Defamation (SDCL20-11-1 to 20-11-8). Officials/employees often ask—can I sue or be sued for something that is posted that is false? The answer is, “It depends”.

Defamation is either a published (libel) or spoken (slander) communication that is false and not privileged and that causes harm from the communication. That is what needs to be proven.

Privileges include:
(1) A “proper discharge of public duty”;
(2) An “official proceeding authorized by law”;
(3) A communication made “without malice” to and from an “interested person”; or
(4) A “fair and true” report made without “malice” of/in the course of a “public official proceeding”

Public Claims against Officials—the public can sue for something the official stated; no malice need be shown for their claim.

Officials Claims against the Public—officials/employees can sue the public, but the standard for a Public Official is higher.
Requires “actual malice” to be shown, that is:

There was knowledge by the wrongdoer that the statement was false; or
There was a reckless disregard in determining if it was false such as
  A “high degree of awareness of ...probable falsity”
  The statement was a “fabrication”
  The statement is a product of “imagination”
  The statement is based on an unverified, anonymous source

Personal Risks-Insurance Coverage Issues—if the Official/Employee is sued:
*a claim of defamation is an intentional tort and punitive damages available
*usually insurance policies exclude payment for damages for intentional torts
*punitive damages are not covered by insurance policies
*city’s policy may provide defense, but not payment from a trial award

Best Practice: Before you make a statement (even on a private text, message, letter, post, etc) related to anything with the municipality, consider whether it is possible that what
you are able to publicize is or could be false. Do more investigation or seek a legal opinion. Just because someone tells you something does not mean it is true and should be published.

Social Media Policies: Accounts may be administered by the City, by employees, and/or by Elected Officials. For each, creation/application of policies should apply.

City’s Social Media Account
* Employees develop and maintain
* Identify as official city account
* Policy should address
  * Access
  * What information can be posted
  * Who can comment
  * A public and use comment policy
  * Saving content for open records purposes

Employees & Elected Officials Social Media Accounts
* Should consider policies including:
  * Harassment, Discrimination, confidential information issues
  * Identification as personal (not municipal)
  * Prohibition of work email for the account
  * Prohibition of access from work device or network

Elected Officials Social Media Account (additional)
* Public’s First Amendment rights/censorship

  *where discussing City business, it is susceptible to being considered a public forum so blocking individuals and deletion of public comments may violate the public’s First Amendment Rights (Trump decision; also Va Ct)*

  *site maintained as a private citizen or in relation to public official position
  *sufficiently close nexus
    * when create (before or after elected to office)
    * maintaining site part of official duties
    * site revert to City when leave office
    * list official title of official
    * provide private or public contact info
    * use of City-devices to post
    * time when posting (non-business hours)
    * using to post City-related topics and get input
    * deletion of “off-topic”, “dissimilar positions”, “profanity”
Discipline of Elected Officials & Employees: Before undertaking any discipline for an employee or public official, consider:

First Amendment-Free Speech Rights
* Speech that is part of employee’s official duties is not protected
* There may be protections for the rest of the type of speech
* If a matter of public concern, before discipline balancing test (*Pickering*)
  * Consider if speech sufficient impact on workplace:
    * disharmony
    * disruptions
    * working relationship in office
    * confidentiality
    * discipline impact
    * self-interest
* The greater the public concern, the greater showing of disruption

Process
Employee’s: Written policy—follow! (procedural due process issue)
Specific statutes (officers, librarian, etc)
Elected Official: Written policy-follow!
SDCL 9-14-12 (removal by majority of board)
Code of Conduct policy-consider having one.
Decide if it can be in Executive Session or not

Government & Employment Hotlines (SDPAA Members)
*1-888-383-0939