



# Social Media: Downsides

Controlling Comments



Archiving and Public Access

Top 10

# 3. Is Your Social Media Platform Public or Private?

- Types of Platforms:
  - Official Government
  - Individual Official
  - Candidate/Campaign
  - Personal (friends and family)



# Official Government Social Media Sites





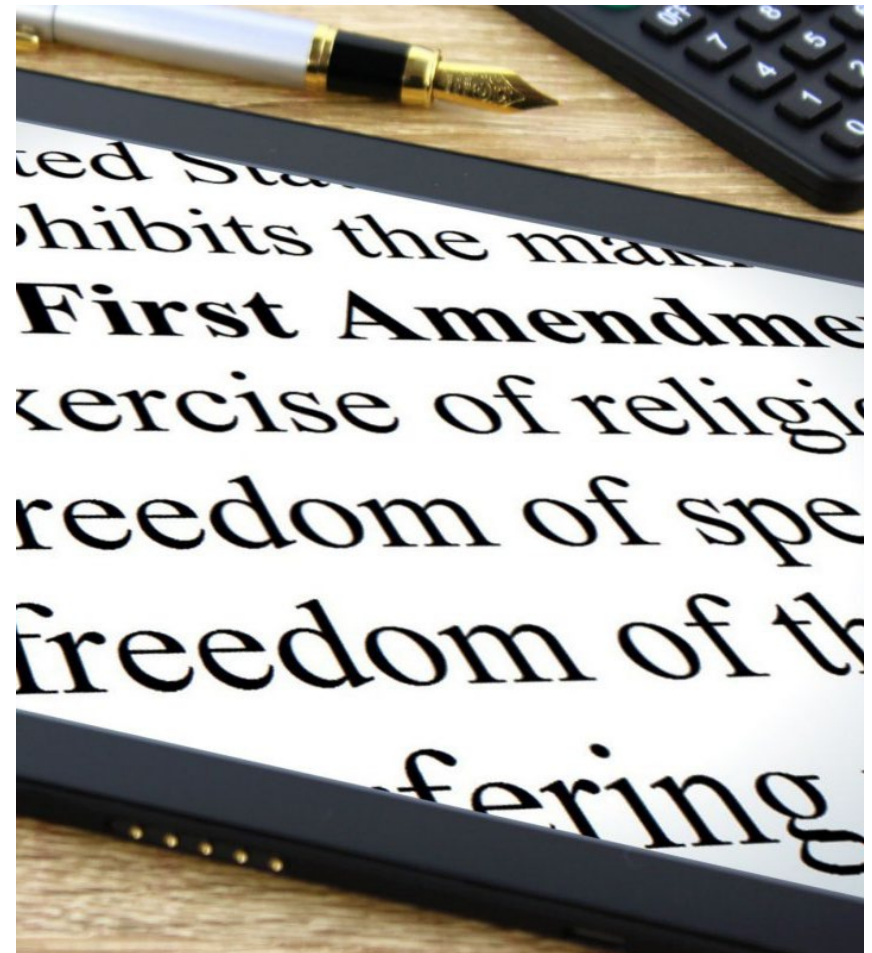
# The Government's Speech and the Constitution

“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

# 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\*

# 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."

# What About the “Government 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



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

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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...



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# GOOD NEWS!

