NAVIGATING SOCIAL MEDIA AS A LOCAL LEADER WEBINAR RESOURCE: FAQ

The Local Government Legal Center held a webinar on navigating social media as a local leader in the wake of the *Lindke v. Freed* decision in which the Supreme Court set forth the test for when local government officials are considered "state actors" for the purposes of the First Amendment when they post on social media. Attendees learned how their municipality can implement and enforce local policies that reflect this court decision.

Below are frequently asked questions of our panelists during the webinar and discussion. Answers provided are from the legal experts featured on the webinar.

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1. **Can you explain the new standard the Court set for government officials' social media accounts under the First Amendment?**
   To find state action on the personal social media page of a government official (elected or employed), the individual must: (1) possess actual authority to speak on the Government's behalf on that particular matter, and (2) purport to exercise that authority.

2. **Do you suggest elected officials maintain two social media pages: one for personal use and one for official city use? Should there be certain language on either page that identifies it as a purely personal or official page?**
   Yes. Having separate accounts is one way to avoid mixing different types of activity. Having three accounts may be best for elected officials – one for campaign activity, one personal, and one official page. A best practice would be to keep these accounts as separate as you can and avoid mixing the activity from each of these pages onto each other. From a legal standpoint, the Court has said a mixed-use page is the hardest to manage as the court will need to look at each individual post and analyze whether there was actual authority to take action on and speak. Best practice is to keep your pages/accounts separate to the extent you can.

The Court noted using labels or disclaimers on the page such as "these are my personal views" or "this is not an official page" are NOT determinative but there is a heavy presumption that if there are disclaimers that will help in the application of the test to avoid state action.

3. **Does a private Facebook or social media page that a local government official uses to post city information need to be made public after this ruling? What if they used to post about city business but no longer do? Can comments be removed from a shared city post on a personal page?**
   There is no clear direction from the Court on this issue, nor is there any indication in any of the decisions by Courts of Appeals that a personal social media page of a government official or employee must be opened up to all. All of the courts that have addressed challenges have focused on the censorship or viewpoint discrimination claims when a user has had their comments deleted and/or has been blocked or banned from a government official's page or account.

   If a city official has used their page/account in the past to post about city business and their actions meet the "state action" test set out in Lindke, then even if they stop posting about city business, the actions they took in the past against users (blocking, deleting) could still be challenged.

   In determining whether a government official's or employee's actions constitute "state action" for First Amendment/civil rights purposes, a court would engage in a fact-specific inquiry as to the action taken and the authority exercised. Sharing a post that originated on a city social media site is unlikely to trigger the test, at least not for that particular post. But, other activities on the employee or official's page could implicate this test.

4. **Can you share the same content under an elected officials page and a campaign page?**
   As discussed above in the last paragraph, courts will engage in a fact-specific inquiry to determine whether a particular post or actions taken in regards to that particular post (i.e., deleting comments) triggers "state action." The Lindke Court did seem to suggest in an example that sharing a post that originated elsewhere may not trigger "state action" and could be distinguished from an official or employee who announced something for the first time on their personal social media page. This is not determinative, however, but the Court did seem to suggest that "sharing" may be treated differently than original postings. The question for a court might be "where did the post originate" and if it was on the personal page, it isn't going to qualify as "sharing."

5. **Did the Court discuss how to handle comments on a social media page from constituents or members of the public that constitute harassment or hate speech? Can you remove these comments or block users for those types of speech?**
   Neither of the decisions get too far in the weeds on the type of protected speech, but any U.S. Supreme Court cases that discuss protected speech (not necessarily in the social media context) still apply. Hate speech is still protected speech. Profanity is also protected speech. Criticism of the government is highly protected speech. If it is a protected form of speech, then it can be problematic to delete the speech or blocking or banning somebody for exercising their rights to engage in their First Amendment rights. If it is on a personal page then you can delete the comments or block, but on a government official page it would be problematic to block, delete, or otherwise restrain protected speech.

6. **How does this ruling apply to LinkedIn pages which are inherently personal AND professional?**
   LinkedIn falls into the "social media" platforms because it has an "interactive space" where people can post comments and engage with the individual on his or her page. It would presumably be subject to the same test as other social media sites. Remember that just because you include your title/position and other "trappings" of your position, that does not mean your page is an official government page – there must be more to it under this new test. You would need to have the authority to speak on the particular government matter that you post about and actually exercise that authority. So, if you are the HR director and you post a job posting on your LinkedIn page, that might trigger state action, particularly if this were the original posting. In that case, comments that users post to that particular post may be protected under the First Amendment. Other posts on your page such as attendance at conferences are less likely to be subject to the new test. In this example, if you have authority to speak on behalf of the government on a particular matter, best to post the job posting on the official government site first, and if you want to post it on your own page, just share the original posting. You may also want to include disclaimers on your LinkedIn page if you regularly post about government issues.

