INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

74TH ANNUAL CONFERENCE

MIAMI, FLORIDA

OCTOBER 17-21, 2009

Legal and Policy Issues Relating to Social Networking Applications

Presented by:

THE BALLER HERBST LAW GROUP, P.C.
www.baller.com

Adrian E. Herbst, Esq.
377N Grain Exchange Building
301 Fourth Avenue South
Minneapolis, Minnesota 55415
(612) 339-2026; (612) 339-4789 (facsimile)
aherbst@baller.com

Casey Lide, Esq.
2014 P Street, N.W., Suite 200
Washington, DC 20036
(202) 833-5300; (202) 833-1180 (facsimile)
casey@baller.com

© 2009 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 74th Annual Conference, held October 17-21, 2009 in Miami, Florida. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

ADRIAN E. HERBST

Adrian E. Herbst is a Principal with the Washington, D.C. based law firm The Baller Herbst Law Group, P.C., in charge of its Minneapolis, Minnesota office. He has over 35 years of experience in municipal and governmental work, with an emphasis on cable television franchising and regulation and new and emerging technologies and services related to cable, telecom and Internet and municipal legal and regulatory matters. He has been extensively involved in representing local governments throughout the country on these matters. Adrian is a frequent participant and presenter at municipal legal and administrative conferences and working with members of his firm helps produce the "Baller Herbst List" distributed nationally every business day throughout the country about broadband and related matters. Adrian was a City Councilmember for the City of Bloomington, Minnesota for 16 years and its City Attorney for 7 years. He has served as a past President of the Minnesota Trial Lawyers Association and Vice President of the League of Minnesota Cities. Adrian is a charter member of the National Association of Telecommunications Officers and Advisors (NATOA) and is also a member of the Alliance for Community Media, as well as various other legal organizations including the International Municipal Lawyers Association (IMLA), the Federal Communications Bar Association, and the Telecommunications Committee of the Minnesota State Bar Association.

CASEY LIDE

Casey Lide is a Principal with The Baller Herbst Law Group, PC, a national law firm based in Washington, DC, and Minneapolis, MN, that specializes in representing local governments and public power utilities in regulatory and franchise matters involving telecommunications, cable television, high-speed data communications, Internet access, wireless telecommunications, right-of-way management, pole and conduit attachments, and barriers to the public-sector entry into telecommunications. In addition to representing clients on the above matters, Mr. Lide is a widely-respected expert on informational privacy. He has co-authored an extensive guidebook on federal privacy law, analyzed the privacy, freedom of information, and open records laws of more than 25 states, and provided counsel on privacy, surveillance, and related issues to numerous public and private clients. He is also a frequent author, speaker, and instructor on these topics.

Prior to joining Baller Herbst, Mr. Lide worked in-house for Digital Signature Trust Co., a leading provider of Internet security and authentication tools. He has also held policy-related positions for the Federation of American Research Networks (FARNET) and for EDUCAUSE, a national information technology association of higher education institutions. In this capacity, Mr. Lide represented the association on a variety of legislative and regulatory initiatives, including the Telecommunications Act of 1996 and the Digital Millennium Copyright Act (DMCA). He has directed working groups and provided policy advice on such topics as advanced networking, wireless communications, Internet security, the digital divide, domain name policy, privacy, federal investment in information technology research, and distance education.

INTRODUCTION

This paper is not intended to serve as an exhaustive legal analysis of the vast array of legal issues and questions that may arise concerning potential municipal liability related to social networks. Rather, its purpose is to describe the topic of social networking in the public workplace, and to identify some initial legal and policy questions and concepts that may face municipal attorneys. While these services may provide tremendous communications benefits for municipalities, significant matters of concern do exist, including: employee use or misuse of publicly-owned equipment to access such services inappropriately; the inappropriate use of municipal e-mail addresses; disparate objectives and policies among municipal departments; the use and control of municipally sponsored or authorized social network sites and tools; and issues concerning their use by political or elected officials of the city government. All of these must be addressed through the use well-crafted policies, guidelines, and protective disclaimers.

This paper includes a brief description of the services to which we refer as "social networking applications." As the descriptions in this paper are quite limited, we urge the reader to become more familiar with each through their own use to better understand how they are or can be used and misused, and the various options for addressing concerns relating to city government and employees.

