



SOCIAL MEDIA: POLICIES, ETHICS AND THE LAW

ELIZABETH B. VALERIO, ESQ.
NICHOLAS J. DOMINELLO, ESQ.

<http://www.vdhboston.com>



JOHN CLIFFORD, ESQ.
CLIFFORD & KENNY, LLP

<http://www.cliffordkennylaw.com>



DISCLAIMER

*This presentation is for informational and training purposes only
and should not be considered legal advice.*

WHERE ARE THE LINES BETWEEN LEGITIMATE DISCOURSE AND ACTIONABLE CONDUCT?



Is everything protected free speech?



As an elected official, should you be subject to more abusive behavior?



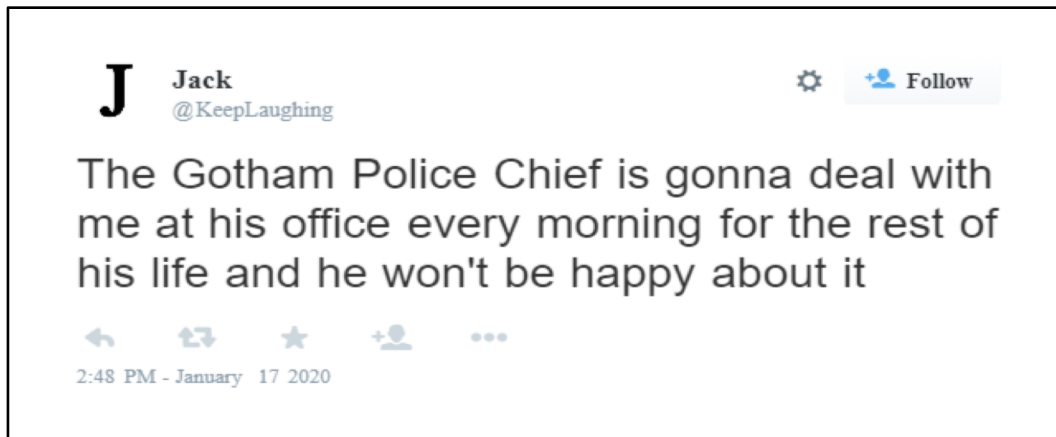
What about employees? Do they have to accept online abuse as part of the job?



Does it make a difference what position they hold?

WHAT TO DO WHEN...

- A member of the public is harassing and/or threatening one of your public employees/officials via social media?



