FOR PUBLIC OFFICIALS, SOCIAL MEDIA IS PUBLIC MEDIA*

C. AMANDA MARTIN**

Once cutting edge, social media is now a commonplace, mainstream mode of communication for everyone from pop stars and presidents to airlines and clothing brands. Defining the rules of the road for elected officials on social media has been fraught with ambiguity. The U.S. Supreme Court recently decided two cases addressing whether Section 1983 provides a right of access by the public to the social media accounts of public officials, but the Court's guidance falls short of creating easy-to-apply, bright-line rules. This Article explores the application of North Carolina's Public Records Law to social media posts by public officials and to comments from citizens on the social media accounts of those officials. Given the breadth of the public records law and the strong statutory construction in favor of access, the Article argues that public officials should not be permitted to block citizens from social media accounts on which the officials discuss public business and that they should not be permitted to delete comments about public business that have been posted by citizens. The Article maintains that clear guidance through well-defined policies is crucial for compliance by public employees and officials and that the existing framework of the Public Records Law can serve as a template for those rules.

** Clinical Professor of Law and Supervising Attorney, First Amendment Clinic, Duke Law School.

INTRODUCTION

Envision a city park, and outside the park is a sign: "All are welcome . . . provided city officials like you and agree with you." Of course, such a policy would never stand. And yet, some governments, government officials, and government employees are effectively implementing such a policy to block and delete citizen critics from social media accounts. In 2020, a Gaston County commissioner acted swiftly after Corey Friedman, a former resident of Gaston County, posted criticism on the Commissioner's Facebook page and X (formerly known as Twitter) feed.[1] The posts were deleted, and Friedman was then blocked from the pages altogether.[2] Similarly, Matthew Creech, a resident of Lucama, North Carolina, was blocked from the Town of Lucama's Facebook page after he commented that the Town's policy against criticism on social media likely violated the First Amendment.[3] In both cases, the public officials' actions not only removed the comments from public view but also stopped Friedman and Creech from seeing the public officials' posts going forward. Those posts included such information as announcements about COVID-19[4] or town surveys.[5] The blocking on X also prevented Friedman from seeing comments posted by fellow citizens and cut off fellow citizens from him.

1. Complaint ¶¶ 23–24, Friedman v. Philbeck, No. 21-CVS-3976 (Gaston Cnty. Sup. Ct. Div. filed Oct. 1, 2021).

2. *Id.* ¶¶ 25, 30–32.

3. *See* Letter from Sarah Ludington, Duke First Amend. Clinic, to Darlene Newsom, Lucama Town Adm'r (Sept. 30, 2022) (on file with the North Carolina Law Review); Brief Amicus Curiae of First Amendment Clinics et al. in Support of Petitioner at 32, Lindke v. Freed, 144 S. Ct. 756 (2024) (No. 22-611).

4. Tracy Philbeck, FACEBOOK (June 18, 2020) (on file with the North Carolina Law Review) (COVID-19 statement). Editor's Note: This Facebook account has been deleted, so the post is no longer available online.

5. Town of Lucama, FACEBOOK (July 19, 2022), https://www.facebook.com/permalink.php?story_fbid=pfbid02bShGjK7ywCp571wKkr3SBUN1Fetfrv8jDHQragwac1LtcrCVgEer7C5781hsr7XMl&id=111476927007225 [https://perma.cc/SB96-9XAE (staff-uploaded archive)] (town survey).

In its 2023–24 term, the U.S. Supreme Court decided two cases, *Lindke v. Freed*[6] and *O'Connor-Ratcliff v. Garnier*,[7] in which citizens were blocked from the social media accounts of public officials. Lindke and the Garniers filed suit under 42 U.S.C. § 1983, alleging that their First Amendment rights had been denied under color of state law.[8] These legal theories necessarily implicate the question of whether the public officials were state actors when they blocked and deleted the citizens.[9] Despite bearing some indicia of public business, did the accounts remain private accounts, entitling public officials to unilateral authority to delete posts and block individuals? Or by using the pages for *some* public business, did the public officials act under color of law and engage in state action, thereby subjecting their actions to constitutional scrutiny?[10] Echoing observations made in *Packingham v. North Carolina*[11] that social media platforms constitute "the modern public square,"[12] the oral arguments in *Lindke* and *O'Connor-Ratcliff* considered analogies to property rights and whether the public officials had established public fora.[13] Despite the Court's adoption of an

6. 144 S. Ct. 756 (2024).

7. 144 S. Ct. 717 (2024).

8. *Lindke*, 144 S. Ct. at 764; *O'Connor-Ratcliff*, 144 S. Ct. at 717.

9. *Lindke*, 144 S. Ct. at 762; *O'Connor-Ratcliff*, 144 S. Ct. at 717.

10. In *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022), the Sixth Circuit analyzed whether the public official defendant was acting pursuant to his duty or authority and found he was not; therefore, he was entitled to delete and block the plaintiff's postings. *Id.* at 1207 ("[O]ur state-action anchors are missing here. Freed did not operate his page to fulfill any actual or apparent duty of his office. And he didn't use his governmental authority to maintain it. Thus, he was acting in his personal capacity—and there was no state action."). In *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022), the Ninth Circuit applied an appearance test. *Id.* at 1172 ("[B]oth in the appearance and the content of the pages, the Trustees effectively 'display[ed] a badge' to the public signifying that their accounts reflected their official roles as PUSD Trustees, whether or not the District had in fact authorized or supported them." (alteration in original) (quoting Naffe v. Frey, 789 F.3d 1030, 1036 (9th Cir. 2015))). The Court held that the public officials created public fora in using their social media accounts to communicate with constituents and that the officials' blocking and deleting ran afoul of the First Amendment. *Id.* at 1185 ("When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them."). The Supreme Court heard oral argument on the two cases on October 31, 2023, and decided both cases on March 15, 2024. *See* Jeff Neal, *The Supreme Court Takes on (Anti)social Media*, HARVARD L. TODAY (Oct. 27, 2023), https://etseq.law.harvard.edu/today/supreme-court-takes-on-social-media-in-lindke-v-freed-and-oconnor-ratcliff-v-garnier/ [https://perma.cc/5K2S-T5WX]; Rachel Mackey, *U.S. Supreme Court Establishes Clear Test for Classifying Private Social Media Use as State Action*, NAT'L ASS'N OF COUNTIES (Mar. 18, 2024), https://www.naco.org/news/us-supreme-court-establishes-clear-test-classifying-private-social-media-use-state-action [https://perma.cc/NPF5-UAKU].

11. 137 S. Ct. 1730 (2017).

12. *Id.* at 1737.

13. *See* Transcript of Oral Argument at 65, *Lindke*, 144 S. Ct. 756 (No. 22-611) [hereinafter *Lindke* Transcript] ("So, Ms. Hansford, do we have enough in this record to really confidently say that the Facebook page here is private property?"); *id.* at 75 ("More and more of our democracy operates on social media. Public discourse, this is the forum for officials to talk to citizens, for citizens to talk to officials, for citizens to talk to each other, and it is becoming increasingly so."); Transcript of Oral

"it depends" standard in which the answer turns on multiple factors such as the scope of a public official's duties and authority to speak on behalf of a public agency,[14] North Carolina's Public Records Law[15] should provide the public a statutory right of access to public officials' social media. This should be so whether the social media account is an official governmental page or a seemingly private page.

The North Carolina Public Records Law provides a powerful tool for citizen oversight of government. Members of the public have a right to inspect and obtain copies of documents about public business.[16] This right applies not only to documents created by public agencies and public officials but also those received by public agencies.[17] And it applies whether the means of communication is official, such as a ".gov" email account, or personal, such as Gmail or icloud.com.[18]

Argument at 57, *O'Connor-Ratcliff*, 144 S. Ct. 717 (No. 22-324) [hereinafter *O'Connor-Ratcliff* Transcript] ("What exactly is the property?"); *id.* at 22 ("Is the act that is at issue in this case what the person who owns the Facebook page says, or is the act that is at issue the forum, so to speak, that is created by enabling comments?").

14. *See Lindke*, 144 S. Ct. at 762; *O'Connor-Ratcliff*, 144 S. Ct. at 718. The Court in *Lindke v. Freed* declined to adopt a bright-line rule regarding all social media accounts operated by government employees and officials. *See Lindke*, 144 S. Ct. at 762. Instead, in a unanimous decision, the Court found "that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id.* The Court in *O'Connor-Ratcliff* remanded the case for consideration consistent with the holding in *Lindke*. *O'Connor-Ratcliff*, 144 S. Ct. at 718.

15. N.C. GEN. STAT. §§ 132-1 to -11 (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

16. *Id.* § 132-1(a) ("'Public record' or 'public records' shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.").

