Social Media and the City—Current Issues Facing Municipalities

by Damien T. Shores



Social networking and social media websites represent a shift in how people discover, read, and share news, information, and content. They are a fusion of sociology and technology, transforming monologues (one-to-many) into dialogues (many-to-many), and represent a "democratization of information, transforming people from content readers into content publishers."[1] The social nature of these websites helps to build online communities of people who share interests and activities (or both) or of people interested in exploring the interests and activities of others.[2] Services, such as Facebook, Twitter, MySpace, LinkedIn, Blogger, YouTube, and others, are the fastest growing segment of Internet usage.[3] Between February 2008 and February 2009 alone, Facebook (the most popular social networking website) grew 228% to add 65.7 million new users.[4] During that period, Twitter saw a 1,374% increase and now has over 100 million users.[5] The growing rate of usage presents unique challenges for municipalities and the attorneys who represent them.[6] What is communicated online to or from municipal employees and officials is a legitimate concern for municipal lawyers. Even unofficial, non-sanctioned postings by municipal employees or officials to friends can trigger legal obligations, depending on the governing laws.

Social Media[7]

Facebook is a perfect example of a social media website because it allows users to post and share content, like photos, videos, notes, blogs, web links, and news stories. It is also an excellent example of a social networking site, as users can link to other users or "friends," send their friends messages, and keep friends updated on the user's status by updating the user's profile.[8] LinkedIn is a business-oriented social networking website that focuses on professional networking.[9] The purpose of the site is to allow registered users to connect with other business professionals they know and trust by maintaining a list of contact details.[10] MySpace is a social networking site that allows its users to create profiles, post content, and connect with other users or friends.[11]

"Blog" is a contraction of the term "web log."[12] A blog is a "personal column posted on the Internet."[13] "Blogs often provide commentary or news on a particular subject, such as food, politics, or local news; some function as more personal online diaries."[14] Twitter is a microblogging service that allows users to communicate through updates known as "tweets."[15] Tweets are posts of up to 140 text-characters, which Twitter displays on the user's profile page and delivers to the user's subscribers, known as "followers."[16] Users can limit delivery of their tweets to their circle of friends or, by default, allow anyone to access their page.[17] Users can send and receive tweets directly on the Twitter website or on their mobile device (e.g., cell phone, iPhone, or Blackberry).[18]

The Potential for Problems

Many municipalities have harnessed the power of these social networking websites by creating city blogs, police department MySpace profiles, and even personal profiles of individual city employees on Facebook to keep co-workers, citizens, and friends informed about events and news.[19] As a general proposition, it makes sense for democratic institutions to use readily available technology to keep the citizenry informed. Difficulties can occur, however, when social media users disseminate voluminous amounts of information, unfettered by policies or usage rules.[20] Well-intentioned efforts to involve the public over the Internet can sometimes thwart investigations or inad-

vertently disclose confidential, private, or privileged information.[21] There may also be legal requirements pertaining to specific types of information shared with others using social networking websites. For example, Florida Attorney General Bill McCollum, in an advisory ruling, recently warned the City of Coral Springs that if the municipality creates a Facebook page, it must operate the site in a way that keeps all records accessible and all virtual meetings open to the public.[22]

Records Retention

Depending on the jurisdiction, many municipalities are required, by law, to maintain their data for a specific period of time. In such jurisdictions, records are to be stored, and eventually destroyed, in strict accordance with a records retention schedule. The challenge for such municipalities is how to go about maintaining records of comments made by an employee or official regarding official business on, for example, MySpace, considering that the information is maintained by a third party (i.e., MySpace Inc., based in Los Angeles). This is why it is important for municipalities to exercise some measure of influence over when, what, and how their employees and officials upload data to the web. Because many jurisdictions have yet to establish a policy for the preservation or destruction of blogs, comments, instant messages, and tweets, the best practice is to analogize these content forms to e-mail messages, because most, if not all, jurisdictions have policies regarding the retention of e-mails. In Texas, for example, the retention period for e-mail depends on the information and content contained within the e-mail.[23]

Open Records

Within the U.S.A. and Canada, virtually every municipality is affected by freedom of information legislation, also known as open records, sunshine laws, or public information laws. Such laws generally facilitate transparency in government by providing a way for the public to access information held by the government. For example, the basic premise of the Texas Public Information Act is that *all* government information is presumed to be available to the public because the constitutional form of representative government requires an informed citizenry, and that, in delegating authority to the government, the people do not give their public servants the right to decide what is and is not good for the people to know.[24] However, as technological capabilities expand, so does the broad application of these open records laws. Municipalities are responsible for more than just paper "records;" they now generate, transmit, and store electronic images and digital blips.

