

To Chief Jim McCann,

First let me start by saying I really appreciate the response although I regret it had to be after I contacted our Mayor twice about this matter. I will attempt to address each point you made in your response in the order in which you addressed them.

1. While all of this started over the incident at West 27th St my concern is the closing off of the comments being unconstitutional. I spoke with Lt. Morris and voiced my concerns that the comments that had previously been open and commented on should stay open. It is my interpretation of current case law that by shutting down comments on posts that you already had open for comment you violated the First Amendment. And while I can appreciate your want to investigate this matter it is of no concern to me in this particular matter. I did not write you about the Police actions that day I wrote, called, and commented about the closing off of a Constitutionally Protected, traditionally public forum that I was participating in first amendment protected speech in. The content of my speech is not to be judged nor should it unless it falls under certain areas such as threats, instigating violence, or narrowly defined hate speech. I would agree though if you feel you cannot manage the page you should shut it down. To my knowledge that is an option but leaving previously commented on posts shut off is the problem. In my initial contacts I even stated if you turned those

comments back on, I would be satisfied. But Then the Page suddenly opened comments previous to the 15th of January which seemed strange but it was a step in the right direction. In the end its about the Facebook forum being protected not investigating the actions at W 27th street.

2. I'm not suggesting you aren't the "most transparent chief" I didn't know the previous one. Hijacked, unmanageable, none of these things mattered once you opened the page up as a community Public Relations page the Department obligated itself to this "criticism" and the First Amendment protects all citizens not just those from Lorain Ohio.
3. I cannot say what people would or would not accuse the Police of but speaking of investigating the Department dumped an entire history of citizens address with pictures of gun shots and reports to go with it in a google drop on the LORAIN CITY SCHOOLS YouTube as well as on Facebook. It looks like the Department had investigated A LOT and as far as I was informed by other city officials the individual who lived there and caused these previous crimes has since become incarcerated and is currently a resident of the State of Ohio, correct? So, if you were scared of being called reckless why did you release all the information onto social media before you completed your investigation? *"As Chief, I am well-aware that a government agency operating a government social media page is subjugated*

to legal and constitutional constraints with regards to page management.” If that is the case, we would NOT be having this discussion. You state “harm to the reputation...” You are not reputation enforcement and your reputation is what you and your officers gain, both positive and negative, through community interactions. If you think your department and employees’ reputations are getting sullied, that sounds like hurt feelings, and we know that the government has no feelings. You are public Servants and as such are by law subjecting yourselves to public criticism and public praise.

“I have personally been the recipient of threats against myself, my family, and my property.” This is CRIMINAL and its my understanding you have remedies under the law. You should contact the Police Department and report local violators or the Federal Bureau of Investigations for out of State violations to protect yourself and your family. I would never condone such types of activities. But just because those CRIMINALS committed a crime and made terrorist threats doesn’t mean I lose my rights as well. And TO BE CLEAR I would hope you are ready to defend any actions you have undertook under the Office of Police Chief of the City of Lorain as you do so under Color of Law and I would hope you don’t go around making decisions you’re not willing to back up, but that doesn’t mean you are

correct either. I am glad you want to protect your employees and staffs reputations as well as the rights that you and your family have to live free without threats of violence or harm. But none of those trump the First Amendment, if anything it only re-enforces our need for protections like the 1st and 2nd Amendments as well as the 4th, 5th and all the amendments really.

4. In your response you state: *“Many people, to include you, made up your mind about the 27th St incident after only seeing a portion of one video and not allowing LPD to respond with the totality of all events leading up to the specific incident. This doesn’t seem impartial, at least in my opinion. Again, the public is free to form their own opinions, regardless of accuracy or partiality. When misinformation or lack of information creates harm, I cannot stand by idly while the social media accounts that LPD manages are used to spread outright lies by way of comments and attachments from uninformed people. You claim to be an educated social worker, but one would think with your claim of being educated, you would have the ability and the “want” to get all the facts before you make assumptions or even a decision regarding what was right and wrong”.*