17. *Id.*

18. The North Carolina Department of Natural and Cultural Resources is statutorily charged with establishing standards and procedures for email retention. *Id.* § 132-8.1. In published guidance, the Department recognizes that emails created on personal accounts are public records. N.C. DEP'T OF CULTURAL RES., DIV. OF HIST. RES., E-MAIL AS A PUBLIC RECORD IN NORTH CAROLINA: A POLICY FOR ITS RETENTION AND DISPOSITION 5 (2009), https://archives.ncdcr.gov/e-mail-public-record-north-carolina-policy-its-retention-and-disposition/open [https://perma.cc/4QDJ-5PV7] ("If a personal e-mail account is used for government business, employees are required to forward all e-mail messages to their government e-mail account."); *see also* OFF. OF GOV. ROY COOPER, GUIDANCE FOR PUBLIC RECORDS AND MEETINGS ACCESS FOR NORTH CAROLINA STATE GOVERNMENT EMPLOYEES 5 (2018), https://governor.nc.gov/documents/files/public-records-guide/open [https://perma.cc/7XAW-FVND] ("A record is considered public if it is made or received in connection with public business. Therefore, your personal email, personal mobile phone records, or social media posts may contain public records."); N.C. ATT'Y GEN., NORTH CAROLINA OPEN GOVERNMENT GUIDE 22 (2019), https://ncdoj.gov/wp-content/uploads/2020/01/2019-Open-Government-Guide-2.pdf [https://perma.cc/ADM7-ZRRB] ("Emails about official business are public records even if they are sent using the personal email account of an employee or official.").

Although there are statutory exemptions,[19] the definition of public records is broad, and the right of access is construed liberally.[20] Moreover, once made or received, it is a misdemeanor for a public official to destroy public records.[21] Although no North Carolina court has addressed the question, these two principles taken together should establish that North Carolina public officials are prohibited from blocking individuals from social media accounts or deleting messages related to public business. This principle should apply regardless of whether those accounts are officially or privately maintained.

Part I of this Article explores the relationship between the social media accounts of public officials and the North Carolina Public Records Law. In Section I.A, this Article will discuss the importance of public officials' social media use in contemporary society and why it matters whether members of the public are deleted and blocked. Section I.B will describe the strong North Carolina history favoring liberal access to public records, regardless of the form or location of the records, and will explain how the statutory protections for access shall apply to social media accounts of public officials. Part II will then argue that under the Public Records Law, social media communications should be treated as public records and may not be hidden from constituents or deleted. Section II.A provides several examples of citizens being cut off from viewing public records on social media. Next, in Section II.B, the Article will address potential challenges posed by North Carolina's liberal access rules in a social media context and explore solutions to those challenges. Section II.C will describe the impact of the Supreme Court's rulings in *Lindke* and *O'Connor-Ratcliff*. Finally, Section II.D will propose a model social media policy for public officials and agencies that is consistent with statutory requirements and creates sound public policy.

19. Some of the exemptions to the Public Records Law are codified within the Public Records Law, such as the exemptions for state and local tax information and public enterprise billing information. N.C. GEN. STAT. § 132-1.1 (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb). Other exemptions are found elsewhere, such as the exemption for personnel records of public employees such as state employees, *id.* § 126-22, or certain records related to individuals receiving public assistance, *id.* § 108A-80.

20. DTH Media Corp. v. Folt, 374 N.C. 292, 300, 841 S.E.2d 251, 257–58 (2020) ("The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions.").

21. N.C. GEN. STAT. § 132-3(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

I. SOCIAL MEDIA ACCOUNTS AND THE NORTH CAROLINA PUBLIC RECORDS LAW

A. *The Importance of Social Media Use by Public Officials*

In the words of Justice Thurgood Marshall, an "informed citizenry" is "vital to the functioning of a democratic society."[22] While the need for information is more essential than ever, "[r]esidents in more than half of U.S. counties have no, or very limited, access to a reliable local news source—either print, digital or broadcast."[23] As so-called news deserts develop, people turn to internet sources for information. The Pew Research Center has reported that in 2023, eighty-six percent of American adults "sometimes" or "often" got their news from digital devices.[24] Moreover, fifty percent of Americans "sometimes" or "often" got news from social media sites,[25] with Facebook as the dominant social media platform.[26] It is no wonder that politicians and public officials flock to social media as a means of engaging with constituencies. Use of platforms is free, and neither newspaper editors nor news directors have editorial control of what ultimately reaches the public.[27] In questioning the respondent in the *O'Connor-Ratcliff* oral argument, Justice Elena Kagan said of former President Donald Trump:

> But he seems to be doing, you know, a lot of government on his Twitter account. I mean, sometimes he was announcing policies.
>
> Even when he wasn't, I mean, I -- I don't think a citizen would be able to really understand the Trump presidency, if you will, without any access to all the things that the President said on that account. It was an important part of how he wielded his authority.[28]

Categorizing online activities as "governmental" or "public" versus "private" is not always clear-cut. Under the state action/public forum theories advanced in most public official social media litigation, there is a continuum.[29] At one end of the spectrum are official, government social media accounts,

22. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

23. PENELOPE MUSE ABERNATHY & SARAH STONBELY, THE STATE OF LOCAL NEWS: THE 2023 REPORT 10 (2023), https://localnewsinitiative.northwestern.edu/assets/slnp/the_state_of_local_news_2023.pdf [https://perma.cc/T7QL-U49S].

24. *News Platform Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/ [https://perma.cc/FJV3-N89X].

25. *Id.*

26. *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/ [https://perma.cc/7XFT-D3DM].

27. *See Terms of Service*, FACEBOOK (July 26, 2022), https://www.facebook.com/legal/terms [https://perma.cc/4GB8-NE2R (staff-uploaded archive)].

28. *O'Connor-Ratcliff* Transcript, *supra* note 13, at 16.

29. *See infra* notes 30–35 and accompanying text.

owned and operated by public agencies.[30] No government agency involved in litigation has taken the legal position that official government social media accounts are entitled to block and delete citizens, though in practice some public agencies have done so.[31]

At the other end of the continuum, harder cases arise when public officials have mixed-use social media accounts. A common scenario is a private individual who runs for office and transforms a private social media account into a campaign page.[32] The elected official then continues to use the page, at least in part, for public purposes after the election.[33] The page itself may contain indicia of public office, such as an official title, a governmental seal, or government-based contact information.[34] The content may comprise a mix of purely personal material—photos of family and dogs and favorite recipes—blended with public material—notices of public hearings, updates on budget matters, and explanations of public policy.[35] At this point, the page has become a channel of communication from a public official to the public.

During the COVID-19 pandemic, for example, public officials and citizens increasingly turned to social media to share and receive news, including time-sensitive news such as lockdown policies and mask mandates, infection rates within the community, and economic impacts on the community. For example, on March 2, 2020, North Carolina Governor Roy Cooper posted a video message about the coronavirus and establishment of a state task force.[36] Throughout the pandemic, governmental briefings were posted on the

30. *See, e.g.*, Letter from C. Amanda Martin, Duke First Amend. Clinic, to Gabriel Du Sablon, Town Att'y for Town of Lucama (Apr. 3, 2023) (on file with the North Carolina Law Review).

31. *See id.*

32. *See, e.g.*, Complaint ¶¶ 19–26, Larson v. Warner, No. 22-CVS-2320 (Cumberland Cnty. Sup. Ct. Div. filed Apr. 27, 2022). Jackie Warner, the former mayor of Hope Mills, had such an evolution of her Facebook page from candidate to mayor. *Id.* After being sued under the Public Records Law for records related to her Facebook page, Mayor Warner settled the lawsuit and agreed not to block individuals from her Facebook page or to hide or delete comments so long as she held office. Settlement at 2, *Larson*, No. 22-CVS-2320 (filed Jan. 9, 2023); Notice of Voluntary Dismissal, *Larson*, No. 22-CVS-2320 (filed Apr. 6, 2023). Mayor Warner lost her 2023 re-election bid. *11/07/2023 Official Municipal Election Results - Cumberland*, N.C. STATE BD. ELECTIONS (Nov. 7, 2023), https://er.ncsbe.gov/?election_dt=11/07/2023&county_id=26&office=ALL&contest=0 [https://perma.cc/YX2L-E9Y4]. She has apparently since disabled her mayoral Facebook page. *See* Jackie Warner for Mayor, FACEBOOK, https://www.facebook.com/JackieWarnerforMayor/ [https://perma.cc/9JUL-HHRQ (staff-uploaded archive)] (informing that "[t]his content isn't available right now" and "[w]hen this happens, it's usually because the owner only shared it with a small group of people, changed who can see it or it's been deleted").

33. *See, e.g.*, *supra* note 32.

34. *See, e.g.*, *id.*

35. *See, e.g.*, *id.*

36. Governor Roy Cooper, FACEBOOK (Mar. 2, 2020), https://fb.watch/riFaIvs0bB/ [https://perma.cc/BSH6-NQ3N (staff-uploaded archive)] (state task force).