As a general rule, it is wise for municipal employees and officials to operate under the assumption that any information they create, regardless of the format, is subject to open records laws, which, in turn, means municipalities should be cautious about what information goes on a social media website, even one that is password-protected. It is a common misconception that just because these social media sites have user identifications and passwords, they are private. In reality, these sites are more accurately characterized as semi-private, because the information one user posts can be viewed by other users, or by a restricted circle of friends. Even if posts can only be viewed by a user's friends, the content created on a password-protected, private computer or mobile device (like an iPhone or BlackBerry) is about as private as your least private friend.[25] A few examples of how such online exchanges, related to official business, can become public information, include:

- planning and zoning commission members, with mutual "friends" on Facebook, leaving comments about an urban redevelopment deal with the same friend.
- A city manager posting a negative blog about his or her mayor.
- Tweets between city council members, discussing upcoming agenda items.[26]

In light of open records laws, municipal employees and officials should exercise common sense and discretion when posting a comment on Twitter or sending a message using Facebook. Elected officials in particular should be clear on the distinction between "campaign" versus "official business" sites and communications. One way for a municipality to avoid problems is to provide *dedicated* cell phones to, and establish e-mail addresses for, employees and officials. These actions would allow municipalities to maintain some control over the records for these types of communications.

The information posted on social networking websites is open to the public by the very nature of it being available, theoretically, for all of the public to see. Yet, the fact that the information can be viewed online (at least by select members of the public) does not relieve municipalities from the statutory obligation to provide the information to other members of the public upon request. Issues arise when an open records request is made to a municipality to produce the information posted on these websites. Compliance with such a request would prove cumbersome (and consider, too, that many jurisdictions provide penalties for failing to publicly disclose information made public under the jurisdiction's open records laws).

Another concern is whether the content of "friend" websites and postings is subject to public disclosure. Generally, a "friend's" content is not subject to public disclosure because it is not maintained in connection with the transaction of official city business. However, if such content does prove to have been maintained in connection with the transaction of official city business, that

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content could, then, become subject to public disclosure upon request. Again, processing such a request would likely be cumbersome.

Confidential Information

Information made confidential by law (either constitutional, statutory, or by judicial decision) is generally exempt from public disclosure under open records laws. Furthermore, the confidentiality of such information is not waived merely by its display in a public forum (like the Internet). In some jurisdictions, a person commits an offense by distributing information that is considered confidential.[27] Examples of the types of information generally made confidential by statute include medical records, student records, information related to a minor, communications between a patient and a mental health professional, and communications between attorney and client.[28]

Open Meetings

Open meetings laws are similar to open records laws in that the intent is to make government more transparent. The basic premise is that public business should be conducted in public. In jurisdictions where open meetings laws apply, social media pose unique challenges for municipalities because these laws typically come into play when a quorum of the city council, or a municipal agency or board, discuss public business. Usually, such meetings must be properly noticed beforehand. The ease with which facts and opinions can freely be exchanged on social networking sites—anywhere, anytime, with anyone—creates endless opportunities for "cyber meetings" that purposefully or inadvertently violate notice requirements and open meetings laws.

Online postings can quickly evolve into illegal cyber meetings, ones that simultaneously generate an evidentiary digital paper-trail. For example, if there are five city council members and three chat about public business online, that dialogue could constitute an open meetings violation. Even if the three were posting online messages regarding city business with a broader network of friends, open meetings laws could still come into play. Some jurisdictions provide for criminal penalties for violations of open meetings laws.[29] If a quorum of a city council agrees on a joint statement on a matter of city business, the deliberative process through which that agreement is reached is typically subject to the requirements of open meetings laws. Those requirements are not necessarily nullified or avoided by avoiding a *physical* gathering of a quorum in one place at one time.[30]

City councils and other decision-making bodies should be particularly careful in avoiding deliberating through e-mail. "Deliberation" is not limited to spoken communication, and discussing public business using written notes or e-mail may constitute a "deliberation" that is covered by open meetings laws.[31] A Washington court held that e-mail communications among a majority of the members of a school board constituted a "meeting" under the State's open meetings law.[32] Accordingly, since a "meeting" can occur if a quorum of a governing body discusses public business via e-mail or over the Internet, caution is encouraged when members of the city council, its commissions, and any other advisory boards, participate in these social networking sites or blogs.