We also outline a set of initial legal issues important for a municipal attorneys to recognize, including, for example, open meetings laws, data practices and open records laws, records retention laws, and privacy issues, among others. Our objective is limited to highlighting these matters for the municipal attorney and others for the purpose of helping establish a basis upon which local policies, rules and procedures governing these matters may be created.

For illustrative purposes, we also include a few examples of municipal uses and outline our ideas about developing policies, disclaimers, rules and instructional materials relating to the use of social network applications.

As municipal attorneys and policymakers consider the use of social network applications, some of the questions that may be asked are:

- Do I need to have rules or policies to protect my city from an employee using city-owned equipment and a city e-mail address to connect to a social network site for personal use?

- If I am in the health department of the city and exchange information with another department, for example, the human services department, about a potential new employee, does the city run the risk of public exposure of that person's private information?

- If two city councilpersons communicate with each other via a social networking application the night before a city council meeting to decide whether or not a high rise building should or should not be approved, might this be subject to violation of the open meeting law?

- How can the city benefit from the use of social network sites to provide current, timely information, for example, street or roadway construction, energy demand and rate information, public park usage, employee position availability, promotion of community events?

- What examples can look to to see how other communities have used social network sites?

It is important to understand that this new topic is not yet well-understood by policymakers, let alone jurists. Caselaw is virtually nonexistent, and municipalities are only just beginning to adopt policies and practices relating to the use of social network applications.

WHAT IS MEANT BY A "SOCIAL NETWORKING APPLICATION"?

A social networking application is an Internet-based service or tool that specifically enables online communities of persons to share similar interests or activities with others. The use of the social networking sites for communication by individuals, groups, and organizations (government and otherwise) is exploding, and represents the most modern way by which local governments can share information with or receive information from its community.

The dominant social networking services currently include:

1. **Facebook** (www.facebook.com). This is a social networking website where users can add friends, create groups, and send messages or update personal profiles about themselves. Users can join networks organized by a city, private workplace, school, and regions. Video clips and photos can be used.

2. **Twitter** (www.twitter.com). This is a free social networking and microblogging service that makes it possible for users to send and read messages known as "tweets." The tweets are text-based and up to 140 characters are displayed on an author's profile page and delivered to the author's subscribers who are known as "followers." Senders can restrict those in their circle of friends or by default, allow open access. Undoubtedly, Twitter has gained the most recent publicity, particularly with this past year's Iran political election controversy and the high use of Twitter as an uncensored way Iran citizens were able to communicate. It is a very favorable web social network site because of its limited content, that this, 140 characters, the ability to "retweet," (forward a "tweet" to another). With the explosion of the use of various mobile devices, including PDAs and cell phones, the limited message on Twitter transmitted via e-mail or as a text message is ideally suited for mobile devices. The tweets that are posted are open to the general public. (Municipal attorneys, therefore, need to make sure they do not mix professional services with personal content matters or disclose confidences.)

3. **LinkedIn** (www.linkedin.com)**.** LinkedIn is a business-oriented social networking site that makes it possible for professional networking. The site allows registered users to maintain a list of contact details of persons they know and trust in business. The people

on the list are called "connections." Users can invite anyone (whether a site user or not) to become a connection.

4. **GovDelivery** (www.govdelivery.com). GovDelivery enables direct communication to persons on a list and access via e-mail or cell phone text messages to important municipal and governmental affairs.

5. **Nixle** (www.nixle.com). Nixle is a short message service that allows instant messages via e-mail or cell phone text messaging to its list. Although similar in its capabilities to Facebook, Nixle limits the communication to short messages, similar to Twitter.

6. **YouTube** (www.youtube.com). Depending on how broadly one defines the "social networking" category, YouTube may also be included. YouTube is a video sharing site in which persons who are registered can exchange an unlimited number of videos. Unregistered users can watch the videos. Videos of registered users that contain potentially offensive content are available only to registered users over the age of 18. Videos containing defamation, pornography, copyright violations, and materials encouraging criminal conduct are prohibited by YouTube's terms of service. Accounts of registered users are called "channels."

