



TO: City Council
FROM: Ethics Advisory Board
SUBJECT: EAB Report on Ethics Complaint 2022-05B FINAL AFTER ADDITIONAL REVIEW
DATE: March 23, 2023

On December 20, 2022, Mr. William Stout (“complainant”) filed a complaint alleging two violations. For purposes of the investigation and reporting, we considered them as two separate complaints and have labeled them Complaint 2022-05A and 2022-05B. This report addresses only Complaint 2022-05B.

Mr. Stout filed a response that will be construed as a request for additional review. Policy 39 says any party may request additional review by the EAB if there is a dispute on the facts of the complaint or interpretation of the Code of Ethics. The EAB’s review is addressed at paragraphs 6 and 7, following the original decision which is set forth below.

Original Complaint Decision:

1. Summary of Complaint -

Mr. Stout alleges that Mayor Brandon Whipple unlawfully blocked him/citizens from the Mayor’s Facebook pages around October 2022.

2. Scope of Investigation -

The investigation included review of the complaint and the Mayor’s response, review of City of Wichita policies, legal research regarding the legal decisions cited by both parties, and related cases.

3. Summary of Facts -

Mr. Stout’s complaint referenced the Mayor blocking people, including Mr. Stout, from his personal Facebook page(s), and he complains regarding the manner in which he was communicated. It does not appear he alleges being blocked from a City of Wichita official governmental Facebook page.

Mayor Whipple responded that he is not aware of anyone being blocked from City of Wichita pages. He says he has two Facebook pages; neither belong to the City nor are used for official City of Wichita business. One page is his personal page that is limited to “friends” that he accepted. The second page is his “politician page,” identified as “VoteWhipple,” owned by the Whipple for Mayor entity, and created before he was elected. No witnesses were listed other than citizens of Wichita.

Mr. Stout references the “*Swanson*” case seemingly as authority for his position. If Mr. Stout is referring to *Swanson v. Griffin*, No. 21-2034, 2022 U.S. App. LEXIS 5179 (10th Cir. Feb. 25, 2022), highly summarized, the government official was accused of blocking someone from his personal Facebook page. The official’s posts on his Facebook page included some comments about his work, and the plaintiff criticized the Commissioner on the page. The Commissioner blocked the plaintiff. The *Swanson* case was decided in favor of the government official. The court distinguished government-created Facebook pages from personal ones in terms of protections granted to citizens. The United States Supreme Court denied review of the *Swanson* Tenth Circuit decision.

The Mayor’s response references the *Haulmark* decision. He is likely referring to *Haulmark v. City of Wichita*, No. 21-cv-1182-EFM-TJJ, 2022 U.S. Dist. LEXIS 82841 (D. Kan. May 6, 2022). Again, highly summarized, the court addressed whether Mayor Whipple’s private campaign Facebook page was subject to ADA (Americans with Disabilities Act) claims. The court distinguished Mayor Whipple’s campaign page from the City of Wichita pages in various contexts. In a subsequent decision as part of the case, the court granted summary judgement to the Mayor and distinguished his private campaign page, but in the context of the ADA. The court explained, “it is just what it claims to be—a politician’s private campaign page.” *Haulmark v. City of Wichita*, No. 21-cv-01182-EFM-TJJ, 2022 U.S. Dist. LEXIS 191917, at *8 (D. Kan. Oct. 20, 2022).

4. Applicable Section(s) of the Code of Ethics Involved –

The complaint form used by Mr. Stout is the original form, which did not specifically require listing a particular Policy 39 subsection (A-P) alleged to have been violated. Mr. Stout appears to allege the Mayor violated his legal rights by blocking him and others on social media. Arguably, this might touch upon sections A, B and/or G.

5. Findings of the EAB –

Upon review of the parties’ arguments and the relevant caselaw, the Ethics Advisory Board (“EAB”) finds Policy 39 was not violated by the Mayor if he blocked citizens from his personal Facebook pages.

On March 9, the EAB adopted this report and considers this matter closed.

Request for Review of Decision:

6. Response of Complainant –

In summary, Mr. Stout's response takes issue with the complaint form provided and the procedures followed at the EAB meeting on March 9, 2023.

Mr. Stout also disputes the EAB conclusion about when he was blocked on Facebook. He now says he was blocked from the Mayor's Facebook page in 2020 when the Mayor allegedly used his personal Facebook page to disseminate governmental information when COVID restrictions were in place. These additional facts were not in his original complaint. However, if these additional facts had been considered, Policy 39 nevertheless was not enacted until May 2021, and the EAB would not address facts or allegations occurring prior to that.

Mr. Stout references facts about participating in a public Zoom conversation with the Mayor that was streamed live on the City's Facebook page on October 27, 2022, which he ultimately did participate in. This does not alter the EAB's original decision.

Mr. Stout lists an additional legal decision, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. May 23, 2018), and provides some articles to support his position.

7. Final Determination of the EAB –

The EAB, having met in executive session to consider legal advice and then in open session, affirms its March 9, 2023 decision and finds as follows:

- a. The original complaint filed October 31, 2022 failed to pass initial review because it was not notarized as required by Council Policy 39. The revised complaint filed December 20, 2022 passed initial review and was investigated.
- b. The complaint form states what information to provide, including instructions to attach copies of documents. Mr. Stout attached to the form a two-page document he drafted, which was considered. He did not include some of the additional information he now raises in his response.
- c. The EAB substantially complied with its procedures in initially deciding Mr. Stout's complaint.
- d. The EAB correctly relied on the information provided in Mr. Stout's original complaint. Regardless, if the clarifying or new information now provided had been considered—such as the Facebook blocking occurring in 2020—the complaint may have failed to pass the initial review or would still have been subsequently denied as the primary events occurred before the Code of Ethics was adopted by the City Council on May 11, 2021.
- e. The portions of the response that do not create a dispute on the facts of the complaint or interpretation of the Code of Ethics are not within the EAB's scope of review.

- f. The additional legal authority and articles provided, even if within the scope of the EAB's review, do not alter its original decision.

For example, Mr. Stout cites *Knight First Amendment Inst. at Columbia Univ. v. Trump* (later recaptioned *Biden v. Knight First Amendment Inst. at Columbia Univ.*) which is from the Southern District of New York and the Second Circuit. This newly-provided case was actually cited by the Court in the *Swanson v. Griffin* case discussed above, which the Complainant proffered in his original complaint. On appeal, the United States Supreme Court actually ordered the *Knight* case be sent back to the Second Circuit for dismissal as moot. Although decisions from other circuits might be persuasive in some circumstances, they are not typically binding on the Tenth Circuit nor Kansas courts. In *Swanson*, highly summarized, the Tenth Circuit mentioned the lack of weight of the *Knight* decision when the *Swanson* plaintiff tried to rely on it. Additionally, the other sources Complainant provided do not establish binding law.

The EAB has carefully considered the Complainant's assertions. The original decision of the EAB set forth above is hereby affirmed.