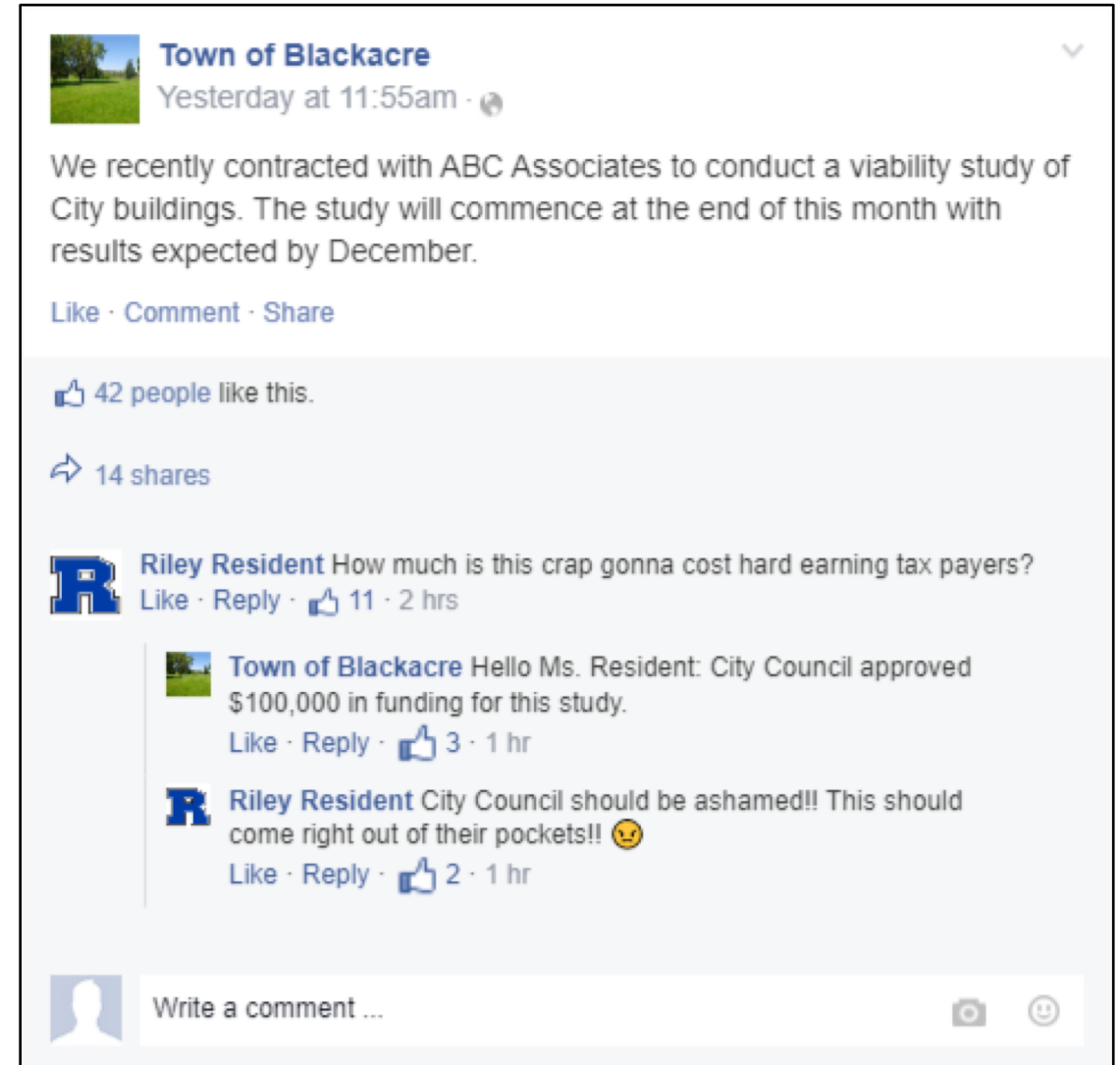
VENUES FOR VENTING

There are several social media forums available to the public to “vent” about public employees and officials:

Facebook	LinkedIn
Twitter	YouTube
Instagram	Yelp/Google Reviews
Snapchat	Personal blogs

POSTING AND HOSTING

- If the individual posts directly on a municipality's social media account, then the municipality may be able to formulate a response.
- If your goal is to share information via social media, do you need to allow commentary?



POSTING AND HOSTING

- If the municipality's page has clear terms of use subjecting certain content to removal and the individual's post violates those terms, it may be removed.
 - For public records retention purposes, a screenshot of the post must be maintained before removing it.
- Social media websites and applications may also remove posts that are inconsistent with their terms of use. In this case, municipalities should attempt to obtain a screenshot of the post in the event it is later removed by the hosting website or application.

POSTING AND HOSTING

When individuals post on social media websites and applications not operated or hosted by a municipality, it can be difficult to respond to the post and to have it removed.



FIRST AMENDMENT

Social media websites and applications provide the public with the opportunity to make their own posts or comment on others – this creates a First Amendment issue



Without explicit limitations on use, social media accounts that permit public comment could constitute open public forums

- To avoid creating an open forum: disable commenting so your communication to the public is one-way
- 

Alternatively, permit comments but designate your social media account as a “limited public forum”

FIRST AMENDMENT

- Draft “Terms of Use” and link to them on all your social media accounts
- Clearly state the page is **not an open public forum**;
- Clearly state that the page is limited to specific subject matter (e.g., Fire Department, Council on Aging, Public Schools, Recreation Department, etc.)

FIRST AMENDMENT

- Clearly and explicitly reserve the right to remove comments:
 - That are off-topic;
 - That include obscenity, fighting words, true threats, commercial promotions or advertisements;
 - That are harassing or discriminatory on the basis of race, creed, color, national origin, religion, age, gender, or sexual orientation or any other protected class; or
 - That encourage illegal activity

FIRST AMENDMENT

If your municipality has social media accounts, consult legal counsel before deleting any user's post or comment from that account and seek guidance

You could violate the First Amendment if...