EXAMPLES OF USE.

Local governments are using social network applications with increasing frequency. For example:

- St. Paul, Minnesota recently announced that Facebook would be used for police and law enforcement including, for example, a recent burglary watch for a neighborhood which provided to persons on the list neighborhood alerts and crime protection information. The St. Paul Police Department is taking community policing efforts to the Internet. According to an article of the Associated Press dated June 30, 2009, the St. Paul Police Department is taking community policing efforts to the Internet. It announces that a new Facebook page allows citizens to become "fans" of the police department. They can leave comments, and learn about what the officers are up to. Another posting promotes safe Internet use for children and adults and points users to a link for more information. St. Paul Police spokesman Paul Schnell says, "People are connecting on Facebook, so it makes sense for the police department to do the same."

- A public utility, Memphis Light, Water and Gas, uses Twitter to promote its service and distribute information. If power is out followers can get e-mails or text messages via cell phone, and followers can choose to receive notices or information alerts concerning rates and charges and energy demand information.

- The City of Brooklyn Park, Minnesota (www.brooklynpark.org/sitepages/pid1730.php) provides connection to Twitter, Facebook, and Nixle to make it possible for persons to

receive information about municipal events and activities, sports, playgrounds, and parks availability and information, and other municipal announcements.

- Similarly, Crystal, Minnesota (www.ci.crystal.mn.us/index.asp?Type=B_BASIC&SEC=%7b12E845B0-454F-4FFE-81EE-38381196D757%7d&DE) uses Facebook for recreation department information.

- As an example of the broad uses of Twitter and how it is expanding, as well as an illustration of the new language associated with social networking application (and Twitter in particular), on June 30, 2009, in an article relating to "Technobabble" entitled "Twitter's Universe is Expanding," Randy A. Salas had this to say: "Anyone who has ever doubted the usefulness of Twitter might want to check the latest news coming out of Iran. That's because much of what's happening in that media-restricted country is being reported by people there who are using the ubiquitous micro-blogging service to share their uncensored observations." He describes a number of examples of Twitter's expanding use, including, for example: "Real-life meetings: providing that Twitter isn't just an online social network, Tweetups are get-togethers in which tweeps meet in the real world, too." and "Extra sensory detection: How about a device that automatically updates Twitter when a certain event happens? "

- In Edina, Minnesota, a recent article written by Kaylyn Martin in the City of Edina, Minnesota summer issue, stated: "Online media such as Twitter, YouTube and the e-mail subscription service 'City Extra' are making it easier than ever to stay connected to the City of Edina."

  "City Extra allows residents to choose topics of which they would like to receive free e-mail updates. Further, 'City Extra,' residents will find on the footer of every page . . . a link to 'e-mail this page to a friend,' allowing the user to send information of interest more easily to friends and neighbors."

  The article went on to state, "There is an advantage in having the ability to get direct feedback from residents through mediums such as YouTube," said Communications and Marketing Director, Jennifer Bennerotte. "It opens a new channel of communication and lessens the information gap between residents, business people, and the City."

  "The City is also tweeting on Twitter. Through Twitter, residents can receive updates via text message or follow the City online at www.Twitter.com/EdinaMN)."

  The list certainly can go on and on, but the above demonstrates how Twitter and other social network applications are dramatically changing how and what we communicate.

A SAMPLING OF LEGAL AND POLICY ISSUES FACING LOCAL GOVERNMENTS

A recent article in the *Minneapolis Star Tribune*, Thursday, August 20, 2009 headed, **"You Have the Right to Remain Silent . . . and Tweetless."** It went onto to state that "anything indiscreet you send out on Twitter, Facebook or a blog post might remain alive forever in cyberspace." According to the article, "perhaps there should be a Miranda warning for social network users just as there is for suspected criminals. Anything you say, tweet, blog, or post can and will be used against you in the court of public discourse, and that includes potential legal challenges." Further, he states, "people tend to use Twitter and Facebook as if they were engaged in casual conversation and think they don't create legal risk; they are wrong," said William McGeveran, an Associate Professor at the University of Minnesota Law School, who focuses on digital issues. He stated, "they don't realize their statements are public, archived, and searchable." Further, "people have to use the Internet with an appropriate precaution. They can't let the chatting tone lull them into thinking (they're) just talking to friends."