For the record I have NOT made up my mind by only seeing a portion of one video. I watched ALL the videos released by your agency and the people at the address. I read ALL the reports you put out and based on that plus my

own knowledge and experience I came to a logical educated conclusion. And while it has no place in this letter, I will say this, your officers missed their shot, the timing was off and once they were told to leave, they should have left and got their warrant. If they had waited, they get their chance again, legally, when the juveniles leave private property. I am not arguing if the residents in that house deserve to be profiled or watched. I am not arguing your Officers or the ATF did anything wrong (In this letter/complaint). Did I offer opinions on line, yes, but that doesn't mean I have made up my mind about ANYTHING. Yes, I made a "*claim of being educated*" **[SARCASM NOTED]** and yes, I would love all the facts. I thought reading the dossier you put online was enough to educate me but sure I never would want to make any assumptions. I also wouldn't want to shut down reasonable conversations on a public forum I opened to try and get that point across and then close it with no explanation. You put the information out there on Facebook then got mad when people didn't just see it your way. Government officials may have no obligation to open the social media account up for public comment, **but if they do**, they cannot discriminate as to which views get to be expressed in those comments. And that's ok as well, you have a right to be mad, but the Facebook page has no feelings not does the Lorain Police Department. You want to make this about the incident on 27th St. and

I am simply stating you violated my First Amendment rights by stopping the conversation.

5. AS far as case law goes I supplied it in my official complaint but I will once again provide it here for your convenience.

Knight First Amendment Institute V Trump (2019), The Second Circuit issued its decision in July 2019, upholding the district court ruling. The Second Circuit determined that Trump used his Twitter to conduct official government business, and therefore, he cannot block Americans from the account on the basis of their political views. The Knight ruling has been cited as an important development in the use of social media as a public forum, and the tendency of government officials to try to block access to that forum or delete past communications.

Davison V Randal (2019) Status: Decided on January 7, 2019. A panel of the Fourth Circuit unanimously held that the “interactive component” of a local government official's Facebook page constituted a public forum and that the official engaged in unconstitutional viewpoint discrimination by banning Davison from that forum.

Swanson V Tillbrook/Griffin (2022) Swanson sued Griffin and Otero County Records Custodian Sylvia Tillbrook alleging that since Griffin's Facebook

page was a public forum, that Griffin had violated the First Amendment by engaging in viewpoint discrimination

Packingham v. North Carolina, in which Justice Anthony Kennedy described social media as "*the modern public square*" and as one of the most important places for the exchange of views.

Cohen v. California, 403 U.S. 15, 19-21 (1971). This Court held, early in the case, that the interactive comment section of the State Police's Face book page is a designated public forum. Profanity usually doesn't justify governmental action against speech in a public forum. Doc. 60 at 2 & Doc. 97 at 2-3

Biden v. Knight First Amendment Institute at Columbia University, 141 S. Ct. 1220 (2021) [I cannot find a summary of this newer case]

City of Houston, Texas v. Hill, 482 U.S. 451, 461 (1987) "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."

Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Cir. 2003) "*an adverse action that would chill a person of ordinary firmness from continuing in the activity.*"

The United States District Court for the Eastern District of Arkansas ruled that the Arkansas State Police unlawfully used Facebook's content

moderation tools to censor speech on the department's Facebook page. The agency set Facebook's profanity filter (which deletes comments if they contain certain objectionable words) to the strongest available setting and blacklisted a custom set of words they selected, including "pig," "copper," and "jerk." "[B]ut people are free to say those words," wrote Chief United States District Judge D.P. Marshall Jr., in the court's opinion. "The First Amendment protects disrespectful language."

