

You Are What You Tweet: An Official Survival Guide



Presented by: Kelly A. Trainer



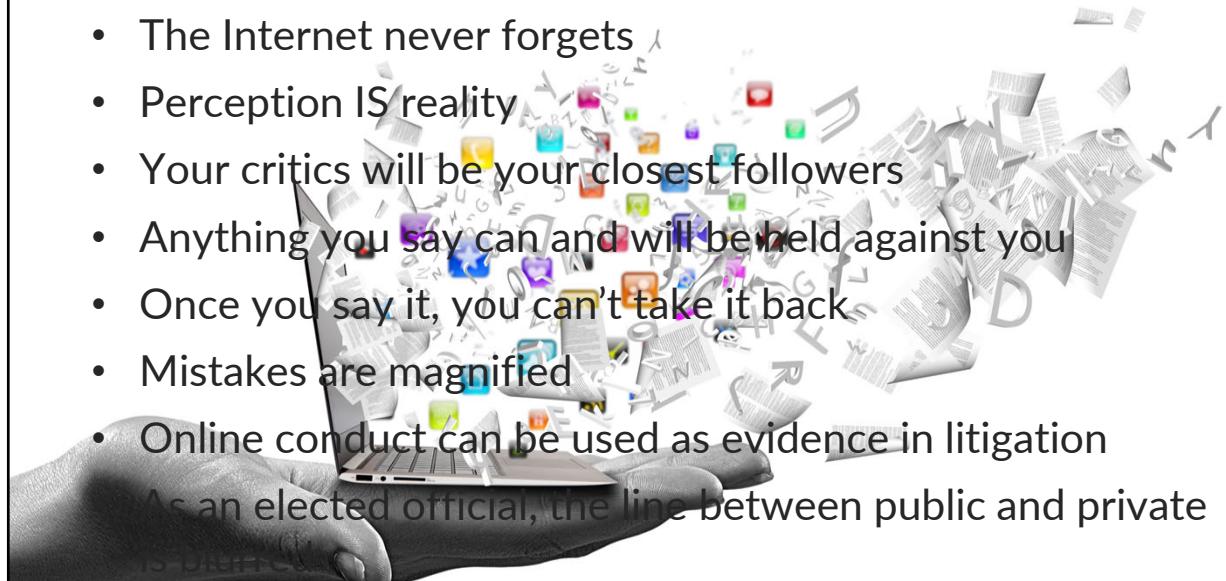
SOCIAL MEDIA IS AWESOME

- Have a direct line to constituents
- Tell your story without the media filtering it
- Target your message to specific constituency groups
- Engage your constituents in new and personal ways
- Connect with constituents and groups you might not reach through traditional media or any other way



SOCIAL MEDIA IS AWESOME, BUT...

- The Internet never forgets
- Perception IS reality
- Your critics will be your closest followers
- Anything you say can and will be held against you
- Once you say it, you can't take it back
- Mistakes are magnified
- Online conduct can be used as evidence in litigation
 - As an elected official, the line between public and private



SOCIAL MEDIA IS AWESOME, BUT...

- Social media in the public sector raises numerous First Amendment issues:
 - Establishment of a public forum
 - Take down policies
 - Banning/reporting users
- Social media use by a City or its officials raises Public Records Act and Brown Act concerns





FREE SPEECH AND PUBLIC FORUMS



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PUBLIC FORUM?

A traditional website pushing out information in one direction—to the public—does not establish a public forum, and that means the entity does not risk violating First Amendment rights when it excludes content.



Vargas v. City of Salinas (Cal. 2009)
46 Cal.4th 1



PUBLIC FORUM

In a true public forum, speech restrictions are subject to the highest level of scrutiny and must be narrowly drawn to effectuate a compelling government interest.



Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)



LIMITED PUBLIC FORUM

In a limited public forum, a public entity has somewhat greater latitude to regulate speech. However, any restrictions still must be reasonable and neutral as to the speaker's viewpoint.



Christian Legal Soc. Chap. of the Univ. of Calif. v. Martinez, 561 U.S. 661 (2010)



SOCIAL MEDIA IS PUBLIC FORUM

Social media has become a vital platform for speech of all kinds. Indeed, social media may now be "the most important" modern forum "for the exchange of views."



*Packingham v.
North Carolina, 137
S. Ct. 1730 (2017)*



IS A “PERSONAL” PAGE A PUBLIC FORUM?

