



Are social media posts public records? That was the question in a recent legal case that could have far reaching consequences for public records in Virginia.



Listen

4:11

*Michael Pope has the story.*

Is that the sound of democracy in the 21st Century? Loudoun software engineer Brian Davison thinks so, and he's filed a number of lawsuits to get at social media records of elected officials.

"We're only going to get compliance with FOIA and the records laws when people enforce their rights. And unfortunately in too many parts of Virginia that's not happening."

The first case was in his backyard in Loudoun, where he posted on the Facebook page of the elected commonwealth's attorney. His comment was deleted, and he was blocked from the page.

"You can't open a government forum just like you can't have a Board of Supervisors meeting where you only allow people to compliment you and then you shut down anybody who criticizes you."

**Read More: Should Social Media Posts from Lawmakers Be Considered Public Records?**  
(<http://wvtf.org/post/should-social-media-posts-lawmakers-be-considered-public-records>)

So he filed a lawsuit. Then his comment was restored to the Facebook page. And Davison was no longer blocked. But he was also trying to get comments deleted from a School Board member's Facebook page. The Loudoun prosecutor asked Alexandria Commonwealth's Attorney Bryan Porter to investigate.

"A public record is a term of art that is defined by the law. It goes back to the 1870's that a public record is defined by the law of Virginia is 'a written memorial intended to serve as evidence of something written, said, done or made by a public officer.'"

By a public officer. In other words, Porter concluded that deleting comments made by citizens did not constitute a destruction of public records — at least not a criminal offense.

“So the direct question here is whether or not a citizen leaving a post on a Facebook page has created a written memorial said, done or made by the public officer. And obviously here, it’s not the public officer making the record. It is a citizen doing it.”

Porter did not look at whether deleting Facebook posts or blocking critics constitutes a violation of free speech, though. And that remains an open question. One that Davison is still interested in, which is why another Facebook post from state Senator Siobhan Dunnivant grabbed his attention.

“She posted a picture of the Bill of Rights, and then claimed that folks had no right of speech on her page – basically that she could delete critical comments but keep the complimentary ones. And I just simply believed she was wrong.”

So he filed another lawsuit, one that attracted a great deal of attention because of the important precedent it might end up setting.

“Well our reaction all along has been these records are not public records that are something that is subject to FOIA.”

That’s Michael Mattheson, who represented the senator in the Henrico Circuit Court.

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**When we are talking about public records, it seems rather anomalous to use a very public forum, which is by its very nature public and social and then to say that somehow it is not a public record.**

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“This Facebook page is a private Facebook page that has been maintained by Senator Dunnivant since long before she was elected senator.”

Keep in mind that this is not the senator’s personal page. It’s a “public figure” page titled “Senator Siobhan Dunnivant”

“She doesn’t use any tax dollars to administer that site. It’s not a site that is an official Facebook page of the Virginia General Assembly.”

The judge eventually ruled that some Facebook posts are, in fact, public records. But the ones in question were not because, the judge concluded, the senator’s Facebook policy was not a matter of pressing public businesses – like a bill being considered before the General Assembly.

“Transaction of public business has generally been understood as generally anything that government does as government, it’s core business. So in that respect I think the ruling was too narrow.”

That’s Megan Rhyne, director of the Virginia Coalition for Open Government.