Governor's Facebook page.[37] Likewise, local elected officials shared information with their communities. Wake County Government posted on Facebook eighty-one times in March 2020, compared with twenty-four times in March 2019.[38] The 2020 posts ranged from the March 3, 2020 announcement that North Carolina had diagnosed its first case of COVID and the announcement of a stand-alone page for pandemic news,[39] to tips on how to avoid the spread of COVID[40] and a hotline number for people to call with questions.[41] Raleigh Mayor Mary-Ann Baldwin posted a COVID-19 update on her page on March 18, 2020,[42] followed on March 22 by an endorsement of Wake County's mandatory closures,[43] and a March 27 post about stay-at-home orders.[44]

Social media is a highly effective communications tool. In the commercial world, consumers routinely use social media to get the attention of companies for the purposes of customer service.[45] Why would the worlds of government

37. *See, e.g.*, Governor Roy Cooper, FACEBOOK (Apr. 30, 2020), https://www.facebook.com/NCgovernor/videos/159450338843691 [https://perma.cc/EX6V-2BTW (staff-uploaded archive)] (emergency briefing).

38. *Compare* Wake County Government, FACEBOOK, https://www.facebook.com/wakegov [https://perma.cc/L7R2-C5KJ (staff-uploaded archive)] (March 2020 posts), *with* Wake County Government, FACEBOOK, https://www.facebook.com/wakegov [https://perma.cc/6BK9-8J9A (staff-uploaded archive)] (March 2019 posts).

39. Wake County Government, FACEBOOK (Mar. 3, 2020, 5:45 PM), https://www.facebook.com/wakegov/posts/pfbid02qygojEe8LmL1CKYiwVHWZMxQ58oyKCxXEZonTnKxpF5oLCKRWuWb8EFbgEmgtRL6l [https://perma.cc/B8VY-EV9P (staff-uploaded archive)] (stand-alone page for pandemic news). The March 3, 2020, announcement of a separate page for COVID elicited the comment, "You're more likely to die from the flu than this." Glenn Nizich, Comment to Wake County Government, FACEBOOK (Mar. 5, 2020, 6:03 PM), https://www.facebook.com/wakegov/posts/pfbid02qygojEe8LmL1CKYiwVHWZMxQ58oyKCxXEZonTnKxpF5oLCKRWuWb8EFbgEmgtRL6l [https://perma.cc/B8VY-EV9P (staff-uploaded archive)].

40. Wake County Government, FACEBOOK (Mar. 6, 2020, 10:30 AM), https://www.facebook.com/photo?fbid=10158414353532845&set=a.113567762844 [https://perma.cc/2HXW-MU7F (staff-uploaded archive)] (tips for stopping COVID-19 spread).

41. Wake County Government, FACEBOOK (Mar. 11, 2020, 2:14 PM), https://www.facebook.com/photo?fbid=10158430727452845&set=a.113567762844 [https://perma.cc/8F22-3FZ2 (staff-uploaded archive)] (hotline number).

42. Mayor Mary-Ann Baldwin, *COVID-19 Update*, FACEBOOK (Mar. 18, 2020), https://www.facebook.com/notes/951440825380701 [https://perma.cc/P8D9-UY5P (staff-uploaded archive)].

43. Mayor Mary-Ann Baldwin, FACEBOOK (Mar. 22, 2020, 1:07 PM), https://www.facebook.com/maryannforraleigh/posts/pfbid0Zugwn8Giuaxgzr1Jf4oC2ZH4BVxTXRAFL4okR89uYvfemVKrG8123g8xSGc8BPcUl [https://perma.cc/V3X5-MLG7 (staff-uploaded archive)] (mandatory closure approval).

44. Mayor Mary-Ann Baldwin, *An Update on Raleigh's Stay-At-Home Order*, FACEBOOK (Mar. 27, 2020), https://www.facebook.com/maryannforraleigh/videos/1083378562024076/ [https://perma.cc/GRU5-LDBQ (staff-uploaded archive)] (stay-at-home order).

45. *See What Is Social Media Customer Service?*, QUALTRICS (2024), https://www.qualtrics.com/experience-management/customer/social-media-customer-service/ [https://perma.cc/3FZZ-ENCU (staff-uploaded archive)]. A majority of people "favor brands that respond to their complaints over

and politics be any different? Of course, as discussed, public officials use their social media accounts to communicate to their constituents about a variety of topics. Constituents often talk back. Mayor Baldwin's Facebook page reflected both praise and criticism, for example. The March 19 announcement that on-street parking would be free, to reduce common contact points, elicited, "Wonderful mayor!" Three days later, a post about new restrictions elicited, "These are a start but we need real action and results, it needs to be shut down. Except for essential services and pharmacy and food stores. Why are we dragging our feet and getting more positive tests."[46] If a public official allows comments on a page, it becomes two-way communication between elected official and constituents.

Citizens also speak to each other online. As the Supreme Court wrote in *Packingham v. North Carolina*, platforms like Facebook and X provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and transform the average citizen into a "town crier with a voice that resonates farther than it could from any soapbox."[47] As Professors Clare Norins and Mark Bailey wrote, "social media allows internet users to express themselves and dialogue in real time, with both the government official who operates the account, and other viewers and commenters engaging with it."[48] A public official's page therefore serves as a platform for discussion of matters of public policy, much like the public comment portion of a government meeting, and affords a reflection of public sentiment on an issue.

B. *North Carolina's Capacious Approach to Government Transparency*

The Supreme Court of North Carolina has made clear, "[g]overnment agencies and officials exist for the benefit of the people."[49] The courts have recognized "[t]he legislature's mandate for open government."[50]

social media," and more than three-fourths of millennials "prefer to use social media for customer service." *Id.*

46. Pam Mueller, Comment to Mayor Mary-Ann Baldwin, FACEBOOK (Mar. 19, 2020, 2:39 PM), https://www.facebook.com/maryannforraleigh/posts/pfbid02YbMHjEp6YWEcPN8xLLb8r4PHrb8iHzJjprqShccQeRnrb7trzEA6QuHDsSZBcKRhl [https://perma.cc/SKL7-PLDJ (staff-uploaded archive)] ("wonderful mayor"); Glenn Alan, Comment to Mayor Mary-Ann Baldwin, FACEBOOK (Mar. 22, 2020, 1:53 PM), https://www.facebook.com/maryannforraleigh/posts/pfbid0a8bYQ6Prv2NAHBvtmvkbsKtr8EbwPSzWu1UJPWNMYDndG8dv4yRv13RhtDEa9RtFl [https://perma.cc/4G85-FG8R (staff-uploaded archive)] (advocating for increased shutdowns).

47. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

48. Clare R. Norins & Mark L. Bailey, Campbell v. Reisch*: The Dangers of the Campaign Loophole in Social-Media-Blocking Litigation*, 25 U. PA. J. CONST. L. 147, 148 (2023).

49. State Emps. Ass'n of N.C. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010).

50. News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992).

In 1935, about a decade before most states passed public records statutes,[51] the General Assembly passed a public records law, declaring that public records and information "are the property of the people."[52] In contrast to its federal counterpart,[53] North Carolina's law sweeps broadly: it applies to all three branches of government,[54] it applies to drafts,[55] and the only exceptions to the right of access are those found in explicit statutory exemptions.[56] This last principle is so strictly applied that in the absence of a statutory work product privilege, the Supreme Court of North Carolina declined to apply a common law attorney-client privilege.[57] Whereas a common law privilege protects communications from a client to his attorney, those communications are not privileged under the Public Records Law.[58] Specifically, the Supreme Court of North Carolina wrote:

51. Thomas H. Moore, Comment, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C. L. REV. 1527, 1543 (1994).

52. N.C. GEN. STAT. § 132-1(b) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

53. Freedom of Information Act, Pub. L. No. 89-487, § 3, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552). The Freedom of Information Act, the federal law allowing access to certain records, applies only to records of executive branch agencies. *Id.* § 3, 80 Stat. at 250. It also has categorical exceptions—such as "internal personnel rules and practices of an agency." *Id.* § 3, 80 Stat. at 251.

54. N.C. GEN. STAT. § 132-1(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.) ("Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government."); *see also* Off. of the N.C. Att'y Gen., Advisory opinion; Judicial Standards Commission; Confidentiality of Records, 2002 WL 31955329, at *1 (Oct. 8, 2002) ("Our courts have established two general rules for construing the statutes providing for public access to records in the possession of executive and legislative branch officials: that the statutes will be construed to provide liberal access to those records and, correspondingly, that records will be deemed public records absent an express statutory provision to the contrary."); *see, e.g.*, *Poole*, 330 N.C. at 474–75, 412 S.E.2d at 12–13. These same rules of construction ordinarily also apply in determining access to records maintained by the judicial branch of government. *See, e.g.*, LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of the Cts., 368 N.C. 180, 186, 775 S.E.2d 651, 655 (2015).

55. *Poole*, 330 N.C. at 484, 412 S.E.2d at 18 ("Our statute contains no deliberative process privilege exception. Whether one should be made is a question for the legislature, not the Court. . . . We, therefore, affirm the trial court's ruling that the draft reports of individual Commission members are subject to disclosure under the Public Records Law.").

