PRIVATE PROFILES, PUBLIC BUSINESS: RECENT RULINGS RELATED TO SOCIAL MEDIA POSTS

The vast majority, if not all our clients, have a presence on social media. There have been two recent court decisions relating to the use of social media which are a good reminder of the consequences that can arise from action taken on social media by policy makers such as school board members and administrators.

In the case of *Markey v. Thompson, Johnson and Borough of Yardley,* Markey, the plaintiff and a member of the Yardley community, petitioned to place a question on an upcoming ballot seeking to reduce the number of borough council members. Council President Thompson, one of the named defendants, posted an informational piece on the referendum on the borough's official Facebook page, which was followed by a snarky exchange between the two individuals that included a comment by Markey flagged by the borough manager, Johnson (the other named defendant), as a personal attack. Johnson notified Thompson, who gave Johnson permission to remove the comment. Markey then filed a civil rights lawsuit alleging that the removal of his comments from the borough's official Facebook page constituted a First Amendment violation. He sued the borough and both Johnson and Thompson in their individual capacities. Both Johnson and Thompson filed motions seeking to have the lawsuit against them in their individual capacities dismissed.

The judge stated that the law is clear in that deleting comments or banning users from a government social media page, such as Facebook, based on the content of the user's speech constitutes a violation of the First Amendment. The contours of this First Amendment protection were spelled out in the United States Supreme Court decision of *Lindke v. Freed.* The fundamental question is whether the social media account and related activities were personal or official. If the account is an official one, deleting comments or banning users based on the content of their statements is not permitted. Also, and of significance, is the fact that, depending on the circumstances, individuals involved in the decision to delete comments or ban users can be held individually responsible for violations. Individual liability can occur if the person has direct involvement in the wrongdoing as shown through personal direction or actual knowledge and acquiescence. In the Yardley Borough matter, the judge allowed the case to proceed against the two individual defendants.

As complicated and time consuming as civil rights lawsuits are when filed against a governmental entity alone, a lawsuit that names board members or employees in their individual capacities as defendants is significantly more complicated. **Accordingly, before a decision is made to remove comments or ban a member of the community from an official social media account, consideration of the First Amendment is necessary.**

Civil rights lawsuits are not the only form of litigation to be concerned about regarding social media content. On August 19, 2025, the Supreme Court of Pennsylvania issued a ruling concerning information on social media and the Right To Know Law (RTKL) in *Penncrest School District v. Thomas Cagle*. In May 2021, the high school library, in anticipation of Pride Month, displayed several books that addressed LGBTQ+ issues. A

contractor working for the district photographed the display and publicly posted it to Facebook. Shortly thereafter, a school board member publicly shared the post on his personal Facebook account with commentary about disagreement with what was being taught. Another board member also shared the post on his personal Facebook account but without comment.

A member of the community submitted a RTKL request seeking disclosure of all communications from the board members on the topic. The district denied access on the basis that "no such posts or comments existed on any Penncrest-owned Facebook accounts." On appeal, the Office of Open Records granted the request. The district appealed to the common pleas court, which denied its appeal. The district then appealed to the commonwealth court and, ultimately, to the Supreme Court of Pennsylvania, which affirmed the opinion of the commonwealth court. The court stated its support for two common scenarios recognized by the commonwealth court:

1. **When a public official posts on an agency's official authorized social media account, such posts are presumptively considered public records**.
2. **If the posts are on an official account but relate to personal matters such as a family birthday or gathering, the post would not document an agency transaction or activity and is not public record.**

In *Penncrest,* however, the court was faced with the more difficult situation where the board members' public posts were on their personal social media accounts. The commonwealth court, now with the approval of the Supreme Court, had created a framework for deciding such a case based on various factors:

- **First, examine the social media account itself, including its private or public status, as well as whether it has the trappings of an official agency account. Also, consider whether the individual who posted the message has an actual or apparent duty to operate the account.**
- **Second, consider whether the post proves, supports, or evidences a transaction or activity of the agency. Was the content merely informational in nature? Was the post created, received, or retained by law?**
- **Finally, consider the official capacity of the individual who posted the material. Was the information produced under the agency's authority or within the scope of his or her duties? Also, consider whether the agency required or directed the post to further the agency's interests.**

This framework appears to be difficult to administer and will be very fact specific. However, it should not be forgotten that the basic purpose of the RTKL is to allow access to information and the burden remains on the agency to provide a basis for denying access. Accordingly, before denying access to information concerning a post by an employee or board member on a social media site, this framework must be considered.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.