- The case law is still developing, but possibly YES. Factors to consider:
 - Does the official identify as a government official?
 - Does the official use it to address constituents?
 - Does the official use it to share information of importance to the community?
 - Does the official post photos of community events?
 - Does the official use it to acknowledge their colleagues or City employees?
 - Does the official use it to discuss their work as government official?
 - Are there any links to the City’s website or social media pages?
 - Do the official’s constituents have access to the page?
 - Does the official use it to provide resources?

FIRST AMENDMENT CONSTRAINTS

Public Agencies and Officials Cannot Prohibit

Comments critical of an official or the City based on policy issues



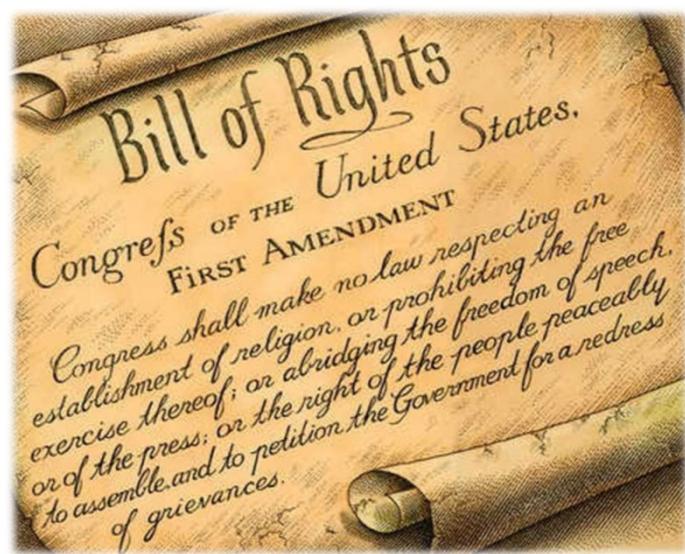
Comments based on the viewpoint expressed



FIRST AMENDMENT CONSTRAINTS

Areas Where Content MAY (if legal standards are met) Be Removed

- 01 Profanity
- 02 "Defamatory" statements
- 03 Personal attacks
- 04 "Offensive" statements
- 05 Implied threats
- 06 Off-topic comments





