

Legislative Council Social Media Policy

Amended December 12, 2024

POLICY

Social media can be useful for legislators to inform constituents, solicit feedback, and gauge public opinion about important issues. However, legislators risk litigation if they restrict user access to a social media account or social media post used for legislative matters.

It is the policy of Legislative Council that a legislator assumes all risk and responsibility for legal defense of any action resulting from filtering, deleting, or hiding comments on a social media post related to legislative matters, or from blocking, banning, or otherwise restricting user access to a social media account used for legislative matters.

RECOMMENDATIONS

To minimize risk of litigation, Legislative Council makes five recommendations for legislator social media activity.

- 1. Clarify that your social media page is not an attempt to exercise the authority of the legislature** by following these suggestions, which the courts may apply as tests to determine whether you've taken a "state action":
 - a. Add a disclaimer to your social media account stating, "The views expressed on this page are strictly my own; I do not speak on behalf of the legislature";
 - b. Refrain from having a legislative employee manage your account;
 - c. If sharing official information, do not invoke the authority of the legislature when sharing the information; and
 - d. Share only information that is available elsewhere and, if possible, include a link to where that information is available; do not use the account to make legislative announcements unavailable elsewhere.

In *Lindke v. Freed* the U.S. Supreme Court found that a public official's social media activity constitutes "state action" only if the official (1) possessed actual authority to speak on the state's behalf, and (2) purported to exercise that authority when the official spoke on social media. The Court reiterated that determining whether blocking a person or deleting a comment from one's social media account constitutes state action remains a fact-specific undertaking, in which the content and function of the post or account are the most important considerations.

By including a disclaimer that your social media account is not an attempt to exercise the authority of the legislature, your activities on your account are less likely to be considered a "state

action," and subsequently blocking a person or deleting a post is less likely to be found an infringement of that person's free speech rights. The recommendation further ensures an action on social media will not be found to be a "state action" if the legislative information in a post on your social media account is available elsewhere, and if you refrain from having your staff manage your social media account. If you choose to have your staff manage your account and post official legislative information, it becomes even more important to follow recommendations 2 - 5 below.

2. Do not allow comments or other interactions with the public on posts, or on the account itself.

Legislators are not obligated or required to maintain a social media account. If a legislator chooses to have an account, there is no requirement that the public be able to interact with it or make posts or comment on posts on it.

If you disable the public's ability to post or comment on your social media platform, either by account or by post, there will be no public forum and no risk of violating someone's rights under the First Amendment.

Options to disable posting or commenting on a social media platform may vary by social media platform.

3. If you choose to open your account to comments or other public interaction, do not filter, delete, or hide comments and do not block or ban any person from access to the account.

One person's understanding of what constitutes an exception to free speech, such as obscenity or libel, can differ substantially from another's. While in deleting a comment you might feel strongly that you are enforcing a content-neutral policy, a dispute on the issue could lead a court to view your justification for the deletion as a pretext for practicing viewpoint discrimination.

Because exceptions to free speech are open to interpretation and often misapplied, allowing unrestricted access to your account is currently the lowest-risk option for managing a social media platform that still allows for public interaction.

4. If you choose to filter, delete, or hide comments, do not block or ban an individual from your entire account; preserve interaction with official announcements.

The *Lindke* decision clarified that a social media account may be "mixed use," where a social media account may contain posts that amount to "state action" and other posts that are not considered "state action." Restricting access by filtering, deleting, or hiding comments on posts that are more likely to be considered state action increases the likelihood that the restrictive action will be considered a violation of the user's First Amendment rights.

Because a social media account may have a "mixed use," the line between a "personal" and "official" account may be blurry. Precautions should be taken on any account used by a legislator to prevent activity on that account from being found to be a state action.

5. If you choose to filter, delete, or hide comments, or block or ban individuals, do not filter, delete, or hide comments, or block or ban individuals based on viewpoint.

Viewpoint discrimination by a state actor is generally found by the courts to be an infringement of the speaker's First Amendment rights. Viewpoint discrimination occurs when a state actor treats a person's speech differently based on their opinion or perspective on a subject. For example, if a state actor deletes social media comments that criticize a fisheries policy but allows other speech about the fisheries policy, that would be viewpoint discrimination. As noted above, one's view of what constitutes an exception to free speech, such as obscenity or libel, can differ substantially from another's. While in deleting a comment you might not feel that you are practicing viewpoint discrimination, a dispute on the issue could lead a court to view your justification for the deletion as a pretext for practicing viewpoint discrimination.

CONCLUSION

Please understand that if, despite the recommendations above, a legislator establishes a public forum on a social media account and restricts access to the account, that legislator personally assumes all risk and responsibility for legal defense of that action.

Managing a social media account comes with the risk of creating a public forum. In certain cases, a legislator may not legally restrict user interaction. This Policy recommends that legislators prevent the creation of a public forum by disclaiming that they do not speak on behalf of the legislature and by turning off public interactions (commenting, etc.) from their social media accounts. If a legislator chooses to allow comments on their social media account and subsequently filters, deletes, or hides comments or blocks or bans a user, it is the policy of Legislative Council that the legislature will not assume the costs of litigation related to that action. In other words, if a legislator allows comments and subsequently filters, deletes, or hides comments or blocks or bans a user, the legislator will be responsible for the legal costs of defending that action, if sued.

First amendment and social media use is a nuanced and evolving area of law, if you have a question about a specific circumstance, or would like an update on the law underlying this policy, please contact Legislative Legal Services.

Adopted September 30, 2022