

Municipal Use of Social Media: Do's and Don'ts

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August 20, 2025



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For Those on Zoom: How to Turn On Closed Captions

1. Click the **"CC" (Show Captions)** button at the bottom of your Zoom screen.
 - If you don't see it, click **"More (...)"** and then select **"Show Captions."**
2. Captions will appear at the bottom of your Zoom window.
3. To change the font size, click the **arrow (^)** next to the **CC button**, then choose **"Caption Settings,"** then change Font Size on scale to either Small or Large.



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Agenda

- Social Media & the Right-to-Know Law
- Social Media & the First Amendment
- Government Speech: Local government control of content on its social media outlets
- Social Media & the First Amendment - Public Employees
- Social Media - Suggested Policies

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SOCIAL MEDIA & THE RIGHT-TO-KNOW LAW

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Is It a Governmental Record? RSA 91-A:1-a

Any information

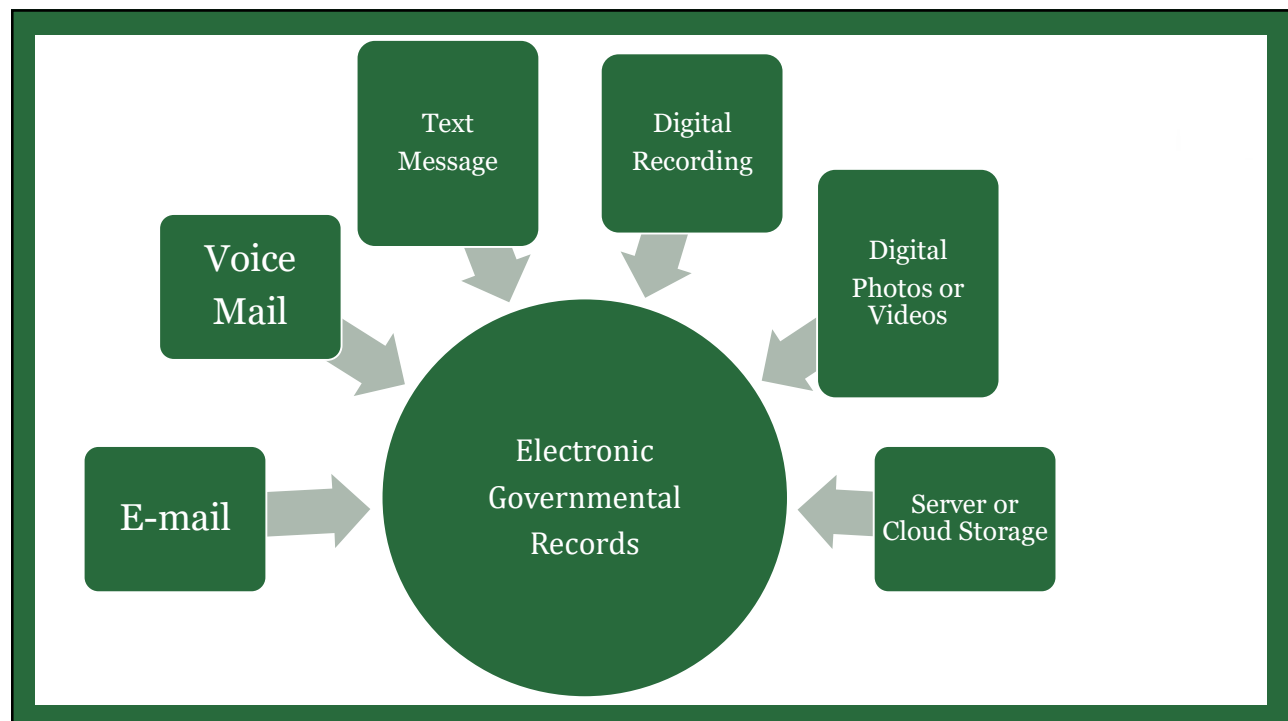
- created
- accepted, or
- obtained

By, or on behalf of,

- any public body, or a quorum or majority thereof or
- any public agency

in furtherance of its official function

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Access to Government Records

- Can you require a person join a social media website in order to gain access to the governmental records stored on that site?
- *“Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, “to copy” means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.” RSA 91-A:4, I*

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Custody & Accessibility of Social Media Information

- Duty to maintain access to governmental records
- *“Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.” RSA 91-A:4, III*
- *Ensure that access to information on a social media site has no barriers to that access*

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Retention of Social Media Information

- Archival period for governmental records on social media. SB1
- *“Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.” RSA 91-A:4, III-a*
- Consider housekeeping measures just like you should be doing with your email and search history.