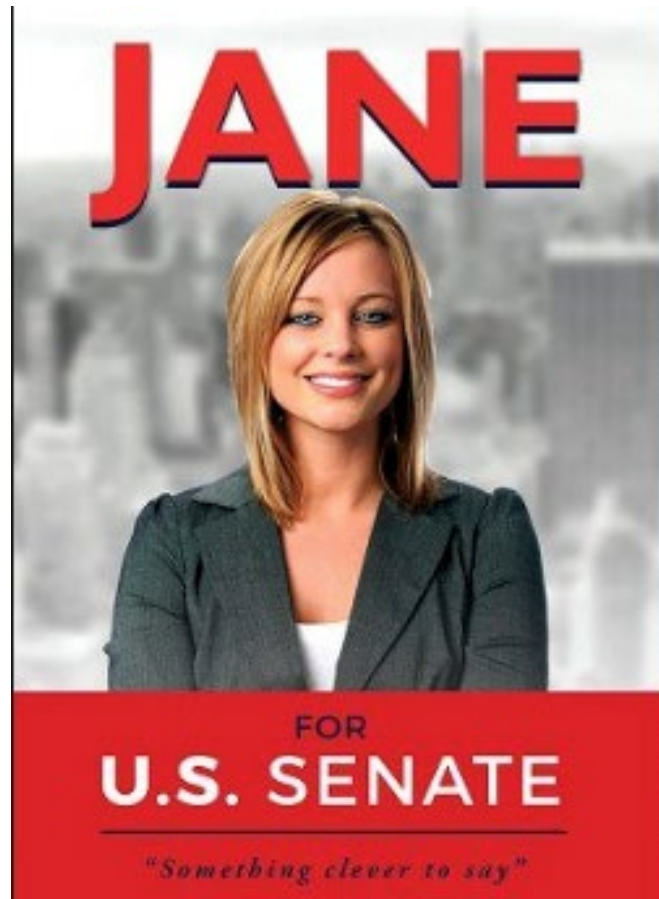
- Facebook has now created an option for “Pages” to disable comments (as of April 1, 2021)
- If you don’t want comments, turn them off completely, instead of allowing comments then deciding to mute them



# 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 time period for response
- If you don't want negative public comments, don't use Facebook.

# Constituent Communications or Transacting Public Business?



# Courts look to the content to determine whether it is governmental

- @realDonaldTrump Twitter account held to be governmental because the President uses it to conduct public business. *Knight First Amendment Institute v. Donald J. Trump*, 302 F. Supp. 3d 541 (2018)
- Board Member used Facebook page “as tool of governance” and used public resources to support the site. *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (2017)

# Other Factors

- The central purpose of the program in which the speech in question occurs
- The degree of editorial control exercised by the government or private entities over the content of the speech
- The identity of the literal speaker
- Whether the government or the private entity bears the ultimate responsibility for the content of the speech

# A Forum Can Have Multiple Parts

- Board Meeting



- Twitter Account



<https://twitter.com/jessicabakeman/status/465913973846454272>



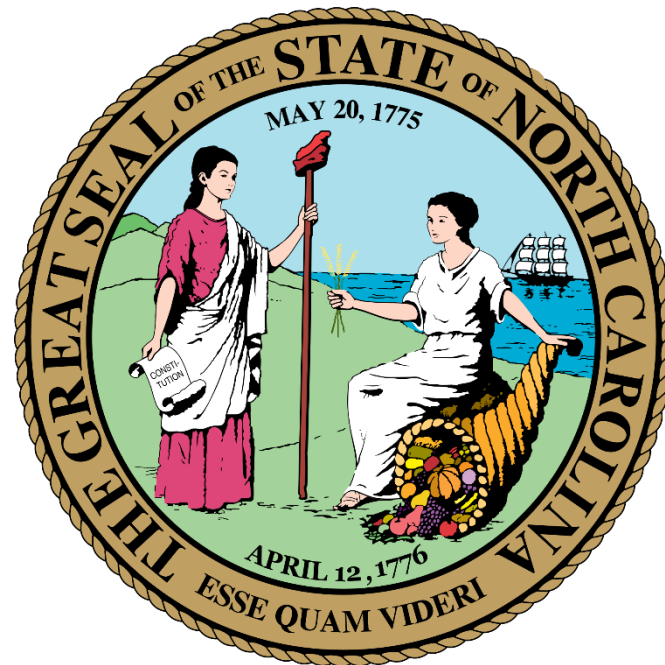
# Public Comment Period



- Statutorily mandated designated forum
- [Blog Post on Comment Period Polices: What's Legal](#)

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## 4. What Rules Apply to Public Social Media Platforms?



