

New Social Media Guidance as of 11/7/2019

Broad Statement: First, always consult with your local attorney on all of these issues as they will represent you in the event of litigation.

For all social media accounts, if you are planning to allow the public to comment on your social media sites, which seems to be the case with every government Facebook site that I have reviewed, you need to create a robust, **legal**, and routinely enforced comment policy. One thing you can do is create a policy that states all comments must be related to items within the authority or jurisdiction of your governmental entity. This will help you reasonably and fairly delete commentary where someone goes on a rant about the President of the United States or uses the comment to talk about chemtrails or something along those lines. **However, you cannot create a broad policy that creates viewpoint discrimination—so 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.**

Here is one blog posting from Frayda Bluestein that starts laying out some of the standards between limited public forums versus “government speech” based on two pertinent court cases that we discussed (the other two are discussed below related to viewpoint discrimination): <https://canons.sog.unc.edu/the-first-amendment-keeps-the-social-in-government-social-media/>. I also encourage you to look at Frayda’s public comments post as it lays out the rules you must follow if you are allowing commentary in a limited or designated public forum (which you currently are): <https://canons.sog.unc.edu/public-comment-period-policies-whats-legal/>

Basic Tenets:

- I find it very difficult to claim any of your social media sites are “government speech” largely because you are allowing some level of comment on those sites. Even if your policy says that you are blocking all comments, most of you are actually allowing comments and then either hiding them or deleting those you find problematic.
- If you want to claim “one way communication of government speech”, but there are clear examples of general commentary that you are allowing, particularly when it appears you allow positive statements but hide or delete any negative statements, then you are engaging in viewpoint discrimination. Essentially, if you are picking and choosing which comments to hide or remove, that is problematic from a viewpoint discrimination standpoint.
- My standard advice: if you don’t want to have commentary from the public, then don’t use social media for communication purposes. Your website is a traditional form of “government speech” and you don’t have to open it up to comments, unlike social media platforms which are designed for two-way engagement.

Generic statement on hiding vs deleting Facebook Comments (as many of our clients like to argue that they hide instead of delete comments which isn’t a First Amendment violation):

I believe they are essentially the same in terms of the First Amendment. If you stop a person from speaking (think public meeting instead of Facebook) assuming the speech is allowed under the First Amendment, then you can’t hide or block the comments. If you have a justifiable reason for hiding the speech (for example: information about an identified minor having an gun and planning to commit an act of mass violence was randomly posted on your FB page) then you could use the hide feature or the delete feature, but you still likely need to preserve the record in some format .

Typical Question I Have Received from Local Governments re: Blocking/Hiding Comments/Blocking Users/Followers and Frayda's Response:

Question: If a government has uses a series of dozens of words (like North, Carolina, Town, of, the, public, beach, etc) in their expanded profanity filter to essentially block all commentary, is that acceptable, as in they are using this mechanism to essentially make their social media site a one way communication vehicle of "government speech"? Facebook and other similar sites don't allow governments to turn off comments on content the government posts, so governments are using the profanity filter with all kinds of keywords to stop public commentary completely.

Frayda's Answer: My thought was that if they say comments are limited to specific categories: need services; have a question; requesting records, report an incident, etc. but maybe that's not possible in the comment structure. If that's the case, maybe you create that kind of thing on the website without using Facebook.

This is where I say – you need to decide what you're trying to do. **If you want to hear from folks then use a social media platform, but be ready to have a robust and clear policy about what can be removed. If you really don't want to have comments but do want to hear from people who need to interact with their government – use some other platform.** Using a filter doesn't seem like a very practical way to do it.

Standard Government Social Media Comments Policy Edited based on Recent Court Cases:

Note 1. items noted in yellow should be removed from all governmental comment policies as they may cause First Amendment violations)

Note 2. please note the section about profane language, as Frayda says it needs to be narrowly defined, so your WTFs probably cannot be blocked.

"We welcome you and your comments to the Town of XXX Facebook Pages. The purpose of this site is to present matters of public interest from the Town of XXX, 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.

My comments on the highlighted content above: I personally don't like the "submit questions, etc" section as it opens up potential issues if a government is not routinely monitoring their social media accounts. I usually suggest offering an alternative official manner to submit complaints/concerns/emergency requests/etc through other channels that are routinely monitored and recorded. This isn't going to stop people from posting such items, but I don't want governments to give the impression of routine monitoring or use of such platforms for official requests, complaints, etc unless they actually can do that. As for the moderated online discussion site, I believe most courts would disagree with this statement in part especially if you are allowing the public to engage in two-way discourse by specifically stating that you encourage submission of comments, etc. However, I am not sure if that statement being included matters or not, as it would be the government's actual practices of limiting speech that would ultimately create legal issues despite stating that it isn't a public forum.

Once posted, the Town of XXX reserves the right to delete submissions that contain:

1. profane language;

My comments on the content above: We actually don't have clear case law on this topic and the courts have been all over the place with it. I personally would keep this statement as a reason to block

content, largely because governments are using the provided profanity filter on the various social media sites to actively stop such behavior. Here is a recent discussion on the definition of profanity relative to governmental regulation: <https://www.mtsu.edu/first-amendment/article/1143/profanity>. I am being asked about whether pseudo-profanity, like WTF, is allowable for blocking, and I am still not sure about this other than assuming it is ok to block as long as it doesn't create viewpoint discrimination.

Frayda Says: I think it will be very difficult to ban profanity unless they keep it pretty narrowly defined, the really obvious ones.