Playing Devil's advocate, I have found some research on this matter as well: The primary approach an agency has in this scenario is to have a policy, carefully vetted by legal counsel, that sets forth what comments are authorized and what are not. For example, the policy can specify that obscene, defamatory, and other similar types of comments are not permitted. The policy can also specify that comments have to relate to the matter originally posted (in the example above, the officer's promotion). But that policy itself presumably must be designed to satisfy the stringent demands of forum analysis, including that the policy be "viewpoint-neutral," and the agency must be able to justify its restrictions on certain types of comments in a way that will satisfy forum analysis requirements. The 2015 Walker decision, described above, is important because it offers agencies a possible

way out of the strictures of forum analysis in the maintenance of government social media accounts. With government speech, the government has significant latitude in the message it conveys. **If what is at issue is not a forum, but instead government speech, the government has substantial authority to limit the message being conveyed.** Government speech is an alternative way of viewing the scenario: it asks the Court to view an agency's social media site not as the hosting of speech by members of the public (subject to certain rules), but instead the government itself speaking, by effectively selecting comments/posts to offer to the public (and choosing not to offer others).

So, under the Walker decision above I agree you could have the right as an agency to restrict posts and comments. But the problem is that wasn't what the department chose to do originally. My understanding is under the Walker decision the department would be correct **IF**

- 1) The department had always made the page about posting facts and information and **had NEVER allowed comments.**
- 2) Never posted the entire scenario online for public comment, thereby inviting the public criticism

3) Had in place a legally vetted social media policy that clearly defined what could and could not be posted on the page (that was posted for public review)

4) Had never utilized the page for any other purpose or as a forum to do anything beyond provide basic public information.

I am not an attorney so you would obviously want to consult with one because I am unable to give legal advice. I can only act in accordance with my own legal rights, on the first amendment claim alone. But I would be worried that if we were speaking hypothetically and say a public official discontinued comments on a public forum based off of possible “*harm to the reputation and, in extreme cases physical well-being, of Lorain Police and City of Lorain employees, as well as to the organizations themselves can and has resulted from the misinformation and inaccurate posts on these social media pages*”. That could be viewed as retaliation and as such could be considered problematic as “*An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.*” See *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990) (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir.1984)). Moreover, “[t]he unlawful intent inherent in such a retaliatory action places it beyond the scope of [an official's]

qualified immunity if the right retaliated against was clearly established.”

DeLoach, 922 F.2d at 620. But again, I’m not an attorney so I am unaware if that is the case nor am I able to provide legal advice.

FINALLY, I only sent the email to Marcy Kaptur out of a connection I formed with her while working on Veterans issues in the State of Ohio. I do realize she is no longer our local representative but as I follow all State and Local politics, I like to keep people in the loop as Ohio is a small community. And as she was our representative for many years, and could be again based on how we moved districts around unconstitutionally and required the Ohio Supreme courts involvement, so that was merely for her information. But I appreciate the attempt to inform me of our current congressional districts representative, its Bob Latta, but I wasn’t trying to involve his office (or Congresswoman Kaptur) officially which is why I didn’t specifically mention them in my email requests.

I am unsure what you mean by “inappropriate FOIA request”? If referring to the form I used it was the only one you had on the website to request information. I realize it had the old Chiefs name on it but it was what the department offers to the public on the outdated website the department currently has up. If you were referring to me asking for communications between my government officials as attorney/client protected I would argue

only direct communications between you and your “lawyer” are covered and as such any emails to anyone who isn’t the Police Departments lawyer would be accessible under a FOIA request. Such information could include and emails between you and Lt. Morris in regards to the Facebook situation, any emails and communications with officers about the Facebook page, and policy letters or memos in regards to the Facebook page. To my knowledge none of these are protected documentation under the attorney client privilege and by law you can annotate any names or personal information.

In Conclusion I would have always been satisfied if you had left the posts, you previously opened for comment opened. I would have appreciated an earlier response with less snarkiness and a little respect but I suppose that was too much to ask as well. To be clear I am only concerned about the First Amendment and the fact you closed off comments on posts you previously opened and engaged in conversation with the public on only to close them off when you didn’t like what was said. As far as whatever garbage fire your department has gotten themselves into over at that house that’s not really my concern, as you pointed out, that’s a matter for the prosecutor’s office to decide. The government has no feelings, your police page is a government page, I argue it too has no feelings and you could choose to just ignore the comments and go about your day instead of being sad and then turning off

comments. Its just a bad look, but to each their own, but again this is just one citizens opinion sprinkled in with some case law.

Insiste Firmiter!

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