SOCIAL MEDIA FOR OFFICIALS IRL

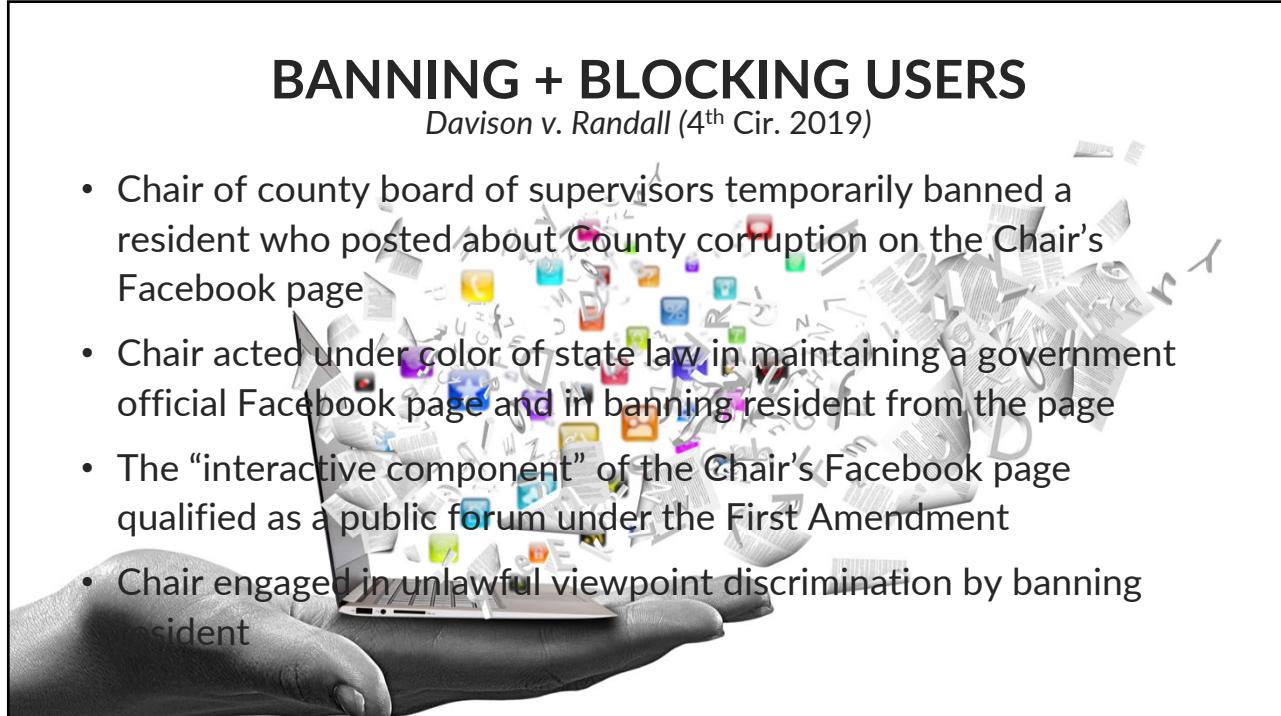


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BANNING + BLOCKING USERS

Davison v. Randall (4th Cir. 2019)

- Chair of county board of supervisors temporarily banned a resident who posted about County corruption on the Chair's Facebook page
- Chair acted under color of state law in maintaining a government official Facebook page and in banning resident from the page
- The "interactive component" of the Chair's Facebook page qualified as a public forum under the First Amendment
- Chair engaged in unlawful viewpoint discrimination by banning resident





KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

302 F.Supp.3d 541 (S.D.N.Y. 2018)

Currently on appeal to the Second Circuit

- Donald Trump established @realDonaldTrump in March 2009, which he has used since his inauguration to communicate with the public about his administration.
- The 7 individual defendants tweeted a critical message in reply to a tweet, and were blocked by the President. The government did not dispute that they were blocked because of the content of their tweets.
- Plaintiffs could not view, reply to, or retweet original tweets, but they could still engage via other users' replies. They could also see the original tweets from a secondary account or when not signed into their blocked account.

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

Questions considered by the Court:

- May a public official, consistent with the First Amendment, “block” a person from his Twitter account in response to the political views that person has expressed? **NO**
- Is the analysis different if that public official is the President of the United States? **NO**

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP ET AL.

“We hold that portions of the @realDonaldTrump account – the “interactive space” where Twitter users may directly engage with the content of the President’s tweets -- are properly analyzed under the “public forum” doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment. In so holding, we reject the defendants’ contentions that the First Amendment does not apply in this case and that the President’s personal First Amendment interest supersede those of plaintiffs.”



PUBLIC RECORDS ACT ISSUES



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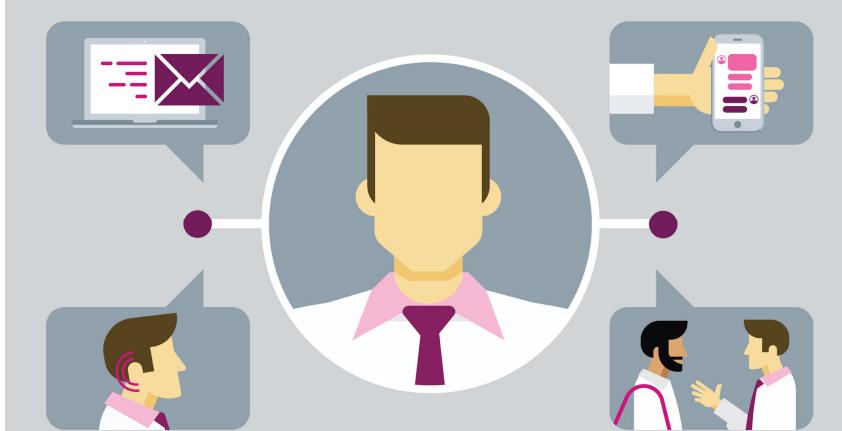


ELECTRONIC RECORDS

Electronic records are specifically included.
Govt. Code Sec. 6252(e).

PRA & PUBLIC ENTITY SOCIAL MEDIA

“Records” include all communications related to public business “regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper...magnetic or other media.”



IS THE CITY'S SOCIAL MEDIA COVERED?



- Content that has to be produced includes anything that relates to the conduct of government
- Polls, surveys, data collection
- Metadata, which shows how and when a document was created or revised and by whom may also have to be produced
- Retention guidelines are based on content, not medium
- What about comments and deleted content?

WHAT ABOUT RECORDS ON PRIVATE DEVICES?