# Are your comments/tweets/posts public records?

- NC Law: records made or receive in the transaction of public public business.
- Can exist on private devices and accounts.
- Can exist on private social media sites.
- Posts are public records

“...if the posts relate to the conduct of government and are prepared within a public official’s scope of employment or official capacity.”

*West v Puyallup, 410 P.3d 1197 (2018)*

# Public Resources Can't Be Used For Political Purposes

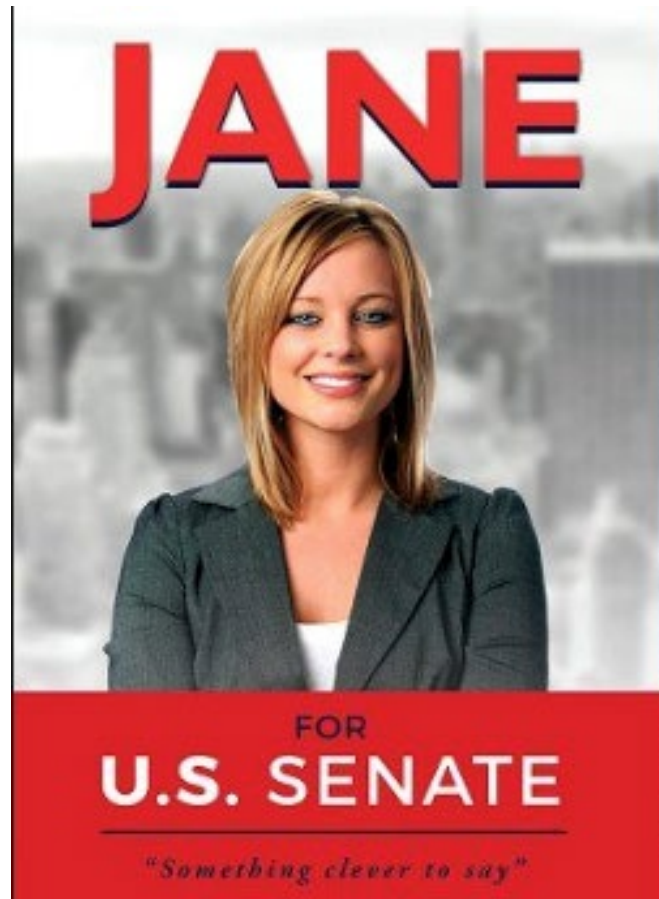
- State law prohibits the use of public resources for political purposes.
  - See GS 160A-169; 160A-499.3

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## 5. What Rules Apply to Private Social Media Platforms?