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SOCIAL MEDIA & THE FIRST AMENDMENT

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Slide 9

SB1 The info in yellow can be deleted - it was UNH T2 related.
Stephen Buckley, 2025-08-18T13:39:43.110

Constitutional Protections Afforded To Free Speech

1st Amendment to the Constitution of the United States of America:

Congress shall make no law...abridging the freedom of speech...

Article 22 of the New Hampshire Constitution:

Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

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Citizen Comments – Blogs?



- A blog might be set up to accept public comments on an issue, or officials might have email or chat exchanges with citizens.
- These exchanges may need to be edited to avoid publishing defamatory statements, to keep the posts on the topic at hand or to avoid obscenity or vulgarity.
- Editing and deleting posts by the public may inadvertently violate the First Amendment rights of free speech.
- *Suggestion – Avoid creating a public forum by not allowing posting comments by members of the public – instead, permit submission for requests for service.*

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GOVERNMENT SPEECH: LOCAL GOVERNMENT CONTROL OF CONTENT ON ITS SOCIAL MEDIA OUTLETS



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Pleasant Grove City v. Summum



- Religious Group sought permission to erect stone monument along side 15 other monuments.
- The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.
- Permanent monuments displayed on public property typically represent government speech
- Denial by city to erect the monument was not infringement of free speech.

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Walker v. Tex. Div., Sons of Confederate Veterans



Texas authorized specialty plates

Sons of Confederate Veterans sought plate with Confederate battle flag

Texas was permitted to choose whether to display the message conveyed by the Confederate flag

The plate's message amounted to government speech the State had the power to control

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Sutcliffe v. Epping School District



Welcome to Epping New Hampshire's Official Home on the Web



2017 TAX RATE - \$25.54

School \$17.36, Town \$5.00, State \$3.24 and County \$1.10

Town Hall Closed for the following holidays in 2018:
January 1, January 15, February 19, May 25, June 18, September 3, October 8, November 12, November 22 & 23,
December 22 and January 1, 2019

2017 TOWN REPORTS ARE AT THIS TOWN HALL or www.eppingnh.org

Sample Ballot to be voted on at the March 19th election, NH Open Book Town www.eppingnh.org

Learn More About Us www.eppingnh.org

Local History & Genealogy www.eppingnh.org

There are 5 openings on the Epping Town Management Advisory Committee. If any Epping resident is interested in serving on this committee please send a letter of interest to the Board of Selectmen, 157 Main Street, Epping, NH 03042 or advisory@eppingnh.org

There is an opening on the Conservation Committee. Please put a note in the Town mailbox regarding interest.

The Epping Conservation Committee is in need of volunteers to monitor Town conservation lands, help maintain trails, etc. Put a note in the Conservation mailbox if interested.

The outside water has been shut. Please contact to conserve water whenever possible.

Information to access on Boards, Commissions and Committees www.eppingnh.org

▶ Town website content determined by the Select Board

▶ Hyperlinks must be from governmental agencies or sponsored by the Town.

▶ Refusal of Town to permit hyperlink by protest group not Free Speech violation.

▶ Controlling Town website content was governmental speech.

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Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022)

- Municipalities can adopt policies that controls the content of signs and flags that are displayed at government venues (including content on municipal social media sites).
- First, a written policy should be developed that makes clear that the government venue is not intended to serve as a forum of free expression by the public, rather any sign, flag or information displayed is an expression of the sentiments of local government.
- Thus, where signs are allowed to be displayed on municipal property, (including information on municipal social media sites) those signs could be limited to community non-profit organizations that are promoting civic events. Similarly, if flags are allowed to be flown on a municipal flag pole, a list of approved flags could be provided.

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The Limits of Government Speech - *Electioneering*

659:44-a Electioneering by Public Employees. –

- I. No public employee, as defined in RSA 273-A:1, IX, shall electioneer while in the performance of his or her official duties.
- II. No public employee shall use government property or equipment, including, but not limited to, telephones, facsimile machines, vehicles, and computers, for electioneering.
- III. For the purposes of this section, "electioneer" means to act in any way specifically designed to influence the vote of a voter on any question or office.
- IV. Any person who violates this section shall be guilty of a misdemeanor.

