Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 14, 2024

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: **Case Law Update: *Lindke v. Freed* – When a Public Official's Social Media is Subject to the First Amendment**

INTRODUCTION

In less than 20 years, social media websites like Facebook and Twitter (now known as X) have become for many the principal sources for information on current events, news, and the like, and are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Public officials' use of social media has given rise to a key legal question – under the First Amendment, may public officials delete unwelcome comments to their social media posts or block individuals from viewing or interacting with their social media accounts entirely?

In 2021, this Office issued a memorandum explaining the laws relating to the use of social media by elected officials. *See*, e.g., City Att'y MS 2021-8 (Apr. 9, 2021) (MS-2021-8), attached. In March, the United States Supreme Court, in a unanimous decision, addressed the use of social media by public officials in *Lindke v. Freed*, 601 U.S. 187 (2024), establishing a two-part test to determine whether a public official's use of social media is the act of a private citizen or represents official public communications subject to the First Amendment. This memorandum supplements our prior advice to address this recent ruling.

ANALYSIS

1. First Amendment – Free Speech And Social Media

The First Amendment of the United States Constitution holds, in part, that Congress shall make no law "abridging the freedom of speech, or of the press." These protections apply to the States under the Fourteenth Amendment's Due Process Clause.[1] As a general matter, the right to free speech means that the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Nat'l Inst. of Family & Life Advocates v. Becerra*,

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[1] Local governments are subdivisions of the State, and their officials are subject to the First Amendment. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 690 (1978).

585 U.S. 755, 766 (2018) (citation omitted). These protections, however, are not absolute, and, in a public forum, the government may impose reasonable time, place, or manner restrictions that are narrowly tailored to serve a significant governmental interest.

Historically, public fora (i.e., places traditionally open to political speech and debate) were limited to government buildings, public parks, streets, and sidewalks. *See Packingham*, 582 U.S. at 104 ("[a] basic rule . . . is that a street or park is a quintessential forum for the exercise of First Amendment rights"). With the introduction of the Internet and social media in particular, the concept of public fora has evolved beyond physical locations and now encompasses cyberspace.[2] *Id*.

Unsurprisingly, recent court decisions throughout the country have found that certain governmental officials' social media accounts were public fora subject to the First Amendment and any attempt to limit public engagement is subject to reasonable time, place, or manner restriction standards. *See Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated as moot sub. nom. Biden v. Knight First Amend. Inst. at Columbia Univ*., — U.S. —, 141 S. Ct. 1220 (2021) (President intentionally opened a Twitter account and repeatedly used the account as an official vehicle of governance and made its interactive features accessible to the public without limitation); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1178-79 (9th Cir. 2022), *vacated*, 601 U.S. 205 (2024) (a designated public forum is created when the government has made the forum available for public use and has no policy or practice of regulating posted content).

These cases have been brought under 42 U.S.C. section 1983 (Section 1983), which allows an injured party to pursue a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives someone of a federal constitutional or statutory right. To be held liable under Section 1983, a defendant must be acting in an official governmental capacity.[3] *See West v. Atkins*, 487 U.S. 42, 47-48 (1988). Conversely, a private citizen who is not acting on the government's behalf or performing a governmental function cannot be held liable under Section 1983. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019) ("when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor"). When a government official uses social media, they may be acting in a private, personal capacity, in an official capacity under authorization granted to them, or a mix of both.

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[2] *See* City Att'y MS 2020-30 (Dec. 14, 2020) (discussing California Government Code section 54952.2 which excludes certain government officials' communications over social media from the Brown Act).

[3] Known as the "state-action" requirement, a plaintiff must show that the defendant "exercised power 'possessed by virtue of state law'" to establish liability. *West*, 487 U.S. at 49 (citation omitted).

A. *Garnier v. O'Connor-Ratcliff*

As discussed in MS-2021-8, Christopher and Kimberly Garnier sued two members of the Poway Unified School District's Board of Trustees in federal court after the Trustees blocked the Garniers from their Facebook and Twitter accounts due to repetitive comments and complaints. The Garniers alleged that the Trustees' social media pages constitute public fora and that, by blocking them, the Trustees violated the Garniers' First Amendment rights. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision in 2022, finding that, under the circumstances presented, "the Trustees have acted under color of state law by using their social media pages as public fora in carrying out their official duties." *Garnier*, 41 F.4th at 1163. Recognizing that it is not always easy to determine if an official is acting in an official capacity on social media, the Ninth Circuit used what is known as the governmental "nexus test" which examines if there is "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Id*. at 1169 (citation omitted). The Ninth Circuit found that the Trustees' use of their social media accounts was directly connected to, although not required by, their official positions and the Trustees' blocking of the Garniers from their social accounts constituted state action under Section 1983 and violated the Garniers' First Amendment rights.