56. *Id.* at 486, 412 S.E.2d at 19 ("[W]e hold that in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection.").

57. *Id.* at 482–83, 412 S.E.2d at 17 ("Confidential communications between attorney and client, from either one to the other, are protected by the traditional attorney-client privilege mandated by common law. So far this Court has not recognized an attorney-client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended. . . . In the context of what such agencies must disclose pursuant to the Public Records Law, the statute itself defines the scope of the privilege." (citations omitted)).

58. *Id.*

> In the context of what such agencies must disclose pursuant to the Public Records Law, the statute itself defines the scope of the privilege. Under this definition only those portions of the Poole Commission meeting minutes revealing written communications *from* counsel *to* the Commission are excepted from disclosure under the Public Records Law.[59]

Similarly, the North Carolina Court of Appeals ruled that when the City of Raleigh was in a dispute with Hanson Aggregates regarding a quarry, the city attorney was not entitled to withhold records based on a common law work product privilege.[60]

Again, leading in transparency,[61] North Carolina amended the public records law in 1975 to cover documents made and received "regardless of physical form or characteristics," making computerized records public.[62] In considering purely electronic records, a recent North Carolina Court of Appeals opinion clarified: "Custody is defined as 'care and control of a thing or person for inspection, preservation, or security.' Because custody encompasses control of a thing, actual or constructive possession is sufficient to meet the requirement for custody."[63]

The Public Records Law reaches beyond documents *required* by law to be created and encompasses all records that are in fact "kept in carrying out lawful duties."[64] Applying this principle, the North Carolina attorney general has

59. *Id.* at 482–83, 412 S.E.2d at 17 (emphasis added) (internal cross-reference omitted).

60. McCormick v. Hanson Aggregates Se., 164 N.C. App. 459, 473, 596 S.E.2d 431, 439–40 (2004) ("[W]e conclude that the City Attorney's work product was subject to disclosure under the Act, unless, of course, the relevant documents are independently exempted by virtue of the criminal investigation exception. Thus, not only was the City Attorney not entitled to greater protections than granted by the trial court's order, but the trial court erred in granting the City Attorney even limited work product protection."). The court went even further and ruled that the City did not have standing under the Public Records Law to bring a declaratory action regarding the records. *Id.* at 463–64, 596 S.E.2d at 433–34.

61. Moore, *supra* note 51, at 1545 ("With this revision, North Carolina became one of the first states in the nation to specify that computer records, which now make up most government records, are public records.").

62. Act of June 24, 1975, ch. 787, § 1, 1975 N.C. Sess. Laws 1112, 1112 (codified as amended at N.C. GEN. STAT. § 132-1 (2023)).

63. Gray Media Grp. v. City of Charlotte, 290 N.C. App. 384, 397, 892 S.E.2d 629, 639 (2023) (quoting *Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019)) (citing Fordham v. Eason, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1990)).

64. News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc., 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981) (citing Joseph D. Johnson, Comment, *Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C. L. REV. 1187, 1191 (1977)) ("The phrase in G.S. 132-1, 'pursuant to law or ordinance in connection with the transaction of public business,' should include, in addition to those records required by law, those records that are kept in carrying out lawful duties." (quoting Johnson, *supra*, at 1191)); Joseph D. Johnson & David M. Lawrence, *Interpreting North Carolina's Public Records Law*, LOC. GOV'T. L. BULL. 1 (Inst. of Gov't., Chapel Hill, N.C.), Mar. 1977,

written that public records include "materials written or made by private people or companies that are submitted to the government, regardless of whether those materials were required or requested by the government or whether they were sent to the government voluntarily at the private person's initiative."[65]

A document's content controls whether it is a public record. This is true regardless of the document's physical form, location, or whether the public official used a personal or private means of technology to create it. In a case involving a request for the billing records of the personal cell phone of UNC's football coach, Judge Howard Manning wrote:

> The only real issue left is what to do about Coach Davis' personal cell phone billing statements that reflect phone usage related to Coach Davis' work as UNC head football coach (calls that would be public record if made on a UNC paid for and furnished cell phone). I have read the Governor Ritter decision of the Supreme Court of Colorado and with all due respect for that Court, do not believe that our government officials, including University officials and coaches, are entitled to use the personal cell phone "dodge" to evade the North Carolina Public Records law. If Chancellors of the UNC system are doing this thinking that they can avoid public scrutiny of their cell phone records by using their personal cell phones to conduct public business, they need to re-think their decision.[66]

Similarly, evaluating voicemail messages received by a public official, one Attorney General Opinion holds: "In considering each record, you must look at the substance of the voice mail record and determine if it was made pursuant to law, ordinance, or lawful duties while conducting State government business. If yes, then that particular voice mail record likely is a public record."[67] For these reasons, the North Carolina Attorney General's Open Government Guide provides:

> Today, we also have text messages, Facebook posts, tweets—and more. These new technologies have created new challenges around retention and resources. Nonetheless, one thing that has not changed is that we in

at 2; *see also* FRAYDA S. BLUESTEIN, COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 128 (2d ed. 2015) (describing that public records include "any material kept in carrying out an agency's lawful duties"); DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 11 (2d. ed. 2009).

65. N.C. ATT'Y GEN., *supra* note 18, at 4.

66. Memorandum from Howard E. Manning, Jr., J., Orange Cnty. Superior Ct., to Hugh Stevens, Amanda Martin, Marc Bernstein & Jonathan Sasser (Aug. 9, 2012) (on file with the North Carolina Law Review) (notifying parties about the Superior Court's decision on a motion for protective order and explaining terms and conditions). The North Carolina Attorney General has written likewise, stating that "[e]mails about official business are public records even if they are sent using the personal email account of an employee or official." N.C. ATT'Y GEN., *supra* note 18, at 22.

67. Off. of the N.C. Att'y Gen., Advisory Opinion; Application of Public Records Law to Voice Mail Records, 1996 WL 925156, at *1 (Apr. 18, 1996).

> government are the guardians of essential public information. Although new methods of communication have emerged, they haven't changed the responsibilities of government. Under the Public Records Act, what matters is the content of the communication, not the channel.[68]

Now-retired, Frayda Bluestein was a distinguished professor at the University of North Carolina School of Government. Professor Bluestein has written extensively about open government, including several books, articles, and bulletins.[69] In a Q&A, she addressed the public character of records created on private devices or private accounts, advising:

> Is an email related to public business that is created on a privately-owned device or a private email account considered to be a public record under North Carolina's public records law? Yes. . . . When an individual employee or public official creates an email on a private email system, is that a record created by a public agency? Yes.[70]

In guidance offered to public officials and the public, both the North Carolina Governor and Attorney General have written that this interpretation extends to social media. Governor Cooper's publication makes clear:

> North Carolina's Public Records Act and Open Meetings Law govern how public employees are to provide this access. While there are some exceptions to the North Carolina Public Records laws, in general, the records of government are presumed to be public records unless otherwise protected. That goes for drafts, as well as final versions, of documents, memos, voice recordings, social media posts, and more.[71]

The law requires custodians of public records to "permit any record in the custodian's custody to be inspected and examined" and to "as promptly as possible, furnish copies."[72] In addition to the inspection and copy requirements, the law mandates the safekeeping of public records once they are created.[73] A 1951 North Carolina Attorney General Opinion advised that it was illegal to

68. *See* N.C. ATT'Y GEN., *supra* note 18, at 1.

69. *Frayda S. Bluestein*, UNC SCH. GOV'T, https://www.sog.unc.edu/about/faculty-and-staff/frayda-s-bluestein#!/publications [https://perma.cc/Y6GF-8TXG (staff-uploaded archive)].

70. Frayda Bluestein, *Using Private Email for Public Business: Is It Illegal in North Carolina?*, COATES' CANONS NC LOC. GOV'T L. (Mar. 12, 2015), https://canons.sog.unc.edu/2015/03/using-private-email-for-public-business-is-it-illegal-in-north-carolina/ [https://perma.cc/86PX-XSMA].

71. OFF. OF GOV. ROY COOPER, *supra* note 18, at 1; *see also* N.C. ATT'Y GEN., *supra* note 18, at 22 ("The Public Records Act covers communications about official business no matter whether they are made on the agency's system or on a system controlled by a third party, like Facebook or Twitter. Both the posts of the agency employee and any feedback by users will become part of the public record.").

72. N.C. GEN. STAT. § 132-6(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

73. *Id.* § 132-3(a).

destroy public records,[74] and the Public Records Law codifies that prohibition as a misdemeanor, punishable by a fine of up to $500.[75]

In sum, the Public Records Law reaches all documents that are made or received by public agencies.[76] It does not matter whether those records reside on government-issued devices or on personal computers or cell phones. For all public records, the Law imposes two obligations on public officials and public agencies: they must retain copies of public records (that is, they cannot be deleted or otherwise destroyed) and they must allow the public to inspect and copy them (that is, they may not block the public from seeing public records).[77] Almost two dozen North Carolina appellate cases have recognized the state's strong public policy in favor of liberal public access and narrow construction of exemptions.[78]

74. *See* Moore, *supra* note 51, at 1555 (citing 31 Op. N.C. Att'y Gen. 130 (1951)).