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SOCIAL MEDIA & THE FIRST AMENDMENT *PUBLIC EMPLOYEES*



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Free Speech And Public Sector Employees

- The United States Supreme Court has construed the 1st Amendment as guaranteeing government employees certain workplace protections related to their speech.

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Why Are Public Sector Employees Different?

When the State is also considered the employer, certain provisions of the United States Constitution and the New Hampshire Constitution that regulate the conduct of the State extend directly into the workplace.

STATE = EMPLOYER = CONSTITUTIONAL PROTECTIONS

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Free Speech And Public Sector Employees

Cornerstones of the United States Supreme Court's jurisprudence on public sector employee speech:

1. Speech must address matters of public concern to be protected (Connick);
2. Balance then needs to be struck between employee rights and legitimate interests of government acting as employer (Pickering);
3. Employee statements made in course of official duties generally are not protected.

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Lindke v. Freed

- City manager had a Facebook page he started long before he was appointed manager
- He added his title to his Facebook page along with links to the city's website
- The city manager mixed personal posts and other policy related posts on his Facebook
- Mr. Freed was a citizen who commented on the managers Facebook and eventually the manager blocked Freed
- State Action Test:
 - The official had actual authority to speak on the State's behalf
 - Purported to exercise that authority when speaking on social media

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State Action v. Personal Expression

- In *Freed*, the court recognized that public officials and employees also have their own First Amendment rights, including the right to speak about their employment
- Factors like use of staff or resources can be used to demonstrate state action
- There must be a tie between the official's authority and the gravamen of the plaintiff's complaint.
- Is the information available elsewhere?
- Labels and disclaimers can help

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Practice Pointers

- The easiest solution is for employees and officials to have separate accounts, personal and professional. And not to co-mingle information
- Do not include official logos, email, websites, etc. on personal accounts
- Include disclaimers
- Don't post something on personal account that isn't available elsewhere
- Blocking someone entirely is viewed as a bigger deal than deleting individual posts

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Public Concern?

My boss is stealing from the Town.

vs.

My boss is a jerk.



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Pickering Balancing Test



- Government's right to manage the workplace has to be weighed.
- Protect confidential information.
- Prevent harassment in the workplace.
- Insure productivity.
- Maintain order/discipline.

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Kennedy v. Bremerton Sch. District (2022)

- When an employee "speaks as a citizen addressing a matter of public concern," the Court's cases indicate that the First Amendment may be implicated and courts should proceed to a second step
- At this step, courts should engage in a delicate balancing of the competing interests surrounding the speech and its consequences.
- The District, like the Ninth Circuit below, insists Mr. Kennedy's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation under Lemon and its progeny.
- The Supreme Court ruled that it was a phantom concern the private, personal prayer of a football coach at end of a football game would be coercive and thus justified suppressing that speech of Coach Bremerton.
- Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022)

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Recent Decision – *Hussey v. City of Cambridge*, Decided August 15, 2025 – First Circuit Court of Appeals

- Cambridge Police officer Hussey posted allegedly derogatory comments about the George Floyd murder by Minneapolis police office on a private Facebook page.
- Those comments were circulated among residents and officials of the NAACP in the City resulting in complaints about Officer Hussey leading to his 4-day suspension without pay. Hussey sued claiming his First Amendment civil rights were violated.
- First Circuit found the comments were not protected under the *Pickering* balancing test because:
 - ✓ Hussey's protected speech was derogatory and only entitled to diminished protection;
 - ✓ Police Department's prediction of community trust being undermined by comment was reasonable; and
 - ✓ The decision to discipline Hussey was only motivated for concern for harm to the community trust's in the Police Department.

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Public Sector Employee Speech In New Hampshire

Through the enactment of *NH RSA 98-E*, New Hampshire has gone (far?) beyond the United States Supreme Court in protecting the speech of public sector employees.