Productivity Concerns

Use of websites like Twitter and Facebook, while keeping people informed, also has the extra consequence of causing productivity problems. Just as personal phone calls at work was an issue that personnel policies had to address, policies must now deal with personal at-work use of e-mail, the Internet, and social networking/social media sites. In most cases, employees are not getting paid to use social networking sites, so monitoring employees for time spent on these sites is important.[33] Further, these websites steal large amounts of bandwidth, which can slow down the Internet for all employees. Security risks to the employer are also posed by revealing sensitive information, as well as intentionally or unintentionally opening the employer's network to viruses and malicious software hiding on some websites. As a result, many municipalities block access to Facebook, Twitter, and Myspace entirely, or limit access to certain times. For example, Robert Wood, City Administrator for the City of West Lake Hills, Texas, ordered his IT consultant to block Facebook and MySpace on the City's servers between 8:00 am and 5:00 pm. (Employees working after hours are free to go to those websites, though.) This is an effective low-tech solution to the risks posed by usage of these websites while "on the clock."

Further, if a public entity chooses to maintain a net presence through a blog, moderating the blog is a good idea to prevent intrusive comments from readers. The City of Seattle, Washington has its blog moderation policy posted on the City's website.[34]

Be Mindful of Postings

Regardless of an employee's ability to access and contribute to social networking sites at work, there is still the need to understand that certain types of content can present problems. Since social networking sites are available 24/7, another area of concern is what employees post or blog about when they are not at work. Generally, what an employee does when he or she is not "on duty" is strictly their own business, although some Internet postings can become a concern, especially in the area of privacy. For example, a mayor's blogging about his personal beef with the police chief may come back to haunt the mayor (and the municipality as a whole) when the police chief is fired for performance reasons and decides to bring suit against his employer for what he feels is the result of a personal vendetta. Discussing someone's medical conditions over the Internet is another "no-no," being a major violation of that person's privacy (and something that can affect the person when he is later looking for a new job). Even anonymous Internet postings on a community blog have boomeranged back to the poster: in a case out of Delaware, a mayor posted defamatory statements about fellow city council members, using the pseudonym "Proud Citizen." Seeking to serve the anonymous poster with a defamation lawsuit, the council members obtained a court order to force the Internet Service

Provider (ISP) to turn over the relevant IP address, thereby identifying the anonymous poster, the mayor.[35]

Thinking before speaking is very sound advice, and this is especially true for elected officials and public employees in the context of Internet postings. Things to consider before posting include:

- Does this reveal any potentially embarrassing private information?
- Am I discussing official business?
- Is there a quorum present?
- Is this information subject to public disclosure?
- If so, how long does this information need to be retained?
- What will my current or future employers think about what I post?
- Who will be able to view the information I post?

The Internet is very much a public forum, so be mindful. Most employers now do an Internet search of job applicants' names to see what these individuals post or what personal information is floating in cyberspace (party pictures with drugs and alcohol? Racist remarks? Rants about previous or current employers?). In many cases, if the employer does not have direct access to Facebook, MySpace, or LinkedIn, they will find an employee to log in and, in some cases, even "friend" an applicant to dig up more information about him or her.

Telecommuting

Telecommuting is another area of concern. Many municipalities now allow their employees and officials to work from home. At home, there is a reasonable expectation of privacy. However, the most common way to remove that expectation respecting the employee's use of a home computer or telephone system is to obtain signed waivers and acknowledgements, in which the telecommuting employee understands that certain aspects of his or her employment will be subject to unannounced monitoring. It is best to provide a telecommuting policy that places the employee on notice that, as a condition of employment at home, the employer reserves the right to inspect computer files and documents prepared or used by the employee in the scope of employment, and to monitor computers and telephone lines during work hours, without notice. If your municipality decides to implement some sort of monitoring option, seek legal counsel's opinion first. Note, too, that any information created, sent, or received by a telecommuting official or employee in the scope of their employment or concerning public business may be subject to public disclosure and open meetings laws and policies. Any telecommuting official or employee should be made aware of these legal obligations and adhere to the municipality's Internet use policy when working from home.

Conclusion

Social networks are excellent tools that give users the opportunity to create and communicate with new communities, but users must be wary. A reasonable social networking-social media policy will go a long way toward addressing the risks involved with social networking websites. Even if no policy currently exists, users should always remember the "Golden Rule:" one should never say anything about others that they would not want said about themselves. While the use of social networking websites can be fun and even productive, it is always wise to keep in mind that using such technology does not absolve users from acting responsibly, and that it creates as many obligations as it does opportunities for expression. As with every new technology, there are laws (i.e., privacy, public information, open meetings, defamation, and copyright), social norms, and business practices that warrant thoughtful consideration and communication with municipal employees and officials.

Author's note: the opinions in this article are the author's alone and do not reflect those of the Texas Attorney General.