75. § 132-3(a).

76. *Id.* § 132-1.

77. *Id.* §§ 132-3(a), -6(a).

78. DTH Media Corp. v. Folt, 374 N.C. 292, 300, 841 S.E.2d 251, 257–58 (2020) ("The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions."); LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of the Cts., 368 N.C. 180, 185, 775 S.E.2d 651, 654 (2015) ("[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records." (quoting News & Observer Publ'g Co. v. State *ex rel.* Starling, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984))); State Emps. Ass'n of N.C. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 211, 695 S.E.2d 91, 95 (2010) ("Our legislature has provided a means for fostering openness and transparency in government through the Public Records Act, codified at Chapter 132 of the North Carolina General Statutes. '[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records.'" (alteration in original) (quoting *Starling*, 312 N.C. at 281, 322 S.E.2d at 137)); Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999) ("Chapter 132 provides for liberal access to public records."); Maready v. City of Winston-Salem, 342 N.C. 708, 730, 467 S.E.2d 615, 629 (1996) ("[E]xceptions should be strictly construed."); News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) ("[T]he legislature intended to provide that, as a general rule, the public would have liberal access to public records." (quoting *Starling*, 312 N.C. at 281, 322 S.E.2d at 137)); *Starling*, 312 N.C. at 281, 322 S.E.2d at 137 ("[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records."); Doe v. Doe, 263 N.C. App. 68, 78, 823 S.E.2d 583, 590 (2018) ("Chapter 132 provides for liberal access to public records." (quoting *In re* Search Warrants of Cooper, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009))); Mastanduno v. Nat'l Freight Indus., 262 N.C. App. 77, 83, 821 S.E.2d 592, 596 (2018) ("[A]pplying the doctrine of *expressio unius est exclusio alterius* to § 97-92(b), we conclude that by expressly listing the subset of records of the Industrial Commission that are exempted from the Public Records Act (i.e. records that are not Awards), the legislature intended that Awards of the Industrial Commission are to be public records."); Gray Media Grp. v. City of Charlotte, 290 N.C. App. 384, 386, 399, 892 S.E.2d 629, 633, 641 (2023) ("The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. . . . Records created or received by a government entity, even when stored or held by a third party, are subject to disclosure under the Public Records Act and the government agency must exercise its right to possession of the records to allow the requestor to inspect or examine the records."); Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., 242 N.C. App. 375, 376, 774 S.E.2d 922, 924 (2015) ("[C]ourts should ensure that the exception to the disclosure

II. SOCIAL MEDIA COMMUNICATIONS ARE A SUBSET OF PUBLIC RECORDS THAT SHOULD NOT BE HIDDEN OR DELETED

When viewed through the lens of the North Carolina Public Records Law, posts by public officials about public business are public records, because they are documents created by public agencies.[79] Similarly, communications received by public officials are also public records.[80] Combining those facts with the regulations that demand public access and forbid destruction leads to a conclusion that public officials cannot, consistent with the Public Records Law, block members of the public or delete posts.

requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law." (quoting *Poole*, 330 N.C. at 480, 412 S.E.2d at 16)); Jackson v. Charlotte Mecklenburg Hosp. Auth., 238 N.C. App. 351, 353, 768 S.E.2d 23, 25 (2014) ("Consistent with that purpose, 'in the absence of *clear statutory exemption or exception*, documents falling within the definition of "public records" in the Public Records Law must be made available for public inspection.'" (quoting *Poole*, 330 N.C. at 486, 412 S.E.2d at 19)); *In re* Investigation into Death of Cooper, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009) ("Chapter 132 provides for liberal access to public records." (quoting *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685)); News Rep. Co. v. Columbus Cnty., 184 N.C. App. 512, 514, 646 S.E.2d 390, 393 (2007) ("Our Supreme Court has held that 'in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection.'" (quoting *Poole*, 330 N.C. at 486, 412 S.E.2d at 19)); Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. 1, 17, 639 S.E.2d 96, 107 (2007) ("[T]he policy underlying our Public Records Act is designed to give liberal access to public records."); Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006), *writ allowed*, 361 N.C. 218, 642 S.E.2d 246 (2007), *and aff'd sub nom.*, Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 361 N.C. 233, 641 S.E.2d 301 (2007) ("Exceptions and exemptions to the Public Records Act must be construed narrowly."); City of Burlington v. Boney Publishers, Inc., 166 N.C. App. 186, 192, 600 S.E.2d 872, 876 (2004) ("The Public Records Act permits public access to all public records in an agency's possession 'unless either the agency or the record is specifically exempted from the statute's mandate.'" (quoting McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 463–64, 569 S.E.2d 431, 434 (2004))); *McCormick*, 164 N.C. App. at 469, 596 S.E.2d at 437 ("As reiterated by our Supreme Court in *Poole*, the statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege."); Gannett Pac. Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 156, 595 S.E.2d 162, 163 (2004) ("The Public Records Act, codified in sections 132-1 *et seq*. of the North Carolina General Statutes, 'affords the public a broad right of access to records in the possession of public agencies and their officials.'" (quoting Times News Publ'g Co. v. North Carolina, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451–52 (1996))); Advance Publ'ns, Inc. v. Elizabeth City, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70 (1981) ("Further, '[g]ood public policy is said to require liberality in the right to examine public records.'" (quoting 66 AM. JUR. 2D *Records and Recording Laws* § 12 at 349 (1973))).

79. N.C. GEN. STAT. § 132-1 (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.) (defining public agency to "include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government").

80. *Id.*

A. *Application of North Carolina's Public Records Law to Public Officials' Social Media*

The expansive definition of public records in North Carolina should sweep within its ambit public officials' posts about public business as well as comments from the public that relate to public business. A pure textual application of the Public Records Law to social media posts and comments—focused almost entirely on whether they are related to the transaction of public business—should answer the question of whether they are public records subject to retention and production. Because North Carolina's law applies to documents without respect to format or location, public officials and employees already are called upon to make such judgments.[81] For example, a council member who receives a request for "all communications regarding the proposed rezoning of XYZ property" already must search both government and private email accounts, cell phones, and computers for responsive documents.[82] The assessment of whether a social media post is sufficiently related to the transaction of public business is just the latest in a string of determinations a government official or employee must make.

To the degree a social media account is used to communicate or receive communications about public business, it should remain visible and available to the public under the Public Records Law's directive of disclosure. Because it is immaterial that social media posts may be "housed" on a server at the headquarters of Facebook or X, government officials and employees have constructive possession of their social media accounts, including posts that would constitute public records.[83]

Regardless of what might be best practices or even required by the law, some public officials decide to silence critics by deleting negative posts or even blocking citizens from the page altogether, especially when comments are particularly sharp or caustic. It may be human nature to recoil from biting criticism, but when a post is removed, others cannot read it and draw their own conclusions about the issues at hand. When a person is blocked from a social media page or account, the blocked individual cannot read anything that is posted by the public official or by fellow citizens, regardless of how important it might be. The blocked citizen is thereby barred from the digital town square.

1. Gaston County, North Carolina

One example can be drawn from a dispute that arose in Gaston County, North Carolina. In November 2020, Gaston County filed a libel suit against the *Gaston Gazette*, alleging that the *Gazette* libeled the County in an article

81. *See supra* note 71 and accompanying text.

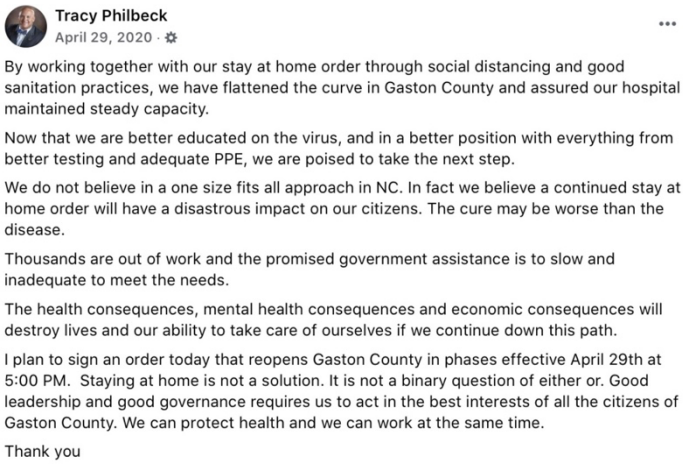
82. *See supra* notes 65–71 and accompanying text.

83. *See supra* note 63 and accompanying text.

reporting that commissioners approved $400,000 in worker compensation settlements in a closed session.[84] The lawsuit asked the court to order the newspaper to retract the story and apologize.[85] Corey Friedman, a journalist and former resident of Gaston County, made critical posts on Commissioner Tracy Philbeck's Facebook and X accounts, calling the County's actions frivolous.[86] Commissioner Philbeck first deleted the comments and then blocked Mr. Friedman.[87] These actions not only denied members of the public access to Mr. Friedman's observations and opinions, but they also cut Mr. Friedman off from all future content that was later posted by Commissioner Philbeck.