City of San Jose v. Superior Court

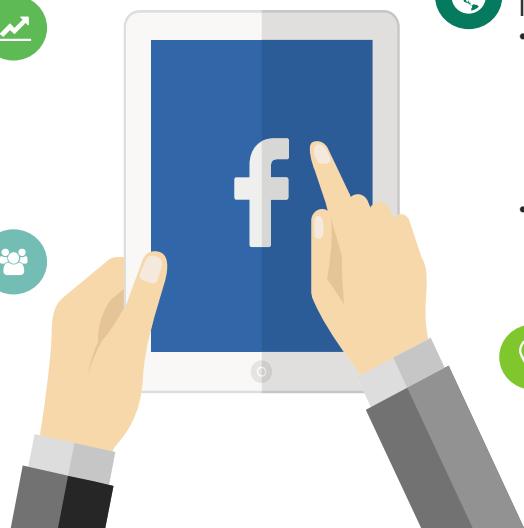
EMAILS & TEXTS

Emails and text messages by public officials are subject to the CPRA regardless of location, including personal accounts and devices



PRIMARY FOCUS

Primary focus is whether the message is related to public business, based upon context, content, purpose, audience, and role of individual when message was written or received



EMPLOYEES + OFFICIALS

Individuals may now be required to:

- search your private emails or personal phones for responsive records if you use your private email account or personal phone to communicate with others concerning public business; and
- certify or provide a factual basis as to whether responsive records exist and/or withheld

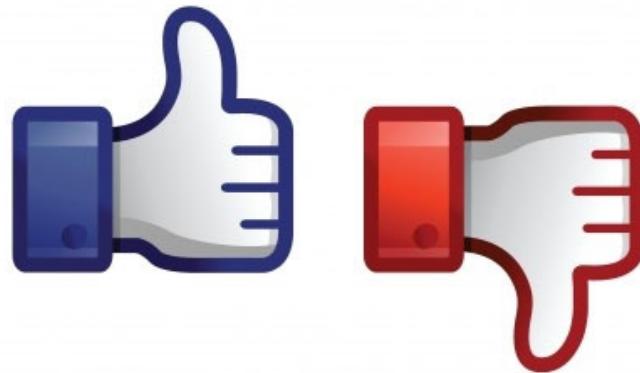


COMPLIANCE

Claiming that the records are not on entity email accounts, computers or servers is NOT enough for compliance now



SOCIAL MEDIA BEST PRACTICES



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BEST PRACTICES

- Establish a limited public forum
- Post user guidelines on the page itself
- Take down policies must be narrowly tailored
- No view-point discrimination
- Critical comments must be tolerated
- Maintain page consistent with First Amendment, Brown Act, CPRA, Elections Code, and City Policies

THE “DOS” OF SOCIAL MEDIA USE

- 01** Engage with your constituents
- 02** Take a stand; share your position; show your leadership
- 03** Follow normal “rules of engagement” for conversation
- 04** Keep the public informed of factually-verified information
- 05** Be a source for good City information
- 06** Remember that everything online lives forever



THE “DON’TS” OF SOCIAL MEDIA USE

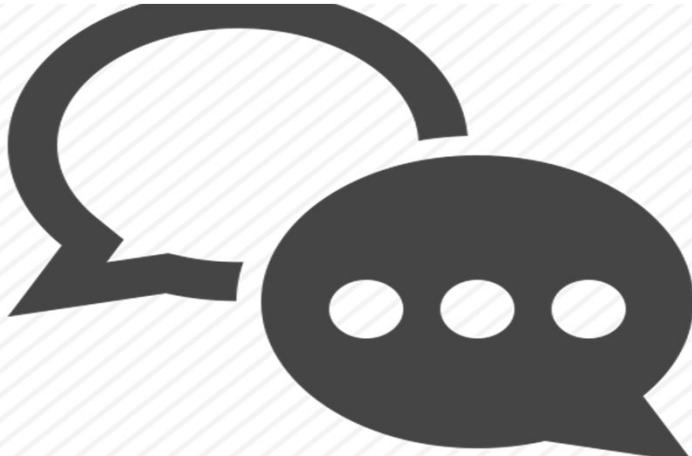
- 01** Argue, provoke, or respond to ‘Trolls’ trying to start a fight
- 02** Censor someone’s “right to be an idiot” – let them show it
- 03** Remove comments you don’t like, because you don’t like them
- 04** Keep the public over-informed
- 05** Take on a reporter – because a good fight sells newspapers
- 06** Post when angry, impaired, or not in a good frame of mind





"A good rule of thumb for any public official is to never put anything on any social network that you wouldn't be comfortable with appearing on the front page of your local paper...When you put something out there digitally, it's out there forever."

Pennsylvania State Representative Michael Schlossberg



WORDS OF ADVICE

ANY QUESTIONS?



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