- You only remove off-topic posts when they are negative; or
- You remove posts based on their content, instead of the explicit (narrow) grounds for removal stated in your policy;
- If you create a limited public forum, you cannot remove posts because of viewpoint

PUBLIC RECORDS



Any electronic communication created or received by a public employee/official in his or her capacity as such is subject to retention and possibly disclosure, in whole or in redacted part, under the public records law



Communications made on social media accounts are not archived – you will need to develop a system for retaining all information appearing on your social media accounts. (Contact the Municipality's IT Department)



If you inadvertently post content that is inaccurate or if you receive negative feedback on a post – don't delete.

Edit or update and make it clear the post was modified.

SAMPLE POLICY AND VIOLATION

POLICY

If you are creating content you know will be posted publicly on a the Town's Facebook page, you agree not to post anything illegal, obscene, threatening, or fraudulent (you have to be who you say you are). If you don't follow these rules, we can remove the publicly posted content. Also remember that any information submitted to the Town is subject to Massachusetts Public Records Law (learn more in our Privacy Policy).

VIOLATION



Paula Pet -> City of Acme

Yesterday at 2:55am · 🌐

i'm f—king done with your animal control officer harassing me about needing a kennel license for my dogs i don't give a s—!! if i hear from that f—king officer one more time i'll be sending the dogs after him and that's a promise

[Like](#) · [Comment](#) · [Share](#)

👍 18 people like this.

↪ 3 shares



Write a comment ...



HARASSMENT

M.G.L. c. 265 § 43A makes it a crime to willfully and maliciously engage in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress.

Under M.G.L. c. 258E, an individual may obtain a restraining order against someone that engages in three (3) or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property

THREATS

Under M.G.L. c. 275, § § 2 – 4, it is illegal to threaten to commit a crime.

CASE STUDY - SCITUATE

- Candidate for Board of Selectmen
- Convicted felon, sex offender
- Active Facebook presence
- Some people thought it was entertaining and funny

IS THIS ACCEPTABLE CRITICISM OF A PUBLIC OFFICIAL?

- Police Chief was accused of:
 - Sexually assaulting a minor
 - Smoking crack
- Threats against Chief's family members

CRITICISM COMES WITH THE TERRITORY — WHY IS THIS DIFFERENT?



The material never goes away



Easy to start rumors and promulgate false accusations



False accusations easily resurrected by re-tweeting or by adding new comment to Facebook content



The employee can see "likes," comments, re-tweets, etc.



Is it realistic to ask the employee to ignore it?

HOW DO YOU KNOW IF YOU MUST ACT?



- Has the employee complained or asked you to intervene?



- Has a threat been posted?



- Has a town official participated in the objectionable activity? Why is that relevant?

STRATEGIES TO RESPOND AND SUPPORT EMPLOYEES AND OFFICIALS

Preserve the objectionable content

- Screen captures
- photographs

Contact the social media host

- Facebook community standards
- Reporting abusive or harmful conduct to Twitter
- They will remove content
- Suspend user's rights

STRATEGIES (CONT.)

- **Public discussion of the problem**
 - Speaking out against objectionable behavior
 - Legitimizing vs. marginalizing bad behavior
 - Should you or your fellow officials participate on a Facebook forum that permits objectionable content?
 - Asking fellow officials to boycott if the hosts don't police content

CROSSING THE LINE — DISTINGUISHING THREATS FROM CRITICISM



Does the employee or official have a reasonable fear of death or serious bodily injury?



Does the employee have a reasonable basis to fear this person?



Are others in fear of this person?

ASSESSING THREATS (CONT.)



Person's history – propensity toward violence



Based on race, ethnicity, gender, orientation, etc.



History of mental illness/instability



Escalating rhetoric



Access to weapons



Engaging law enforcement professional to review

LAW ENFORCEMENT'S ROLE



If you're not sure whether there was a crime, ask



Providing legal representation/advocacy for your employees



Involving the District Attorney's office

Perceived or alleged conduct by having your Police Department

They may defer immediate action, but they are on notice and may act on subsequent allegations

Q + A