Some of Commissioner Philbeck's posts were personal, but some were directly related to public business. For example, at one point Commissioner Philbeck posted the following on his Facebook page[88]:

Figure 1: Commissioner Philbeck's April 29, 2020, Facebook Post



Tracy Philbeck
April 29, 2020 ·

By working together with our stay at home order through social distancing and good sanitation practices, we have flattened the curve in Gaston County and assured our hospital maintained steady capacity.

Now that we are better educated on the virus, and in a better position with everything from better testing and adequate PPE, we are poised to take the next step.

We do not believe in a one size fits all approach in NC. In fact we believe a continued stay at home order will have a disastrous impact on our citizens. The cure may be worse than the disease.

Thousands are out of work and the promised government assistance is to slow and inadequate to meet the needs.

The health consequences, mental health consequences and economic consequences will destroy lives and our ability to take care of ourselves if we continue down this path.

I plan to sign an order today that reopens Gaston County in phases effective April 29th at 5:00 PM. Staying at home is not a solution. It is not a binary question of either or. Good leadership and good governance requires us to act in the best interests of all the citizens of Gaston County. We can protect health and we can work at the same time.

Thank you

84. Marshall Terry, *Gaston County Sues Gaston Gazette over Story It Says Was Defamatory*, WFAE (Nov. 20, 2020, 7:42 AM), https://www.wfae.org/crime-justice/2020-11-20/gaston-county-sues-gaston-gazette-over-story-it-says-was-defamatory [https://perma.cc/87GM-HLF2].

85. *Id.*

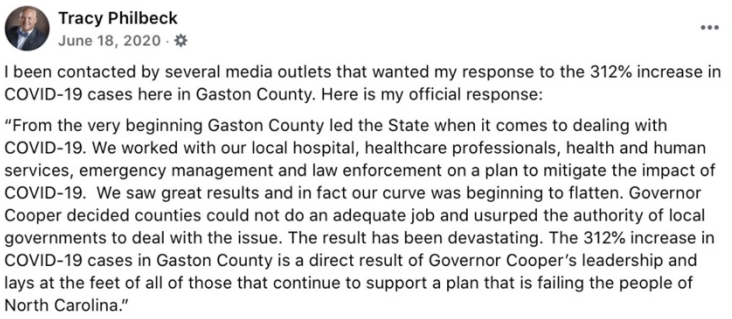
86. Verified Complaint & Request for Mediation Pursuant to N.C. Gen. Stat. § 7A-38.3E ¶ 23, Friedman v. Philbeck, No. 21-CVS-3976 (Gaston Cty. Sup. Ct. Div. filed Oct. 1, 2021).

87. *Id.* ¶¶ 25, 30, 32.

88. *Id.* Exhibit K at 4.

He also posted[89]:

Figure 2: Commissioner Philbeck's June 18, 2020, Facebook Post



Corey Friedman brought suit against Commissioner Philbeck for violation of the Public Records Law when Philbeck failed to produce records related to his Facebook page.[90] Although the lawsuit did not contain a Section 1983 claim for the Commissioner's deletions and blocking, Friedman and Philbeck reached a settlement that included an agreement by Philbeck that so long as he held public office, he would keep his page accessible to the public and would not hide or delete comments.[91] Commissioner Philbeck did not seek reelection in 2022,[92] and seemingly his Facebook page has been disabled.[93]

89. *Id.* Exhibit K at 7.

90. *Id.* ¶ 39.

91. Settlement Agreement & Release of All Claims at 2, Friedman v. Philbeck, No. 21-CVS-3976 (Gaston Cty. Sup. Ct. Div. filed Oct. 1, 2021).

92. Kevin Ellis, *Tracy Philbeck Won't Run for Gaston County Commissioner in 2022*, GASTON GAZETTE, https://www.gastongazette.com/story/news/politics/2021/10/25/philbeck-wont-run-gaston-county-commissioner-2022/8547377002/ [https://perma.cc/W7MS-TXXE] (Oct. 26, 2021, 6:00 AM).

93. *See* Tracy Philbeck, FACEBOOK, https://www.facebook.com/commissionerPhilbeck [https://perma.cc/X5S3-WDL6 (staff-uploaded archive)]. Editor's Note: This Facebook account has been deleted, so the post is no longer available online.

2. Wilson County, North Carolina

Another example of a public agency communicating through Facebook arose in Wilson County, North Carolina. In 2019, the Town of Lucama established its first and only online presence by creating a Facebook page.[94] The rules of the page prohibited "any criticizing of the town or individuals"[95]:

Figure 3: Town of Lucama's December 12, 2019, Facebook Post

Most of the page was in fact "informational."[96] However, praise was accepted—"and thank you Miss Dena for keeping us informed. You do a super job!!!"[97]—but criticism was not. The Town deleted and blocked Matthew Creech when he challenged the constitutionality of the positive-only comments policy.[98]

94. Town of Lucama, FACEBOOK (Dec. 12, 2019), https://www.facebook.com/permalink.php?story_fbid=pfbid02wAnA7zSmri5KqA2jeumaQ6XQSbik9HVkmBQpFBRV7bxSh6CqwskSE6V7Lx4J6LG4l&id=111476927007225 [https://perma.cc/M8QH-PSYM (staff-uploaded archive)] (new Facebook page).

95. *Id.*

96. For example, the Town of Lucama page had a post with the "Top 5 COVID-19 Scams," the Town announced that utility bills could be paid by credit card, and the Town explained a mistake that had been made in utility billing. Town of Lucama, FACEBOOK (Mar. 25, 2020), https://www.facebook.com/permalink.php?story_fbid=pfbid0VG3pCWC4vWJQvQimwtHaQdKN31uXSGH8My4ftA1sMJJaaPSce6dcNNQorZr7vdpPl&id=111476927007225 [https://perma.cc/XS55-WD6W (staff-uploaded archive)] ("Top 5 COVID-19 Scams"); Town of Lucama, FACEBOOK (Mar. 9, 2021), https://www.facebook.com/permalink.php?story_fbid=pfbid0FoJiXdbG1YWhpuyUNdKqvr2MaG2WuHjQTskiYFgvfzUzdCSYfYRPLxv7V1j3kmATl&id=111476927007225 [https://perma.cc/6RV9-KNPY (staff-uploaded archive)] (utility bills paid by credit card); Town of Lucama, FACEBOOK (Dec. 28, 2022), https://www.facebook.com/permalink.php?story_fbid=pfbid02fDsxaqEZLLxDCcKU2he8QTGmy26jtB4YGFTqX49yn9L27e1PHCdeUNLgexhTJVEwl&id=100037756758921 [https://perma.cc/RWD2-WX8P (staff-uploaded archive)] (mistake in utility billing).

97. Judy Mason, Comment to Town of Lucama, FACEBOOK (Feb. 28, 2022), https://www.facebook.com/permalink.php?story_fbid=pfbid04ro7sNDn26eLuEnb5gKanANWqFGjVehCdZnzH7A1Af942V4BQsGqwCRHiYMCisMQl&id=111476927007225 [https://perma.cc/38CV-CGFH (staff-uploaded archive)] ("super job!!!").

98. Letter from Sarah Ludington, *supra* note 3.

During the time Mr. Creech was blocked from the Town of Lucama Facebook page, the Town posted: "We have been notified of power outages and crews are already working. Help is on the way. Please be patient as they work hard and quickly to assess the issue and make the repairs. We apologize for any inconvenience."[99]

3. Alexander County, North Carolina

Another example of a public agency cutting off communication with citizens comes from Alexander County, a rural North Carolina area, where Steven Barrett was blocked from posting on the public school system's Facebook page. Mr. Barrett had the temerity to ask whether buses would be running and if school would be open on a snowy, winter morning. Due to a disability, Mr. Barrett could not drive his daughter to school, and he hoped to avoid her needlessly waiting for the school bus in the dark at 6:00 a.m. The school system had a policy of only permitting positive feedback in the comments: "ACS invites you to celebrate student, staff and school recognitions by commenting on the posts on our page,"[100] but when he questioned the school system, Mr. Barrett's post was deleted.

The Alexander County School System used Facebook for posts such as: "Families: We have four schools in a 'Code In' as a precaution. Students and staff are NOT thought to be in immediate danger. Taylorsville police are responding to a shooting. We are working with the department and will update as soon as possible. Time 12:58pm."[101] Through three more posts, the school system updated the public and then lifted the Code.[102] In addition to being cut

99. Town of Lucama, FACEBOOK (June 5, 2022), https://www.facebook.com/permalink.php?story_fbid=pfbid013yPqa9UrgXWu4z7omVvjPRjv1fVfgmfaKgecFa6JuHMhQek7eGg389KiBkrEFv5l&id=111476927007225 [https://perma.cc/EU9W-T8LJ (staff-uploaded archive)] (power outages).