B. *Lindke v. Freed*

On similar facts, the United States Court of Appeals for the Sixth Circuit reached the opposite conclusion in finding the actions of the Port Huron city manager in blocking an individual on Facebook did not constitute state-action under Section 1983. *See Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022), *vacated*, 601 U.S. 187 (2024).

In this case, James Freed created a private Facebook account before he was appointed city manager for Port Huron and used it for years like many average citizens. When the account outgrew Facebook's 5,000-friend limit, Freed converted his account to a public page with unlimited followers instead of friends. In 2014, Freed was appointed city manager for Port Huron, Michigan, and updated his page to reflect his new title. During the COVID-19 pandemic, Freed's posts caught the attention of Kevin Lindke, who did not approve of how Freed was handling the pandemic and began posting criticism to Freed's Facebook account. Freed did not appreciate the comments, so he deleted them. Freed eventually blocked Lindke from the page.

Lindke sued Freed in federal court alleging that Freed violated his First Amendment rights. As Lindke saw it, he had a right to comment on Freed's Facebook page as a public forum and Freed had engaged in impermissible viewpoint discrimination by deleting Lindke's comments and blocking him.

Recognizing that Section 1983 distinguishes actions taken in an official capacity from those taken in a personal one, the Sixth Circuit concluded that Freed maintained his Facebook page in his personal capacity and his conduct in deleting social media posts and blocking a user did not constitute a state-action under Section 1983. *Lindke*, 37 F.4th at 1202, 1204. The Sixth Circuit

used what it calls the "state-official test," which "asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.'" *Id*. at 1202 (citation omitted).

The Sixth Circuit acknowledged that its analysis differs with how other Circuit courts approached the question of state-action involving public official's social media usage.[4] Instead of examining whether a social media account's appearance and content looks official like the Ninth Circuit, the Sixth Circuit focused on the official's duties and whether government resources or employees were used to maintain the social media account.

II. Supreme Court Establishes New Test For Determining Whether A Public Official Engaged In State-Action When Deleting Or Blocking Comments On Social Media

Recognizing a split in the Circuit courts, the Supreme Court in *Lindke* established a two-part test to determine whether a public official's social media posts and activities constitute state-action subject to the First Amendment. Under this two-part test, a public official's social media activity can only be characterized as state-action if the official "(1) possesses actual authority to speak on behalf of the government regarding a particular matter or topic, and (2) purports to exercise that authority when speaking on social media." *Lindke*, 601 U.S. at 198.

According to the Court, an analysis of these two factors will determine if a government official engaged in state-action or functioned as a private citizen on social media.[5] Purely personal accounts are not subject to the First Amendment's protections and the account owner may delete third-party comments and block their authors.

A. Plaintiff Must Demonstrate the Public Official Possessed Specific Authority to Speak on the Government's Behalf to Establish Liability under Section 1983

The test's first prong is based on the principle under Section 1983 that the conduct allegedly causing the constitutional violation must be "fairly attributable to the State." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The alleged conduct, therefore, must be traceable to the official's power or authority to speak for the public agency, which can be found either in the agency's statutes, ordinances, or regulations, or may be derived from well -established customs or usage.[6] The Supreme Court cautioned that "[p]rivate action – no

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[4] The Second Circuit adopted a similar approach to the state-action question as the Ninth Circuit. *See Knight First Amend. Inst. at Columbia Univ.*, 928 F.3d at 236.

[5] The Supreme Court identified the nature of the technology involved as an additional factor to consider in making the state-action analysis. *Lindke*, 601 U.S. at 204. For example, in matters involving the deletion of comments, the only relevant social media posts are those from which comments were removed. "Blocking, however, is a different story," and requires that a court consider whether the public official engaged in state-action with respect to any post in the account. *Id*. "If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts." *Id*.

[6] "Custom" and "usage" encompasses "'persistent practices of state officials' that are 'so permanent and well settled' that they carry 'the force of law.'" *Lindke*, 601 U.S. at 200 (citation omitted).

matter how 'official' it looks – lacks the necessary lineage" to hold the State "responsible for the specific conduct of which the plaintiff complains." *Lindke*, 601 U.S. at 198-199. A plaintiff must show more than simply that the public officials had some authority to communicate on behalf of the public agency. It is insufficient to merely allege that "making official announcements *could* fit within [an official's] job description." *Lindke*, 601 U.S. at 201 (emphasis in original). Rather, a plaintiff must show that "making official announcements is *actually* part of the job that the State has entrusted the official to do." *Id*. (emphasis in original).[7]

If this threshold showing of authority cannot be met, there is no state-action and, thus, no liability under Section 1983 for blocking individuals or removing comments.