My comments on the issue of using expanded keyword blocking via the profanity filter: I personally am not recommending this practice for keywords that are not profane or pseudo-profane. The case involving Texas A&M and PETA raises the issue of blocking words (like lab, dog, cruel, PETA, etc) specifically to inhibit speech that is not in line with the government's views or practices. These strategies can easily and almost intentionally lead to viewpoint discrimination. If the words are profane in nature or intent, then the argument of viewpoint discrimination seems to lessen, but even that is an open matter of legal interpretation currently as noted above.

Frayda Says: I like your point that there's a difference between filtering specific words because they are offensive or target or disparage any ethnic, racial, or religious group, and they're not allowed as opposed to words used by commenters whose viewpoints are not welcomed.

2. **personal attacks of any kind;**

My comments on the content above: The main issue with this rule is that personal attacks could lead to a viewpoint discrimination claim so I find this inadvisable. In fact, President Trump's Twitter case, the case from Loudon County VA, and the Robinson vs. Hunt County Sheriff's Office cases essentially hinge on followers disagreeing with a public official or public office's stances and posting about it on their pages, which led to viewpoint discrimination when those detractors were blocked.

Frayda Says: Definitely ditch the personal attacks and the off topic. I think both of these can be regulated within the broad rule that it has have something to do with the unit, or under one the other specific prohibitions.

3. offensive comments that target or disparage any ethnic, racial, or religious group. **(seems reasonable to include in a comments policy)** **Frayda agrees.**

Furthermore, the Town also reserves the right to delete comments that:

1. are spam or include links to other sites; **(seems reasonable to include in a comments policy)**

Frayda Says: I like this except I worry about links to other sites. I imagine some comments might include useful links, for example resources, places for people to go for help etc. It might be hard to stick to that one and once you allow one you'd have to allow others.

2. **are clearly off topic**

My comments on the content above: The main issue with this rule is that "clearly off topic" claims could again lead to a viewpoint discrimination claim. If you allow positive statements that are "clearly off topic" relative to a post made by the organization but then remove another person's comments that are

negative and “clearly off topic” then, you have engaged in viewpoint discrimination, which is never allowed.

Frayda Says: Definitely ditch the personal attacks and the off topic. I think both of these can be regulated within the broad rule that it has have something to do with the unit, or under one the other specific prohibitions.

3. advocate illegal activity; or compromise safety or security of the public (seems reasonable to include in a comments policy) **Frayda agrees.**

4. promote particular services, products, or political organizations;

My comments on the content above: I have less concerns about this one and think it is likely OK to leave in a policy. Specifically you cannot use government platforms to promote political organizations so that is an easy one. I also wouldn't allow individuals or businesses to advertise on my government's site as it can lead to “endorsement” and emolument issues so I think you are fine to leave this as it is. **Frayda agrees.**

5. infringe on copyrights or trademarks; or violate the legal ownership of the party (seems reasonable to include in a comments policy) **Frayda agrees.**

6. use personally identifiable medical information; We recommend you not share any of your medical information on our Facebook Pages. (seems reasonable to include in a comments policy) **Frayda agrees.**

Please note that the comments expressed on this site do not reflect the opinions and position of the Town of XXX government or its officers and employees. If you have any questions concerning the operation of this online moderated discussion site, please contact the Administration Department at XXX.” (seems reasonable to include in a comments policy) **Frayda agrees.**

My final comment: As a reminder, the policy still cannot allow viewpoint discrimination in any manner.

Court Cases We Discussed:

Here are the relevant court cases that have emerged in the last several months:

- Robinson vs. Hunt County Sheriff's Office: <https://law.justia.com/cases/federal/appellate-courts/ca5/18-10238/18-10238-2019-04-15.html> (Sheriff's Office had posted a policy about removal of “inappropriate comments” and a citizen stated that criticism or insulting the police is protected by the First Amendment. The SO blocked her and removed her comments, she sued, and ultimately won). I find this case to be quite compelling even if it is from Texas as it falls in line with many settlements by elected officials (like the Governor of Maryland) around similar lawsuits.
- PETA/EFF vs. Texas A&M: <https://www.eff.org/cases/peta-v-texas-am> (using expanded word filters to block specific content outside of profanity). This case is currently stayed while the parties attempt to settle out of court, but it is the first case I can find where blocking specific words using the expanded profanity filter is cited as viewpoint discrimination. The words they block (PETA, dog, cruel, etc) are not profane but are blocked to stop PETA and others from posting protest content. Many governments are using similar strategies and I am now advising against that practice as it quickly slips into potential viewpoint discrimination. I still stand by the

statement that if your organization wants to keep citizens from commenting, then just have a website which is “government speech” instead of using an interactive social media platform.

- Knight First Amendment Institute vs. President Trump: <https://canons.sog.unc.edu/wp-content/uploads/2019/01/Trump-case.pdf> (established that @therealdonaldtrump twitter account cannot block followers as it constitutes a violation of the First Amendment)
- Davison v. Randall: <https://canons.sog.unc.edu/wp-content/uploads/2019/01/Davison.pdf> (Fourth Circuit case) (similar finding to the Trump case; Loudon County Board Chair cannot delete or hide comments or block followers from her “official Chair” Facebook page as it constitutes a First Amendment violation)

Side notes:

-- I found this link to be useful in terms of what is and isn't allowed by various SM platforms:

<https://www.freedomforuminstitute.org/first-amendment-center/primers/free-expression-on-social-media/> (basically some social media platforms block more content based on specific categories than others, but that is outside the local government's control as it relates to First Amendment issues.

--Here is one more link that was interesting and might be worthwhile:

<https://news.bloomberglaw.com/us-law-week/insight-government-attorneys-tell-your-clients-they-cant-censor-people-on-social-media>