100. Alexander County Schools, FACEBOOK (Feb. 20, 2022, 7:06 PM), https://www.facebook.com/alexandercoschools/posts/pfbid02PF1iinoJG6GtgZQTYJpHY96ekvEAHiak8LtMcbS4XZGkT3NzkhtuB9Tg2d59XBM5l [https://perma.cc/8Y3H-XUH8 (staff-uploaded archive)] (soliciting comments).

101. Alexander County Schools, FACEBOOK (Aug. 29, 2022, 12:58 PM), https://www.facebook.com/alexandercoschools/posts/pfbid0gMxBDS7GbGcEyKAQNJaR9LJyPYwJZpQTCffmbjtSjgQn9n5UqHoSk1xZwhpxXJByl [https://perma.cc/U5L2-HPLP (staff-uploaded archive)] ("Code In").

102. Alexander County Schools, FACEBOOK (Aug. 29, 2022, 1:45 PM), https://www.facebook.com/alexandercoschools/posts/pfbid0DVR1DAHZpsyKTHypvJJTCLkdqmfEAMmzjUmKojqxU2uMod3TtesnYaMyn57K2jRal [https://perma.cc/WF6H-VRLV (staff-uploaded archive)] (explaining that the "code in" would remain in effect for the remainder of the day); Alexander County Schools, FACEBOOK (Aug. 29, 2022, 1:54 PM), https://www.facebook.com/alexandercoschools/posts/pfbid0cveHbZiaKLuW2jdf87SbUqBzbqiD1THKmGDQQ36HEyzX3n4QKATh8PDQQjSy8eCal [https://perma.cc/W53D-4FCN (staff-uploaded archive)] (explaining that another school had been added to the "code in"); Alexander County Schools, FACEBOOK (Aug. 29, 2022, 2:14 PM), https://www.facebook.com/alexandercoschools/posts/pfbid024mSgeDLf6k83Yjy95ZFzsxqqjbM4CuKAiFBNxMo2zmRzJA3fWq33DdS9SkSaG4uAl [https://perma.cc/J6D5-SR8F (staff-uploaded archive)] (giving notice that the "code in" had been lifted).

off from addressing the school regarding things like weather emergency policies, Mr. Barrett was cut off from effective communication with other parents at the school.

4. Tying It All Together

There can be no question that in all three of these cases the social media accounts were being used, in whole or in part, for communications "in connection with the transaction of public business by any agency of North Carolina."[103] In Gaston County, the issue was the County Commissioners' decision to sue the local newspaper. In Lucama, the Town ironically blocked a citizen for saying the Town's Facebook policy violated the Constitution. In Alexander County, a citizen was blocked for questioning decision-making and communications by a school system. These all were matters of public, not personal, concern. Under the Public Records Law, the public officials had an obligation to permit those records "to be inspected and examined."[104]

Applying purely statutory rights derived from the North Carolina Public Records Law would result in Mr. Friedman, Mr. Creech, and Mr. Barrett being able to post on the social media accounts, having those posts retained on the sites, and keeping access to the accounts. It would not matter whether the accounts were officially held and operated by a government entity, as in Lucama or Alexander County, or "privately" held and operated by a government official or employee, as with Commissioner Philbeck.[105] The comments—public records under the plain meaning of the statute—were destroyed when they were deleted, which is a violation of the retention requirements.[106] Blocking them from seeing the social media accounts they wanted to access cut off their right to inspect public records—the posts that related to public business.

B. *Challenges of Adopting a Statutory Analysis and Solutions*

1. Concerns Raised by Public Officials

One of the challenges of social media pages is that access is essentially an on/off switch.[107] If a member of the public is allowed access to a page, they can see it all: communications about public business as well as vacation pictures, birthday wishes, and props given to favorite teams. Public officials might argue

103. N.C. GEN. STAT. § 132-1(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

104. *Id.* § 132-6(a).

105. *See supra* notes 83–90 and accompanying text.

106. N.C. GEN. STAT. § 132-3(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

107. *See* Lindke v. Freed, 144 S. Ct. 756, 770 (2024) ("Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment.").

that requiring public access to discrete emails sent on a private email account or to official documents created on private computers is fundamentally different. A person cannot be blocked from just personal or private parts of a social media page. As the Supreme Court noted in *Lindke*:

> Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: 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.[108]

This challenge is not insurmountable for a public official who sincerely wants to keep a private life private. Much like individuals who are required to keep two cell phones because their employer does not allow private use of corporate equipment, a public official with this concern can easily maintain two Facebook or X accounts. Unlike cell phones, though, social media accounts such as Facebook, X, and Instagram are generally free of charge, greatly lessening the burden of keeping two accounts.

Another complaint of public officials resisting blanket public access to their social media pages is lack of control over "posters." The tenor and tone of discourse on social media is sometimes hateful and devolves into mudslinging.[109] The Supreme Court has recognized, though, that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[110] By definition, public officials have invited public attention and scrutiny. To the degree a post on a public official's social media is a purely personal attack instead of a comment about public business, it likely does not fit the definition of a public record and could lawfully be deleted. But a posting that is merely critical of a public official could fairly be characterized as being about public business, in which case it would be protected and must be preserved. The distinction between these two types of comments might be hard to draw, though public officials are called upon to make such determinations of what is or is not public business when responding to traditional public records requests. Nonetheless, developing rules that are instructive and perhaps

108. Lindke v. Freed, 144 S. Ct. 756, 770 (2024).

109. Peter Leavitt & Cynthia Peacock, *Civility, Engagement, and Online Discourse: A Review of Literature*, UNIV. OF ARIZONA NAT'L INST. FOR CIV. DISCOURSE 2–3 (Aug. 4, 2014), https://mediaengagement.org/wp-content/uploads/2014/09/Civility_Online-Discourse_ENP_NICD report.pdf [https://perma.cc/24N2-XPKC] ("Online spaces are unique social environments that can make civil discourse challenging. . . . One common criticism of online interactions is that they are often uncivil and impolite.").

110. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

approach bright-line distinctions would be an aid to public officials who are called upon to be faithful to the public records law.

Some public officials have claimed that requiring retention of comments on pages is tantamount to compelled speech, but this argument is unavailing. The very nature of call-and-response on social media pages makes clear where one speaker's message ends and another begins. There is no legitimate concern that a third-party reader might confuse a commenter's communications with those of the official or that the official endorses the idea expressed.

2. Potential Drawback of the Forum Analysis

One weakness of the state actor/public forum analysis is that it requires more judgment and evaluation by the public official than the Public Records Law analysis requires. This weakness might invite unnecessary litigation from the public. Questions during oral argument in *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier* probed whether the key question is ownership of the social media site or use of the site.[111] Namely, if a site is heavy with personal posts, does that "override" its public aspects?

The Public Records Law analysis of social media, by cataloguing all public-related messages as public records, eliminates numerous value judgments raised by the state actor/public forum analysis. In the oral argument, for example, Supreme Court Justices asked a host of questions about the qualitative and quantitative aspects of the social media accounts under review. Justice Thomas asked, "In this case, just going through the Joint Appendix, there's quite a bit that is personal. So how would you just factually distinguish that or emphasize the fact that . . . the personal here does not override the official?"[112] Justice Alito asked, "What if 95 percent of the posts are personal and 5 percent of the posts involve discussion of his work?"[113] Justice Gorsuch said, "I'm confused. Is -- is it the channel that we're supposed to be focusing on . . . or is it the message at issue itself?"[114]

All of the Justices' questions would be answered and resolved if the assessment were purely a public records question. A page must remain open to the public if a government official or employee posts public records—communications related to the transaction of public business. In fact, keeping a page fully "open" and allowing unfettered access would relieve a public official from any other production obligation. The Public Records Law provides:

111. *Lindke* Transcript, *supra* note 13, at 60 ("And so to make so much turn on who owns the Facebook page seems quite artificial."); *O'Connor-Ratcliff* Transcript, *supra* note 13, at 22 ("Is the act that is at issue in this case what the person who owns the Facebook page says, or is the act that is at issue the forum, so to speak, that is created by enabling comments?").

112. *Lindke* Transcript, *supra* note 13, at 5.

113. *Id.* at 9.

114. *Id.* at 11.

> A public agency or custodian may satisfy the requirements in subsection (a) of this section by making public records available online in a format that allows a person to view the public record and print or save the public record to obtain a copy. If the public agency or custodian maintains public records online in a format that allows a person to view and print or save the public records to obtain a copy, the public agency or custodian is not required to provide copies to these public records in any other way.[115]

A government official or employee who desires a purely private space free from public eyes and public commentary can easily create such a social media account and refer all public engagement to a public-facing account. In the event someone "approaches" that government official with a public policy question on a private page, the government official can simply re-route the inquiry to the public page for answer or discussion.