B. The Speech is Purportedly Made on the Government's Behalf

The second prong looks to whether the public official was using their official authority in the disputed social media posts. Recognizing that government officials have a choice about the capacity in which they choose to speak to the public, the Supreme Court held that it is generally accepted that a public official "purports to speak on behalf of the State while speaking 'in his official capacity or' when he uses his speech to fulfill 'his responsibilities pursuant to state law.'" *Id.* (citation omitted). If the public official is not speaking in furtherance of their official responsibilities, they are speaking in their own voice and cannot be held liable under Section 1983 for alleged violations of the First Amendment.[8] *Id*.

The factors to consider in determining whether a specific social media post purports to speak on the government's behalf include whether the account belongs to a governmental office or is passed down to whoever occupies a particular office. Another consideration is whether the official uses government staff to maintain the account or make a particular post. In these situations, the context can make it clear that the social media account speaks for the government. *Id.* at 202. Conversely, if the account carries a label (e.g., "this is the personal page of") or disclaimer (e.g., "the views expressed are strictly my own"), the account will be entitled to "a heavy (though not irrebuttable) presumption" that all the posts contained therein are personal. *Id.*

For ambiguous or hard-to-classify accounts, "a fact-specific undertaking" is required which examines a specific post's "content and function." *Id*. at 203. The Court cautioned that there must be an awareness that an official does not necessarily purport to exercise their authority

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[7] The Supreme Court states that "[t]he alleged censorship must be connected to speech on a matter within [the public official's] bailiwick." *Lindke*, 601 U.S. at 200. The Court explained that if Freed, as city manager, had posted a list of local restaurants with health code violations and subsequently deleted snarky comments made by other social media users, state-action could not be established unless it is shown that public health is within the city manager's portfolio of responsibilities. *Id*.

[8] The Supreme Court outlined a hypothetical situation to explain this distinction. In the hypothetical, a school board president announces at a school board meeting that the board has lifted COVID-19 restrictions at public schools. The next day, at a backyard barbecue with friends whose children attend public schools, the president shares that the board has lifted the restrictions. Although the substance of the announcements is the same, the Supreme Court states that only the former is state-action taken by the school board president in their official capacity while the latter is a private action taken in a personal capacity as a friend and neighbor. *Id.*at 201-02.

simply by posting about a matter within it. The Court recognized that a public official may post job-related information on social media for any number of personal reasons, including a desire to raise public awareness or to promote the official's reelection prospects. *Id*.

In sum, because public officials have the right to speak about public affairs in their personal capacities, a plaintiff must show the official is intentionally exercising their state authority in the specific, complained-of social media posts for there to be state-action.

C. Cases Remanded to Respective Circuit Courts

The Supreme Court remanded both *Lindke* and *O'Connor-Ratcliff* to their respective lower courts for review under the newly announced two-part test.

RECOMMENDATIONS

The two-part test announced in *Lindke* highlights several important issues for public officials, the agencies that employ them, and their interactions on social media. Key among them is the importance of clarifying whether the public official is speaking as an authorized representative on the agency's behalf or in a personal capacity.[9] Additionally, there are other actions that can be taken to lessen any confusion and avoid potential liability when public officials use social media:

- Public officials should label their social media accounts to identify whether they are personal accounts or official ones. Social media accounts labeled as personal are entitled to a strong presumption that their posts are personal.

- If an account is labeled as public, the public officials should make sure they have authority to post on the agency's behalf. It may be appropriate to include a disclaimer if authority does not exist.

- Public officials should not post personal news to their official accounts and vice versa.

- If public information is posted on a personal account, the public official should include links or re-posts to the location where the information is officially released so it is clearly shown that the information is publicly available elsewhere.

[9] As stated above, Section 1983 liability is contingent on a plaintiff establishing that the complained of action or conduct can be fairly attributable to the State. The Supreme Court's test focuses on whether making public announcements is an actual, specifically enumerated part of an official's job function and not merely an incidental (i.e., "could") one. If no express authority exists, the official's conduct is likely personal in nature and not subject to Section 1983.

Questions about whether a public official may delete comments or block individuals on social media must be analyzed on their specific facts. This Office is available to assist and answer any questions as they arise.