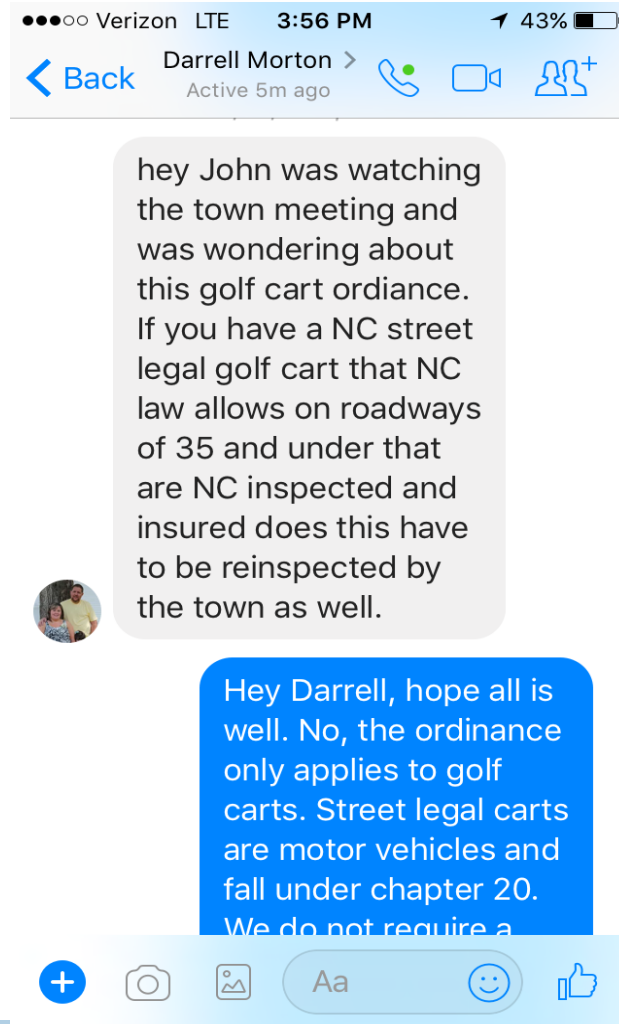


# Constituent Communications or Transacting Public Business?



# It Depends on the Content of the Communication!

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



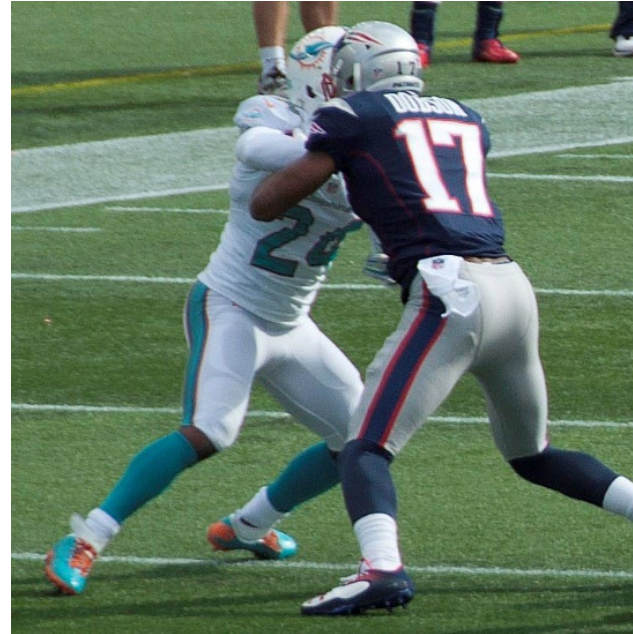


# How About This One?



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## 6. Comment Policies and Blocking Comments/Users



# Comment Policy Guidance

- 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.

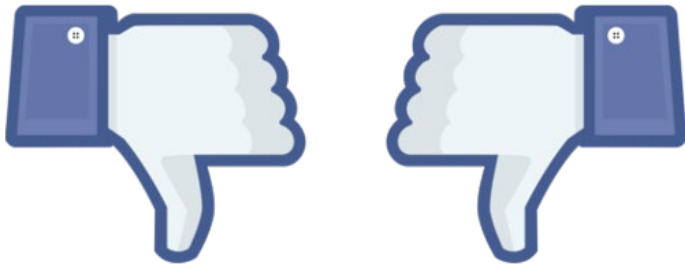
XXX City/County reserves the right to delete submissions that do not meet the purpose of this site as set out above. The following are examples of unacceptable social networking content and comments. Please note this list is not intended to be all-inclusive:

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).

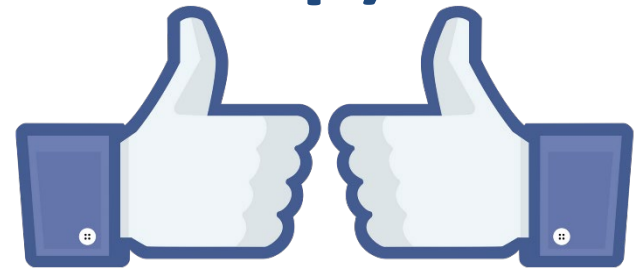
3. Content that promotes, fosters, or perpetrates discrimination on the basis of race, creed, color, age, religion, gender, physical or mental disability, or sexual orientation, or any other protected class of people.
4. Duplicate posts by the same author (the original post will be left intact assuming it follows the guidelines of acceptable comments or content).
5. Solicitations of commerce and/or content that contains gratuitous links including links to videos or photos. 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 Elected Officials (Individually or as a Group)?



