

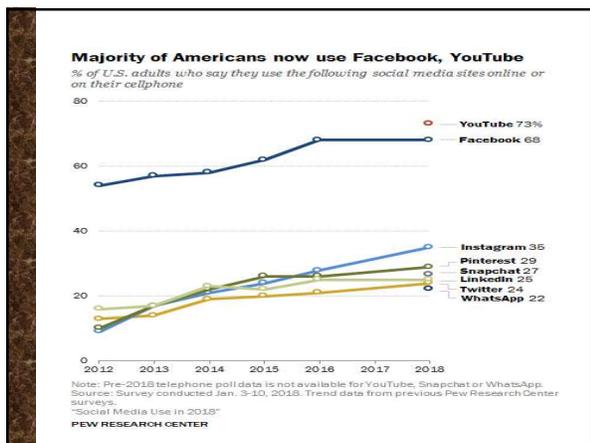


Social Media

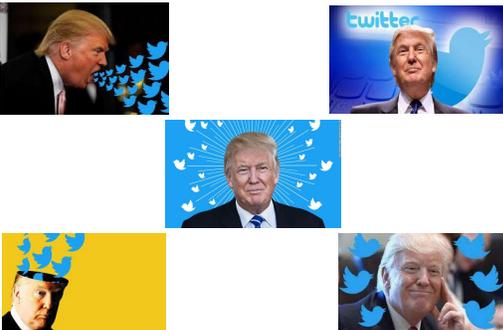
Open Government, Human Resources & Policies

Municipal Fundamentals Seminar
City Hall Essentials, LLC
Belton, TX
December 6, 2019

BOJORQUEZ
LAW FIRM, PC
TexasMunicipalLawyers.com



Leadership by Tweet?



Pros / Cons

PROS

- Timely
- Direct
- Personal
- Unfiltered
- Widely Distributed

CONS

- Impulsive
- Unvetted
- Unfiltered
- Derogatory
- Inaccurate

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Agenda

1. Records Retention
2. Open Records
3. Open Meetings
4. Human Resources
5. Blocking / Removing
6. Agency Policy



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Records Retention

Texas State Library & Archives Commission

- Retain social media records based on content & function.
- Check your **records retention schedule** for the minimum duration.
- When faced with potential social media records, ask yourself:
 - Is this document government business or provide evidence of an important action?
 - Is this a unique record?
 - Does the information exist elsewhere in a different record or format?
 - Does it fit into my government's definition of a social media record?

<https://www.tsl.texas.gov/slrn/blog/2016/03/faq-when-is-social-media-a-record/>



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Open Records

- Duty to **provide data** posted on websites.
- All data collected, assembled, or maintained **by** the City regarding transaction of official business.
- All data collected, assembled, or maintained **for** the City – the City owns the data or has a right of access.
- Regardless of format:
 - Paper
 - Film
 - Digital media



Tex. Gov't Code Ch. 551

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Open Meetings

Public business should be conducted in public.

- A "Meeting" is:
 1. Deliberations (talking and/or voting).
 2. Quorum (majority).
 3. Governing body (city council, P&Z).
 4. City business.
- Action without meetings.
- Email Exchange can = "Deliberation" thus OMA.
- *State v Doyal re: §143 (HB 2695).*

Tex. Gov't Code Ch. 552

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Human Resources



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Requiring Passwords

- **Beware of** hiring practices that require applicants turn over social media passwords during the interview process.
- The ACLU has taken a position against that practice and is *bringing challenges*.

<https://www.aclu.org/blog/privacy-technology/privacy-borders-and-checkpoints/social-media-passwords-shouldnt-be-condition>



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Protected Activity

- Some employer disciplinary actions related to social media violate federal labor law.
- Terminations can be *unlawful* if flow from unlawful social media policies.
- Rights to discuss wages and working conditions (not merely gripes).

<https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media>



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Serious Medical Condition?