MARA W. ELLIOTT, City Attorney

By *__/s/ David J. Karlin__*

David J. Karlin
Senior Deputy City Attorney

DJK:cm
MS-2024-2
Attachment: City Attorney Miscellaneous Memorandum MS-2021-8 (Apr. 9, 2021)
Doc. No. 3652734

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: April 9, 2021

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update on Elected Officials' Use of Social Media: *Garnier v. O'Connor-Ratcliff*

In December 2020, this Office issued a legal memorandum discussing amendments to the Ralph M. Brown Act clarifying that members of a legislative body may communicate with the public on social media platforms. City Att'y MS 2020-30 (Dec. 14, 2020). As this type of activity grows more common, courts are being asked to determine whether activities like blocking individuals from posting on elected officials' social media accounts violate the First Amendment. This memorandum discusses a recent local federal court case evaluating these issues. *Garnier v. O'Connor-Ratcliff*, No. 3:17-cv-02215-BEN-JLB, 2021 WL 129823 (S.D. Cal. Jan. 14, 2021). Although the outcome is currently being appealed and subject to change, the case merits consideration by elected officials in their use of social media.[1]

I. FACTS

In *Garnier*, two members (Board Members) of the Poway Unified School District (PUSD) Board of Trustees blocked a husband and wife (Plaintiffs) from their public Facebook pages after Plaintiffs posted numerous repetitive comments. The Facebook accounts were established before the Board Member were elected to the PUSD Board to promote their campaigns and political activities. The Board Members updated their Facebook pages after their election to reflect their new positions and provide information about PUSD and their participation in PUSD activities. PUSD did not regulate or control the pages or spend money maintaining these accounts. Also, the Board Members did not have in place social media rules of etiquette or decorum.

Plaintiffs' children were enrolled in public schools within PUSD, and Plaintiffs regularly attended Board meetings to voice concerns on PUSD issues. Plaintiffs began posting comments to the Board Members' social media accounts when they believed the Board Members were not responding to their emails and other communication efforts.[2]

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[1] Although this Office can only advise on social media accounts used to discuss official City business, the issues discussed in *Garnier* are equally applicable to private campaign and personal social media accounts.

[2] Evidence shows Plaintiffs emailed one of the Board Members at her PUSD email address 780 times, and Plaintiffs testified that email messages sent to the Board Members either went unanswered or the recipient refused to talk or meet. *Garnier*, 2021 WL 129823, at *3.

None of Plaintiffs' comments used profanity or threatened physical harm, and almost all related to PUSD. Plaintiffs' comments were often repetitive, however. For example, one of the Plaintiffs posted the same comment to 42 Facebook posts made by one of the Board Members and posted the same reply on Twitter to 226 separate tweets made by that Board Member in a 10-minute period. *Garnier*, 2021 WL 129823, at *6.

The Board Members testified they blocked Plaintiffs due to the disruptive and repetitive nature of their comments and not due to the content of the comments.[3]

II. LEGAL CLAIMS AND RULING

On October 30, 2017, Plaintiffs filed suit in the United States District Court for the Southern District of California against the Board Members in their individual capacities. Plaintiffs alleged the Board Members violated their First Amendment rights by blocking them from their public social media pages. Plaintiffs also named PUSD in the lawsuit but voluntarily dismissed the District in January 2018.[4]

Plaintiffs' federal claim arises out of 42 U.S.C. section 1983 (1996), pursuant to which "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (1996). To state a claim under Section 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. Plaintiffs allege that the Board Members violated section 1983 by restraining their ability to participate in a public forum (Facebook).

Under the First Amendment, the government may regulate speech in a public forum by imposing reasonable time, place, or manner restrictions, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Here, the District Court found the Board Members were acting in their official capacity as PUSD board members in blocking Plaintiffs. *Garnier*, 2021 WL 129823, at *10. Because the Board Members "could not have used their social media pages in the way they did but for their

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[3] One of the Board Members blocked Plaintiffs after contacting Facebook. The other Board Member implemented a 2,000-word filter preventing all Facebook users from commenting on his posts. Although this Board Member may not have intentionally blocked Plaintiffs, the District Court found the result of the Board Member's actions was that he prevented Plaintiffs from commenting on any of his posts, which is consistent with what a blocked user would experience. *Garnier*, 2021 WL 129823, at *7.