3. Being a Matter of State Law Is Both a Bug and a Feature

Access to state and local government records is purely a matter of state law, which creates both a bug and a feature.[116] Unlike a right grounded in the Constitution, what the North Carolina General Assembly giveth, it can take away. An amendment to the Public Records Law to exempt social media could eviscerate all statutory rights of access. On the other hand, states are free to create requirements that go beyond the minimum set by the Constitution. North Carolina's near century of commitment to public records access suggests that an exemption of social media posts would be a significant deviation from historic transparency.

C. *The Impact of Supreme Court Cases*

On March 15, 2024, the Supreme Court issued opinions in two cases they accepted "to resolve a Circuit split about how to identify state action in the context of public officials using social media."[117] In both cases, the plaintiffs sought a determination of their First Amendment rights under 42 U.S.C.

115. N.C. GEN. STAT. § 132-6(a1) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.).

116. At least one state with public records laws similar to North Carolina's has recognized social media posts as public records. Pennsylvania's public records law has a broad definition that encompasses "information" that "documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 PA. CONS. STAT. § 67.102 (2024). The law takes no regard of the physical form of the record, and the Commonwealth Court of Pennsylvania applied it to certain social media posts. *See* Wyo. Borough v. Boyer, 299 A.3d 1079, 1083–86 (Pa. Commw. Ct. 2023).

117. O'Connor-Ratcliff v. Garnier, 144 S. Ct. 717, 718 (2024).

§ 1983.[118] For a Section 1983 claim to succeed, plaintiffs must prove that their constitutional or statutory rights have been violated by someone acting under color of state law.[119] By definition, therefore, the question of state action is central to the legal evaluation.[120] The Court articulated its essential holding in *Lindke*—which matched neither the Sixth nor the Ninth Circuit test—vacated both judgments below and remanded both cases for reconsideration consistent with the principles set forth.[121]

At the outset, the Court noted that the First Amendment applies only to governmental action, meaning the plaintiff's "claim is a nonstarter if Freed posted as a private citizen."[122] Although Freed argued that his Facebook page was "strictly personal," he also used it to post information related to his job as the Port Huron, Michigan city manager.[123] The Section 1983 inquiry therefore becomes how to categorize Freed's mixed-use Facebook page.

While never reaching a conclusion about whether Freed was acting under color of state law, the Court described facts that might come into play. For example, in his Facebook profile picture, Freed was wearing a city lapel pin, he identified himself as "'Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.,'" and he included a link to the Port Huron website and email address.[124] The Court described the page content as containing "hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston."[125] At the same time, he also posted about "mundane [job] activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch."[126] He reposted press releases from others and sometimes "solicited feedback from the public . . . [including] a link to a city survey about housing and encouraged his audience to complete it."[127]

118. Lindke v. Freed, 144 S. Ct. 756, 764 (2024) ("Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated his First Amendment rights."); *O'Connor-Ratcliff*, 144 S. Ct. at 717 ("The Garniers sued the Trustees under 42 U.S.C. § 1983, seeking damages and declaratory and injunctive relief for the alleged violation of their First Amendment rights.").

119. *Lindke*, 144 S. Ct. at 765 n.1.

120. *Id.* at 764 ("Because only state action can give rise to liability under § 1983, Lindke's claim depended on whether Freed acted in a 'private' or 'public' capacity." (quoting Lindke v. Freed, 563 F. Supp. 3d 704, 714 (E.D. Mich. 2021), *aff'd*, 37 F.4th 1199 (6th Cir. 2022), *vacated and remanded*, 144 S. Ct. 756 (2024)); *O'Connor-Ratcliff*, 144 S. Ct. at 718 (granting certiorari "to resolve a Circuit split about how to identify state action in the context of public officials using social media").

121. *Lindke*, 144 S. Ct. at 770; *O'Connor-Ratcliff*, 144 S. Ct. at 718.

122. *Lindke*, 144 S. Ct. at 762.

123. *Id.*

124. *Id.* at 763.

125. *Id.*

126. *Id.*

127. *Id.*

In a deceptively short, two-part test, the Court held that "such speech is attributable to the State only if the official: (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[128] The Court noted that although the appearance of a public official's activities are relevant in the second prong of the test, appearance in the absence of authority is not enough.[129] "Private action—no matter how 'official' it looks—lacks the necessary lineage. . . . [T]he presence of state authority must be real, not a mirage."[130]

The Court required more, though, than a simple finding that a public official had some authority. The public official must have been speaking on a topic "within [his] bailiwick."[131] For that reason, the Court explained, if a public official with no responsibility for health code compliance posts about local restaurants and "deleted snarky comments made by other users," the posts and deletions are unrelated to his actual authority and therefore do not give rise to any constitutional violation.[132] "The inquiry is not whether making official announcements *could* fit within the job description; it is whether making official announcements is *actually* part of the job that the State entrusted the official to do."[133]

If a plaintiff has satisfied the requirement that a defendant had authority to speak, further inquiry is required to determine if in fact he was using that authority. The Court stressed that public officials do not lose all ability to speak individually, even about public affairs.[134] If it is difficult to determine whether an official is meaning to speak personally or as a public official, the Court noted that a plaintiff may need to prove additional factors.[135] However, the only example the Court gave as likely to establish official action—"an official who uses government staff to make a post"—is also unlikely to exist in a "close call" case.[136]

The Court highlighted some of the problems of public officials using social media pages for both personal and official communications. "Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment."[137] Noting the "bluntness" of Facebook blocking tools, the Court

128. *Id.* at 762.

129. *Id.* at 766–67 ("The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.").

130. *Id.* at 767.

131. *Id.*

132. *Id.*

133. *Id.* at 768.

134. *Id.* at 770.

135. *Id.*

136. *Id.*

137. *Id.*

cautioned that an official with "mixed use" social media "might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability."[138]

The Court's standard falls between the Ninth Circuit's appearance test and the Sixth Circuit's duty and authority test. Indeed, the Court noted that "the state-action doctrine demands a fact-intensive inquiry,"[139] which is a virtual antithesis of a bright-line rule. In so holding, the Court did little to provide clarity to either public officials or members of the public wanting access to public officials.

D. *A Model for Clarity*

In order for public officials, public employees, and the public to have a clear understanding of what is permitted and what is required, a governmental social media policy should comprise certain key elements. As in any area of the law, clarity promotes compliance, at least among those who are seeking to follow the law. A definition of what constitutes official business is at the heart of the matter. For fully official accounts—such as the Facebook page of the Alexander County School System—no citizen should ever be blocked. Comments should never be deleted by reason of the viewpoint expressed, although topical deletions might not run afoul of the First Amendment. For example, a city's social media account could require comments be related to city business or could prohibit profane speech or true threats.

A sound policy should also address the social media activities of employees and public officials. After Mr. Creech was blocked from the Facebook page of the Town of Lucama, he contacted the Duke Law First Amendment Clinic and opened a dialogue with the Town's legal counsel.[140] The Town unblocked Mr. Creech and agreed to amend its social media policy.[141] On September 5, 2023, the Town passed a social media policy that addressed the rights of individuals to access the official page as well as the use of personal social media accounts by Town officials and employees.[142] Officials and employees are directed to maintain separation between their official and personal social media accounts and must not use their personal accounts to "discuss, disseminate information, or comment on Official Business of the Town."[143] Anyone who blurs the lines and engages in communications about official business on their personal social

138. *Id.*
139. *Id.* at 766.
140. Letter from Sarah Ludington, *supra* note 3.
141. *See* LUCAMA BD. OF COMM'RS, MINUTES 6 (N.C. Sept. 5, 2023).
142. TOWN OF LUCAMA SOCIAL MEDIA POL'Y (effective Sept. 5, 2023).
143. *Id.* at 2.

media accounts by "[mingling] personal communications with discussion, information and comments relating to Official Business of the Town" must abide by the access and nondeletion rules of official accounts.[144]

By mandating clear delineations between personal and public communications, the Town of Lucama provides clarity for public officials and the public alike. Anyone interested in following or commenting on public business will have access, but officials and employees who want to have a purely personal space for purely personal matters are free to do so.

CONCLUSION

Both the letter of the North Carolina Public Records Law and the public policy underlying the statute support an interpretation that the public should have liberal access to the social media posts of government officials and employees. The focus of the North Carolina Public Records Law on content and disregard for technicalities such as medium and location leads to a conclusion of access. When public officials write about public issues, the public is entitled to know. Deleting comments posted by the public is both a destruction of a public record and a distortion of reality. The fact that a public official or employee wanting to keep a purely private social media account can do so offers an antidote to any complaints such a person might have to allowing public access.

It has been said that news is the first rough draft of history.[145] Social media may in fact be creating a zero draft of history—the raw footage, as it were—of the give and take between the public official and the public. Never before has the public had such direct access to their governmental officials, and we should bring all possible tools to bear to preserve that record.

144. *Id.*

145. Jack Shafer, *Who Said It First?*, SLATE (Aug. 30, 2010, 8:04 PM), https://slate.com/news-and-politics/2010/08/on-the-trail-of-the-question-who-first-said-or-wrote-that-journalism-is-the-first-rough-draft-of-history.html [https://perma.cc/NEA4-HHS8].