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

# 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.



# Hiding vs. Deleting Comments?



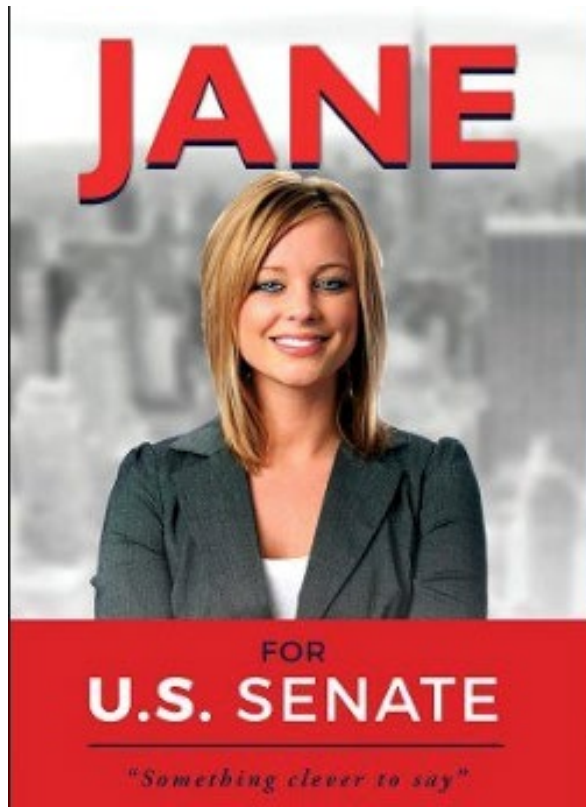
- There is no legal (First Amendment) difference between hiding and deleting comments

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## 7. Public records on social media vs. campaigning, constituent communication



# A Difficult Issue – Not Yet Settled



Avoid transacting government business on  
“personal” social media.

# *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.

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## 8. Board Communications and Open Meetings



Another open question!

# Does elected official discourse on social media violate the open meetings law?

- Official meetings under the open meetings law require a majority of member of public bodies, gathering simultaneously to transact public business.
- Members of public bodies should avoid engaging in a near real-time conversations with each other on social media (aka group messages, group texts, or even group emails)



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## 9. Retention Requirements





# It's Possible I Created a Social Media Based Public Record...



# All Public Records Have Retention Schedules

- Based on content
- Location of the content isn't relevant
- Duty of the custodian of the record to retain it accordingly
- General Records Retention Schedule for Local Governments:  
<https://archives.ncdcr.gov/documents/general-records-schedule-local-government-agencies>

# Governmental Social Media Posting

## Sample Records Retention Application



### 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>  
[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...

This comment could be considered a citizen complaint and accordingly would be categorized under “Citizen Complaints and Service Requests”. The record can be destroyed one year after resolution of the complaint. But there is another way!

**\*\*What else could you do with this?**

# How To Retain the Public Record

- Create an alternative official copy (log, etc)
- Archiving services
- Download features on SM platforms
- POP (Plain Ole Print): with time/date stamps



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# 10. Ethics and Social Media



# Common Social Media Questions

- Can I speak on behalf of my jurisdiction?
- Are my likes considered endorsements?
- Can I express personal preferences for other candidates on my social media site?
- Can I share my thoughts on any particular topic, even if the topic is sensitive?
- Can I use Facebook to communicate with jurisdictional staff?
- Can I post images, content, etc. from my jurisdiction's page onto my page?

# Sample Local Board Policy Governing Board Member Social Media Behavior





# Thank You!



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