[4] PUSD is defending the Board Members in this action. This is consistent with California Government Code section 995, which requires a public entity to defend public officials or employees if the civil action is being brought on account of an act or omission within the scope of employment. Here, Plaintiffs alleged the Board Members used their private social media accounts as a tool for governance and thus were acting in "under the color of law" in blocking Plaintiffs.

positions on PUSD's Board," the Court found their blocking of Plaintiffs "satisfies the state -action requirement for a section 1983 claim." *Id.* The Court's ruling is consistent with other recent cases which found legislators acted in their official governmental capacity in making blocking decisions on social media. *See, e.g.*, *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (county board chair); *Campbell v. Reisch*, 367 F. Supp. 3d 987, 994 (W.D. Mo. 2019) (state representative); and *Felts v. Reed*, No. 20-cv-821-JAR, 2020 WL 7041809, at *6 (E.D. Mo. Dec. 1, 2020) (municipal alderman).

The District Court recognized that whether Plaintiffs' repetitive comments and replies disrupted the Board Members' original posts, making the Board Members' blocking of Plaintiffs a reasonable time, place, or manner restriction on Plaintiffs' speech was an issue of first impression. *Garnier*, 2021 WL 129823, at *11. The Court found that the blocking of Plaintiffs' repetitive posts was content-neutral and "promoted the legitimate interest in facilitating discussion on the[] social media pages and did not burden substantially more speech than necessary because it *immediately responded to high frequency posting during a short period of time.*" *Id.* at *13 (emphasis added).[5] The Court expressed a need to intervene because the 3-year length of blocking "applies a regulation on speech substantially more broadly than necessary to achieve the government interest." *Id.* at *14.

The District Court suggested the Board Members "could adopt content-neutral rules of decorum for their pages to further the substantial government interest of promoting online interaction with constituents through social media." *Garnier*, 2021 WL 129823, at *14. Those rules "could contain reasonable restrictions prohibiting the repeated posting of comments and include sanctions such as blocking for a limited period of time." *Id.* Although the Court stated that it "cannot decide a precise time limit that might be reasonable," it did suggest that "blocking for one month may pass muster given the ease at which a page administrator can block and unblock a user from a particular page" while "[b]locking for three years, on the other hand, cannot." *Id.*

III. RECOMMENDATIONS

As demonstrated by *Garnier*, elected officials should use caution when blocking individuals from their public-facing social media accounts. The first step in making a blocking decision, as suggested by the District Court, is the adoption of content-neutral guidelines or rules of decorum. Regularly monitoring and reviewing comments with the potential for removing comments or users (also known as "moderating" comments) should be performed without consideration of the viewpoint expressed by the user. The rules should expressly state that prohibited activity will lead to user-generated posts being rejected or removed, or the user being temporarily blocked from the account. For example, the rejection or removal of an offending post, or temporary blocking of a user, could be warranted against users who on multiple occasions posts a comment that:

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[5] The Court commented that it was "undeniable that Defendants, by creating and maintaining public Facebook pages and Twitter accounts, serve a substantial government interest," by "leverag[ing] technology to provide new ways for their constituents to gain awareness of their activities and initiatives as elected officials." *Garnier*, 2021 WL 129823, at *14. According to the Court, the Board Members' social media accounts facilitate "transparency in government" which "is one of the most 'significant government interests' the Court could imagine." *Id.*

a. contains sexually explicit, profane, or obscene language or content;
b. would be threatening, abusive, or harassing to a reasonable person;
c. incites or promotes violence or illegal activities;
d. contains information that reasonably could compromise individual or public safety;
e. contains or links to malicious or harmful software;
f. violates the copyright, trademark or other intellectual property rights of any person or entity; or
g. violates a local, state, or federal regulation or law, including privacy laws.

Detailed documentation on any blocking decision should be meticulously maintained and include the reason for the blocking. Decisions cannot be based on the content of the speech.

Elected officials may also consider adding a disclaimer as applicable. If, for instance, the elected official maintains a personal Facebook page, the official may wish to post on the page that the page is maintained for personal purposes and is not affiliated with official government business. The elected official should refrain from using the forum for anything other than personal business.

In addition, if social media is used for government business, the elected official may wish to note on social media that the site is not regularly checked or maintained, if that is the case, and refer the public to an alternative mode of communication that may be more responsive to the public, such as an office phone number, website, or even the Get It Done app.

The City's Communications Department maintains social media standards for City department use in developing and maintaining social media pages that may prove helpful when addressing issues that arise on City officials' private social media accounts. We are also available to address specific questions related to official City websites and social media.

MARA W. ELLIOTT, CITY ATTORNEY

By ***/s/ David J. Karlin***
David J. Karlin
Senior Deputy City Attorney

DJK:cm
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