7. **It is a best practice, under this ruling, that government employees or officials not list their employer, or title when they do possess the authority to post on the government's behalf, but only on the official government page?**
   Identifying one's employer or title is not determinative for purposes of state action – the Court rejected the "appearance" test that other Courts of Appeals had adopted that looked at these "trappings" of the office. If a government employer or officer has no authority to speak on the government's behalf, this test will simply not apply to them and their discussions of government business on social media would be as a private citizen and protected by the First Amendment.

8. **Can you block ALL comments on official accounts and be in compliance with this new ruling? What if you allow for certain posts to allow for comments from time to time? Can you utilize Facebook/social media settings to filter out or hide comments that contain certain phrases or profanity?**
   There is no way to block all comments from Facebook. There is a way to add common words to a word filter that would hide comments but that action could be subject to a different type of lawsuit challenging a closing of a public hearing after it had already been opened by the government official or employee (if the page/account would be considered a public forum – that's for the court to determine). Better practice is if a government official or employee does not want to engage with the public or interact, don't use social media which is inherently interactive - instead, use a website, newsletter, e-news, and other "one-way" forums for communication.

   There are many cases finding governments in violation of the First Amendment for selectively filtering out phrases or words, and particularly where those have First Amendment protections such as profanity, so this is <u>not</u> a recommended practice as you would be very likely to be challenged and lose that lawsuit. In most cases, the filtering of selective words and phrases is targeted at protected speech (for example, Universities have been sued and lost when they filter out words and phrases relating to animal testing because the court has found that these phrases are typically used to criticize the University which is highly protected speech).

9. **If an elected official is in a private Facebook group and is engaging with members of the group and posting official city information within a group can they block members or comments on the posts in the private group?**
   If the EO is engaging with constituents in matters where that EO has the authority to speak on the city's behalf and is exercising that authority, then the forum is irrelevant – the EO's actions in censoring protected speech or taking negative action against commenters could violate the First Amendment.

10. **Can you block bots or anonymous accounts that are spamming comments not relevant to the city business or topics?**
    Spam is usually not protected speech – the government attorney may want to review the specific post to confirm that it is truly spam and not protected speech.

    The courts that have addressed "off-topic" policies (i.e., comment policies that allow deleting of comments that do not relate to the original post or to the government's mission" have been split. Most of the courts find this type of policy or activity to violate First Amendment as viewpoint discrimination, although there is one Wisconsin court that upheld an off-topic rule. You will want to review your own jurisdiction's cases to determine whether this type of rule has been discussed in your courts.

11. **Can a resident use the Freedom of Information Act (FOIA request) to determine who a government official has blocked/banned from his social media?**
    This is controlled by your state's FOIA laws which vary across the country in the types of exemptions that apply so the government attorney will want to review their own statute and cases to determine whether FOIA applies to information or records on a personal account of a government official or employee. The answer may also depend on an analysis of the page/account or specific posts or activities and whether they constitute state action.

12. **Does having posting rules or regulations for proper social media etiquette give any authority for blocking a member of the public or deleting the comments that violate the rules?**
    If your policy violates the constitution and prohibits what is considered protected speech, then the answer is no, your unconstitutional policy will not protect you. There are many social media comment policies out there that prohibit protected speech such as banning profanity or hate speech or criticism of public officials – actions taken in furtherance of an unconstitutional policy cannot rely on that policy to justify the violation.

13. **If officials can no longer block comments, are there any useful strategies, best practices or resources that can be shared to handle inappropriate speech online?**
    Officials can still block comments as not all comments will be considered protected speech. For example, officials can delete posts that encourage illegal activity or that promote discrimination or that include copyrighted materials or that contain true threats of violence. A constitutional social media comment policy that only prohibits speech that is not protected can be enforced, and having that policy and enforcing it evenly and fairly is the best defense (as is training those individuals who moderate the page).

14. **Should local governments make official updated HR policy on social media usage?**
    If the question is whether a government should have a social media comment policy for its own pages, the answer is yes – make sure it only prohibits speech that is not protected by the First Amendment. Social media training is also a good idea, as is having an employee social media policy in your personnel policy/employee handbook.