With that in mind, there are a variety number of contexts in which issues relating to social networking applications may arise:

1. **Employee's personal** use of city-owned equipment and assigned e-mail addresses. While not an entirely new concern, problems may arise with regard to employees who spend excessive work time on social network sites, who may disclose information about city government without authority to do so, or may engage in conduct that may be unlawful and potentially damaging to the city.

2. **Communications between departments** within the city hall and/or between different government offices may create issues relating to privacy and unintended sharing of government information, especially to the extent the social networking application is public. In addition, disparate usage and authorization policies among departments can create confusion and lead to adverse consequences.

3. **City authorized use.** If a city department chooses to use a social networking application to communicate with citizens, under what circumstances may the communication be made, and by whom?

4. **Data retention and public record obligations.** If municipal information is maintained on a third-party site, such as Facebook, do data retention obligations still apply? Are comments made on a municipal Facebook site by non-city personnel considered a public record? Under what circumstances may they be deleted?

5. **Facebook "friends" and the First Amendment.** If the Aryan Nation, for example, or any objectionable organization, requests to be added as a "friend" to a municipal Facebook page, may the municipality decline the request consistent with its obligations under the First Amendment? Is the social networking application a "public forum"?

6. **Elected official use.** If a mayor makes an announcement about the city government, or expresses a position on a particular matter pending before the city council or boasts about

the city the question is whether or not it is an official statement or comment of the city authorized for him to make or a personal view of the mayor. Further, if two or more councilpersons communicate via a social network about an upcoming matter before the city council, is there a problem with an open meeting law which may prohibit two or more elected officials from conferring on a matter outside a public meeting.

7. **Social Network Use Policies and Legal Issues.** City policies regarding the use and connection to social networks must address the social network license or connection agreements a user accepts before the user is enabled to use that social network site. It is important to recognize there are legal issues in the wording for connection to social networks that includes legal jargon which needs to be understood and as well as whether or not acceptance and connection is consistent with city policy. For example, a site may include limitations of liability, a waiver of claims, no liability for damages, a limitation of damages or indemnification all of which may or may not be permissible under local law unless otherwise acceptable in a use policy approved by the city. Additionally, by acceptance there may be a royalty free license granted to the social network that extends to the employee or city content that gives permission for its use in any way until the license ends when the content or account is deleted by the employee or city, except to the extent that the content has been shared with others.

8. **Employee Liability.** Local laws concerning municipal liability and employee liability should be made clear in any policy that may be developed by the city. For example, the city may have liability subject to liability or immunity provisions under applicable state or federal laws. Further, an employee may have personal liability for any wrongful conduct, including fraud, or possibly even violation of the requirements of the policies and standards and requirements of the city.

POLICIES ADDRESSING THE USE OF SOCIAL NETWORKING TOOLS BY MUNICIPAL GOVERMENTS

Given the tremendous potential value of social networking applications to local governments, the simplest approach to address the issues above – to ban all municipal use and access to them – is likely ill-advised. Instead, we suggest that local governments carefully draft and adopt targeted policies, rules, procedures and requirements addressing the rapidly developing use by municipalities and employees of the various social network technologies. We believe at least the following should be considered:

1. **Employee personnel policies**. Personnel policies may need to be updated to provide clear guidelines to all employees about the use of city-owned equipment and the use of city e-mail addresses to access and use social networking applications. All employees should be advised that the use of city-owned equipment and e-mails is subject to the policies and that personal use, including personal use of social network sites, is or may be prohibited. Such policies should specifically describe what amounts to prohibited personal use, and raise awareness of issues surrounding the disseminating of any information concerning the municipal government and its activities that may be available

to an employee because of their position within the city government. While the modern tools and use of social networks may enhance the capabilities of a municipal employee to gain access to a wide range of information important to the city government, it is important that employees understand that the exchange of information by an employee that may involve personal information of another, trade secret information that would otherwise be required to be kept confidential, or disclosure of information prematurely regarding a matter pending before the city's governing body, all of which may accidentally occur and must be guarded against. Policies, procedures, guidelines or instructions regarding this use will help the municipal employee have a better appreciation of the needs and requirements of the city and the importance of the employee's use of the city's equipment, e-mail address, and connections to various social network sites in the performance of his/her job.

