

July 15, 2021

Re: Social Media Accounts and Free Speech Rights

Dear Massachusetts Public Officials:

We have received reports from various Massachusetts residents indicating that they have been blocked from interacting with the social media accounts of certain public officials. Many of these residents appear to have been blocked or otherwise censored based on having expressed views critical of the public official who blocked them.

Because this is an evolving issue as use of interactive social media grows – and an issue of importance to representative democracy – we offer some guidance on the free speech issues that such restrictions create and some suggestions for how best to avoid free speech violations.

Background

The First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights protect free speech from government restrictions. This protection applies to social media accounts that government officials use for official governmental purposes (for instance, to announce public meetings and resources or to discuss policies and government business) and on which comments or reactions by readers are allowed. As several courts have recognized, once a government official creates an interactive social media platform for discussing such issues, a public forum is created and the power to restrict comments in that forum – whether by blocking a user or by hiding or deleting their comments – is limited by constitutional free speech guarantees. As these decisions emphasize, in a public forum, restrictions based on disagreement with the viewpoint expressed are clearly illegal.¹

¹ See, e.g., *Knight First Amend. Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019), *vacated as moot sub nom Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220 (2021) (holding that the President and his staff violated the First Amendment by blocking users who criticized him on Twitter); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that a government official violated the First Amendment when she blocked an individual from a Facebook page for criticizing her).

Given that online forums play an increasingly central role in our system of government, including as a means to communicate with and comment on the performance of government officials, it is important that public officials comply with these free speech principles. Constituents look to the social media accounts of public officials not only as forums for dialogue with their representatives and other constituents, but also for important logistical announcements regarding constituent services, local emergencies, and other time-sensitive matters.

We therefore write to set forth some basic principles to consider as you administer your social media accounts used for governmental purposes.

Guiding Principles

1. Any limits on who can follow you or what your followers can post must be viewpoint-neutral.

- Public officials may *not* block people from the account or otherwise censor comments because the users' comments are **critical of the official** or because the official otherwise disagrees with the **viewpoint** expressed.²
- Public officials *may* restrict comments that are **not protected by the First Amendment or Article 16 of the Massachusetts Constitution**, including posts that make a true and immediate threat of physical harm, incite others to imminently violate the law, contain statements previously found by a court of law to be defamatory, or are obscene as narrowly defined by the U.S. Supreme Court. But these are limited categorical exemptions, and most types of speech that may be crude or offensive to some readers do not fall within these exemptions. Moreover, a free speech problem would arise if an official allows some speech that falls into one of these proscribable categories because the official agrees with the viewpoint expressed, but prevents speech within such categories when the official disagrees with the viewpoint expressed.³ Put simply, officials must neutrally and consistently

² See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

³ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (while speech falling within categories such as true threats and obscenity may be proscribed, the government may not differentially regulate speech within these categories based upon hostility or favoritism towards the viewpoints that accompany such speech).

enforce their policies, without giving special preference to certain individuals or viewpoints.⁴

- If a social media page was created specifically to discuss only a certain issue or category of issues (e.g. schools), officials are allowed to restrict comments that are off-topic. But, if comments on a government site that praise an official or government agency on particular subjects are allowed, comments criticizing the official or agency on such or topics cannot be restricted.

2. If you wish to limit what your followers can post, you should have a transparent social media policy.

- A **clear and accessible policy** can help you make good decisions when confronted with these issues and reassure constituents and the general public that decisions are not being made by whim.
- A **policy should provide clear notice of any limits you intend to enforce in the forum.** Any rules should be consistent with the guidance above. Describe your rules with specificity, so that users have sufficient notice of what types of speech are and are not permissible on the site.
- **Explain in the policy how you will address violations.** Include in the policy a means for people to contest an assertion that they have run afoul of the rules. Think carefully before imposing restrictions on individual followers and, when you determine some action is warranted, consider responding in a measured way. For instance, the policy could provide a warning for an initial infraction, then removal or hiding of individual posts, followed by temporary restriction on access (e.g. three days) only if problems recur, all before resorting to longer-term blocking for repeated and serious infractions.

⁴ Courts have not yet clarified whether or when officials may impose other content-based restrictions on social media. Depending on the type of forum that has been created, other content-based restrictions are likely problematic, but, even if such restrictions are allowed, they must be applied equally to those who express viewpoints supported by or supportive of the official and those who offer criticism or disagreement.

3. Enforce your social media policy consistently, in accordance with due process and viewpoint-neutrality.

- As noted above, the first step to ensuring due process and viewpoint-neutrality is to make your policy publicly available and to enforce it consistently.
- **Provide a point of contact** for individuals who have been blocked or otherwise censored to request an explanation as to the basis for such actions and information about how individuals can contest any blocking or removal/hiding of comments.
- In addition, due process is served by **proactively giving notice** to users whom you block or otherwise censor. Such notice can provide the specific policy that you believe the user has violated, a copy of the content that you believe violated the policy, an explanation as to measures you will take in response, and an explanation as to how the user can challenge your determination.

4. Social media accounts may qualify as public forums subject to free speech protections even if they share some personal or campaign-related content.

There is not yet a single legal test for determining when an interactive social media site is used for government business and thus subject to constitutional protections. Courts have looked to a variety of factors, including:

- **How the account is used.** If you use your account to ask for input on government policy or to share information about government services or meetings, it is more likely to be a public forum. This is true regardless of whether the account is designated as an official account by the public employee.⁵
- **Whether government resources are used in connection with the account.** If government staff help you to administer your account (for example, editing or drafting content, monitoring analytics, or interacting with users), or if you use your account to carry out official duties, it is more likely to be a public forum.

⁵ See, e.g., Texas Attorney General Ken Paxton Agrees to Stop Blocking People on Twitter, Ending Lawsuit Over First Amendment (Texas Tribune, July 12, 2021), <https://www.texastribune.org/2021/07/12/paxton-twitter-lawsuit-blocked>.

- **How the account is presented.** An account is more likely to be a public forum if it links to official websites or lists public office addresses and phone numbers, displays government symbols, or highlights that the account belongs to a public official.

Remember, an account need not meet *all* of the above characteristics in order to be subject to free speech protections.

Conclusion

The ACLU of Massachusetts recognizes that social media presents new challenges in addition to new opportunities for government officials. We share this guidance to help you avoid violating free speech guarantees going forward. While we cannot provide individualized legal advice to government officials, please do not hesitate to reach out if you have questions about the content of this letter.

Sincerely,

Ruth A. Bourquin
Rachel E. Davidson, Legal Fellow