Employee sued Employer after being terminated upon Employer finding photos of Employee on Facebook dancing and playing frisbee while on FMLA leave for a “serious medical condition” that allegedly left her “completely incapacitated.” *Employee lost.*

Jaszczynyn v. Advantage Health Physician Network (2012)



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Shower Selfie

- Anonymous caller informed fire department female firefighter trainee had MySpace account with “fresh out of the shower” photos bare showing shoulders & backside.
- Department issued oral reprimand.
- When trainee demanded info about the photos, she was terminated for her “combative tone” and “disrespect toward administration”.
- Trainee sued alleging disciplined & terminated based on race & gender.
- **Trainee lost!**



Marshall v. Mayor of Savannah (2010) 13

No Privacy

- Employers can conduct work-related audits of pager text messages and discipline employees for inappropriate content.
- For example, police officers can be disciplined for sending sexually-explicit material via city-issued devices.
- No 4th Amendment Search problems.
- **Employer won!**



City of Ontario v. Quon (USSC 2010)

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Reasonable & Proportionate

- Male employee posted photo on Facebook of female co-worker asleep at her desk with thong & buttocks showing.
- Female employee learned of photo 8 months later, reported it to H.R., who disciplined Male employee.
- Female employee sued Employer alleging sexual harassment and retaliation after furloughed.
- **She lost.**



Yancy v. U.S. Airways (2012)

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Off-The-Job-Blog

Non-Union security employee terminated:

- FB post: "u kno wat, I do not give a f*** about a police officer that got shot, if they quit f***kin wit ppl, ppl prolly quit shootin em all the goddamn time.....karmas a bitch."
- Awarded Unemployment Comp.
- Court: off-the-job blog post was not work-connected misconduct and therefore she was **entitled to unemployment benefits**.

Kirby v. Wash. State Dep't of Employment Security (2014)

Toxic

Comptroller was terminated:

- Tweets u referred to his work environment as "toxic" his co-workers as "morons" and his administrative assistant as "dysfunctional" "psychotic" and "schizophrenic".
- Denied Unemployment Comp.
- Court: **properly terminated** for willful misconduct and correctly denied unemployment benefits.

Burns v. Unemployment Comp. Bd. of Review, (2012, Pennsylvania)

Blocking from Official Sites



Donald J. Trump ✓
@realDonaldTrump

@realDonaldTrump blocked you

You are blocked from following @realDonaldTrump and viewing @realDonaldTrump's Tweets.

Blocking from Official Sites

Trial Court:

President Trump violated **1st Amendment** rights:

- by blocking their accounts on Twitter;
- the interactive space created through posting a “tweet” was a **designated public forum**;
- by blocking individual users Trump impeded political speech highly protected 1st Amendment.



Knigh First Amendment Institute v. Donald J. Trump
2018 U.S. District Court - Southern District of New York
argued before the 2nd Circuit **March 26, 2019**

More on Blocking

- Portions of Personal / Private Social Media pages can become “Public Forums”.
- Elements Courts look for:
 - Related to Duties;
 - Used as Tool of Governance;
 - Informed about Official Activities;
 - Solicited Input on Policy Issues; and
 - Shared alerts and warnings.
- Viewpoint Discrimination (not just Subject Matter).
- Unconstitutional to Block or Ban (or remove comments).



Davison v Randall (4th Cir. Jan. 2019)

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Blocking

“Official censorship based on a state actor’s subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination,” said the Robinson v. Hunt County ruling.

Robinson v Hunt County, TX



Blocking: *Whoop?*

PETA sues Texas A&M president, says university blocked them on Facebook over dog research comments



Blocking

“Blocking these words serves to bar posts that are essential to PETA’s message... TAMU’s actions are **viewpoint-based and unreasonable**, which the First Amendment prohibits in both public and non-public forums... TAMU’s actions are **content-based and not narrowly tailored**, which the First Amendment prohibits in **designated public forums**, including, again, the comment section of TAMU’s Facebook page.”

PETA v. Texas A&M

Value of a Good Policy

Bubba Gump Shrimp Restaurants, Inc., had adopted a social media policy in its employee handbook:

- “While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business. This can be accomplished by always **thinking before you post**, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.”
- NLRB affirmed an Administrative Judge’s decision that the language was **appropriate** and determined that employees reasonably would not construe the policy to prohibit protected activity.



Lendry’s, Inc., 362 N.L.R.B. 69 (California 2015)

Agency Policy

Online activities can affect your job, so:

- **Restrict** personal use on City resources.
- **Perform** agency business on agency resources.
- **Apply** to computers & phones.
- **Protect** privacy, confidentiality & privileges.
- **Remember** respect & safety.
- **Clarify** role & opinions.
- **Work** comes first.



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Agency Policy (cont.)

- ~~Remember the reflection on Agency's image.~~
- **Be cautious** with trade secrets, competitive info.
- **Do not** tolerate plagiarism.
- **Honor** logos or trademarks.

Draft Model Social Media Policy

<http://ow.ly/OFNe30ohn9F>

Courtesy of



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Because I'm a lawyer,...

do as I say, not as I do.



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