

## WORKING DRAFT 3 -- 8.22.2022

### Legislative Council Social Media Policy

Social media, such as Facebook, Twitter, Instagram, and YouTube, can be useful for legislators to inform constituents about pending legislation, to tout one's accomplishments, and to solicit feedback and gauge public opinion about important issues. However, legislators risk litigation if they block, ban, or otherwise restrict user access to a legislator's official social media account or an account used for legislative matters.

Therefore, to minimize risk of litigation, Legislative Council has adopted the following guidelines for legislator social media activity.

- 1. Do not use a personal social media account to post about legislative matters.**
- 2. If you use a social media account for legislative matters, administrate it as an official legislative account.**
- 3. To avoid creating a public forum on an official account, do not open the account to comments or other interactions with the public.**
- 4. If you choose to ignore the above guideline, then do not filter, delete, or hide any comments and do not block or ban any persons.**
- 5. Note that if despite the guidelines above you choose to establish a public forum on an official legislative social media account and you do not allow unrestricted access to the account, you personally assume all risk and responsibility for legal defense of that action.**

## REASONING

- 1. Do not use a personal social media account to post about legislative matters.**

In recent years, there have been a growing number of lawsuits across the country arguing that elected officials whose social media accounts relate to official matters have created public forums in which free speech is protected under the First Amendment to the U.S. Constitution.

Some courts have found that elected officials who deleted comments or blocked persons who made comments critical of the official were committing viewpoint discrimination and violated the person's First Amendment rights. The highest profile case on this matter is *Knight First Amendment Inst. at Columbia Univ. v. Trump*, in which the U.S. Court of Appeals for the Second Circuit found that the First Amendment prohibits officials from blocking people from otherwise open online interactions because they expressed disparaging points of view.

The fact that former President Trump's Twitter account was created in 2009, when he was a private citizen, was found immaterial because it became a public forum when he decided to use

it to announce policies and address other matters related to his public office. Thus, it is important to keep your personal account personal.

To mitigate the risk that a personal account would be interpreted as an official account:

- Do not make the personal account available to the public; keep your account private.
- Do not designate the personal account as an official or public legislative page.
- Do not make the personal account resemble an official account, or one related to your legislative office by adding images or graphics, such as the state seal.
- Do not include links to legislative email accounts or legislative or caucus websites.
- Do not announce or solicit feedback about legislative matters. Legislative matters may include announcing a bill's passage, noticing a constituent or legislative meeting time and place, and/or discussing sponsored legislation or caucus priorities, for example.
- Do not allow a legislative employee to manage the personal account.
- Do not use links to your personal social media in any official legislative communications, including newsletters or a legislative email signature block.

If a legislator maintains a personal account, follows the mitigation strategies listed above, and uses it for purely personal reasons, blocking a person, or imposing any other access restriction is highly unlikely to result in a successful First Amendment challenge.

**2. If you use a social media account for legislative matters, treat it as an official legislative account.**

Generally, accounts may be considered official if they:

- focus on legislative matters;
- include legislative and/or caucus images and graphics;
- are open to the public;
- are used to announce legislative information;
- and, in some cases, use legislative resources for administration and the generation of content.

If you choose to maintain such an account, follow the remaining guidelines accordingly.

**3. To avoid creating a public forum on an official account, do not open the account to comments or other interactions with the public.**

A July 11, 2022, Legal Services memo noted that the case law on these issues is rapidly developing and far from settled, with potential interpretations by an Alaska court fraught with uncertainty:

*In sum, however, an Alaska court may find that blocking a user from an elected official's social media account is unconstitutional. For similar reasons, it is*

*inadvisable to block a user from an elected official's account, or to delete or hide comments on the page of an elected official. Therefore, this office strongly recommends that elected officials disable those functions on their social media accounts.*

Alaska legislators are not obligated or constitutionally required to maintain a social media account. If a legislator chooses to have an official account, there is no requirement that the public be able to interact with it.

If you disable the public's ability to post or comment on your Twitter, Facebook, Instagram, YouTube, or other similar social media platform, there is no public forum and no risk of violating someone's rights under the First Amendment.

**4. If you choose to ignore the above guideline, then do not filter, delete, or hide any comments and do not block or ban any persons.**

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, issues of fact in a dispute 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, permitting unrestricted access to an account is currently the safest, lowest-risk approach to managing a social media platform that allows for public interaction.

**5. Note that if despite the guidelines above you choose to establish a public forum on an official legislative social media account or use a personal account for legislative matters and you do not allow unrestricted access to the account, you personally assume all risk and responsibility for legal defense of that action.**