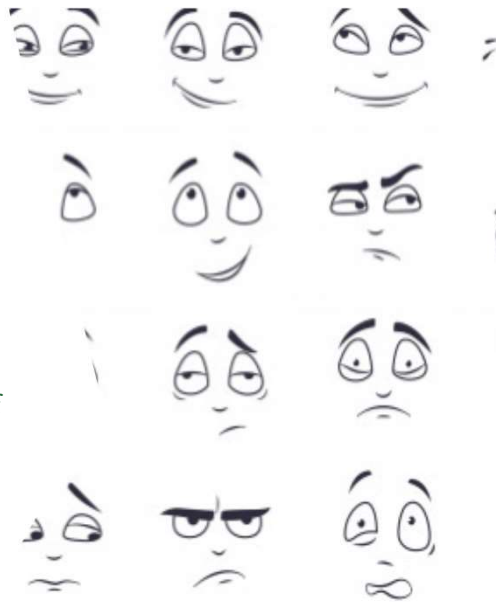
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Freedom of Expression NH RSA 98-E

98-E:1 Freedom of Expression. –

Notwithstanding any other rule or order to the contrary, a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies. It is the intention of this chapter to balance the rights of expression of the employee with the need of the employer to protect legitimate confidential records, communications, and proceedings.



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Definition of Public Employee NH RSA 98-E



98-E:1-a Definition. – In this chapter, "public employee" includes any person employed by the state or any subdivision thereof, including, but not limited to counties, cities, towns, precincts, water districts, school districts, and school administrative units.

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SOCIAL MEDIA – SUGGESTED POLICIES



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Best Practices - Speech-Related Policies



Social Media Policies

- Social media is speech
- Subject to 1st Amendment and NH RSA 98-E

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Best Practices - Speech-Related Policies

- Social Media Policies
 - Can limit speech in official capacity
 - Can limit disclosure of confidential information
 - ✓HIPAA
 - ✓FERPA
 - ✓NH RSA 91-A

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Best Practices - Speech-Related Policies

- Social Media Policies
 - **Narrow = better.**



- Focused only on legitimate areas of concern.
- Content based restrictions are almost always a problem.

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Assign One Person as Manager of all Social Media

- Have one person appointed the Social Media Administrator who shall have administrative, password and content posting control of the municipality's social media account.
- Having multiple administrators is not the preferred option.
- The designated Social Media Manager must agree in writing to comply with any training or other requirements, policies or restrictions and have on file such written agreement before editing, posting or altering Content on a Social Media Site.
- The Social Media Administrator must keep the governing body (select board, town council, city council) fully informed about the municipality's social media accounts, contents, tools and activities.

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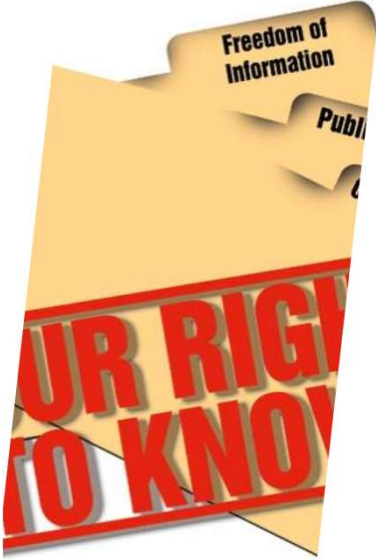
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Social Media Management

- The Social Media Administrator must review and approve information posted to the municipality's social media sites to ensure the content is appropriate, professional, and consistent with municipality's policies and the purpose for which the site exists.
- It is not recommended that the municipality permit posting comments or sharing content on the municipality's social media site by members of the public.
- Municipal Employees and Officers must not form groups/pages that are private or closed to the public. It is important to note that in the event that such a group is created, it may be subject to records retention, open records statutes and other applicable law.

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Social Media Management and the Right-to-Know Law

- Under the Right-to-Know Law, content on a municipal Social Media Site, is a public record. The Social Media Administrator is responsible for assisting in responding to requests for public records on a municipal social media site.
- Content must be maintained in an accessible format so that it can be produced in response to a request. Difficulty in accessing the information does not excuse compliance.
- Before deleting content from a municipal social media site, a determination must be made whether that content is required to be retained under the Disposition of Municipal Records statute, RSA 33-A:3-a.

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Deactivating a Social Media Site/Account

If a decision is made to deactivate a municipal social media site/account the following actions shall occur:

- Confirm proper public records management to preserve content related to the site/account has occurred.
- Set a time-line for deactivating the site.
- Develop a “sign-off” message to post on the site that includes when the site shall be closed and a “sign-off” message to post during the final days/weeks.
- Confirm to the governing body once the site has been deactivated that the site is completely deactivated.
- Determine whether to protect the site name by keeping it active to prevent use of the municipality’s name for improper purposes and upon a determination that it is necessary to protect the site name take all necessary action to do so.

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for attending this legal lunch and learn webinar

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