The opening page of an employee or other official's computer may contain a brief summary of city policy, rules, procedures and requirements and liability issues, including an acknowledgment that the city is not liable for any unauthorized use or any matters involving defamation, slander, invasion of privacy, etc. The page may require a check-off before the computer would then be usable for normal purposes.

2. **Internal, interoffice policies**. A significant amount of communication throughout the municipal government offices or between other governmental authorities and employees of a municipal government naturally occurs. While such interaction should by no means be discouraged, it is possible that disparate policies concerning the use of social networking tools could create confusion. To the extent that usage policies cannot be implemented citywide and must be addressed at the departmental level, the city should insist that departments share such policies, ideally in a centralized fashion. For this reason (and others) we suggest that some municipalities may find it beneficial to appoint a single person (or small committee) responsible for oversight and administrations of such policies.

3. **Authorized use policies**. Cities, municipal departments, and citizens may benefit tremendously from the intelligent use of social networking tools. However, municipal controls must be implemented to ensure that communications are appropriate and authorized. The policies, procedures, rules and requirements of the city need to provide clear guidelines for the dissemination of such information, who has authority to approve content, and any related precautions.

4. **Policies applicable to elected officials**. Persons who serve in any capacity on a local government council or board or commission have available to them information that should not be disclosed outside of a public meeting. In particular, the casual dissemination of information through a social networking application about a particular matter may ultimately be very harmful to those whose interests are affected by municipal deliberations. In addition, elected officials must be informed that personal use of such services to advertise or promote the person as a political candidate should not be through the city e-mail address, website, or a social network identified as a city communication.

ADDITIONAL RECOMMENDATIONS.

In addition to the above, the following are additional suggestions:

1. The city may wish to conduct an instructional workshop for all affected employees and officials of the city to attend. This may include information and instructions about the differing social network sites and how they may be used to benefit the city and its citizens, municipal guidelines and policies for appropriate use, practical and liability problems associated with the use of social network sites, and other matters.

   The municipality might appoint a committee, including a member of the law department, to identify and coordinate the city's plans and requirements.

2. Depending upon the size of the city, a webmaster, IT persons, or other designated city person should have the responsibility for oversight, review of city procedures, and activities that may properly be disseminated through a social network site and by whom and assist in crafting the content.

3. Given the new and rapidly changing nature of this topic, it is vital to seek out opportunities to obtain information on practices and experiences from others by sharing information with colleagues. An online repository of municipal policies relating to social networking applications, and examples of their use, would be beneficial.

4. Remember that this new wave of communication capabilities is exploding and changing on an almost daily basis. New types of social network sites may become available in the future and the capabilities of the existing technologies may change dramatically. City governance in this area should not be static, but instead requires ongoing review of oversight processes and guidelines. The city's legal department should be involved in this process not only initially, but periodically as well, and should provide an open office to all employees for questions concerning policies, procedures, rules and issues relating to personal or city authorized use of social network applications.

5. It is important to identify whether or not a social networking application is or is not an official activity of the municipality, and whether communications made thereby are official communications. Disclaimers on Facebook pages, etc. may help protect the municipality from potential liability.

CONCLUSION

We hope this very brief paper encourages municipal governments and their municipal law departments to recognize the importance of social networking applications to the future operation of municipal governments, their rapidly changing and increasing use, and potential pitfalls related to such use by local governments. We hope to encourage municipal attorneys to not support any outright prohibition of their use, but to consider how they can be used intelligently, creatively, and prudently, while protecting the municipalities' interests.

DISCLAIMER: This presentation paper is not included to provide legal advice. It is only intended to service as a general guideline of the topic and the subject matter included in it. State and local laws may vary and other requirements apply to the subjects outlined in this presentation paper. Further, this presentation paper should be considered as merely a summary and not all inclusive of any of the subjects, legal issues, or topics contained in it. The Baller Herbst Law Group and the authors of this presentation paper are not liable for the unauthorized use of any of the materials contained herein.