Notes

1. *See* Dave Evans, Social Media Marketing: An Hour a Day 33 (2008).
2. *See* Douglas Downing et al., Dictionary of Computer and Internet Terms 443 (10th ed. 2009) (hereinafter Downing et al.).
3. The Social Media Guide Website, http://mashable.com/2009/04/20/the-fastest-growing-social-sites/ (last visited Nov. 10, 2009).
4. Texas Workforce Commission, *Employee Social Networking: It's Time to Address the Issue*, Texas Business Today, Spring 2009, at 4, *available at* http://www.twc.state.tx.us/news/tbt/tbt0509.pdf (hereinafter Texas Workforce Commission).
5. *Id.*; *see also* Twitter, *What is Twitter*, http://business.twitter.com/basics/what-is-twitter/ (last visited Oct. 30, 2011).
6. *Id.*
7. The terms "social media" and "social networking" are used interchangeably in this article because most of the websites that will be discussed have elements of both.
8. *See* Facebook, *Product Overview*, http://www.facebook.com/press/product.php (last visited Nov. 6, 2009).
9. *See* LinkedIn, *Learning Center*, http://learn.linkedin.com (last visited Nov. 6, 2009).
10. *See id.*
11. *See* Downing et al., *supra* note 2, at 321.
12. *See id.* at 58.
13. *Id.*
14. Glossary–Blog, http://www.sussex-learningnetwork.org.uk/glossary/B (last visited Nov. 16, 2009).
15. *See* Twitter Support, *Frequently Asked Questions*, http://twitter.zendesk.com/forums/10711/entries/13920 (last visited Nov. 6, 2009).
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* Fla. Op. Att'y Gen. 9-19 (2009).
20. *Id.* at 1.
21. *Cf.* Doe v. Cahill, 884 A.2d 451 (Del. 2005) (a mayor posted defamatory statements on a community blog about City Council members).
22. *See* Fla. Att'y Gen. Op. 9-19 (2009).
23. 13 Tex. Admin. Code §7.125(b)(1) (2011) (Tex. State Library and Archives Comm'n, Records Retention Schedules).
24. Tex. Gov't Code § 552.001.
25. Clarissa M. Rodriguez, *What do you mean the media can ask for my Facebook account?* Hogwild 2009 (June 26, 2009) Denton, Navarro, Rocha, Bernal, PC.

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26. *Id.*
27. *See e.g.,* TEX. GOV'T CODE § 552.352(b), (c); Miss. Code § 43-15-21.
28. *See e.g.,* 20 U.S.C § 1232g; 45 C.F.R. § 164 (2010); MODEL CODE OF PROF'L CONDUCT R. 1.6 (2003).
29. *See* TEX. GOV'T CODE § 551.143.
30. *See* Op. Tex. Att'y Gen. No. DM-95 (1992).
31. *See* Op. Tex. Att'y Gen. No. JC-307 (2000).
32. Wood v. Battle Ground Sch. Dist., 27 P.3d 1208 (Wash. Ct. App. 2001).
33. Texas Workforce Commission, *Texas Business Today*, "Employee Social Networking: It's Time to Address the Issue," 4-6 (Spring 2009).
34. *See* City of Seattle, *City of Seattle Blogging Policy*, http://www.seattle.gov/pan/BloggingPolicy.htm (last visited Oct. 24, 2011).
35. *See* Doe v. Cahill, 884 A.2d 451 (Del. 2005). ML

Supreme Court

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treatment of similarly situated property owners." Further, the "fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings."

Nordlinger v. Hahn, 505 U.S. 1 (1992), involved a California constitutional amendment that imposed limits on the rate at which real property was taxed, on the rate at which assessments were increased annually, and which reassessed property up to its current appraised value upon new construction or a change in ownership. Stephanie Nordlinger discovered that she was paying about five times more in taxes than her neighbors, who owned comparable homes within the same residential district. She sued, claiming the assessment system treated newer owners less favorably, in violation of equal protection. (Longer-term owners paid lower taxes reflecting historic property values, while newer owners paid higher taxes reflecting more recent values.) The Supreme Court ruled the acquisition-value assessment scheme did not violate the Equal Protection Clause. As in *Armour*, the case revolved around the "rationally related" test. Significantly, the scheme did not discriminate between old and new owners with respect to either the tax rate or the annual rate of adjustment in assessments. The only distinction—the basis on which their property was initially assessed—satisfied rational review as it furthered a legitimate state interest in local neighborhood preservation, continuity, and stability by discouraging a rapid turnover in ownership of homes and businesses. In addition, "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." The Court distinguished *Allegheny Pittsburgh* as "not controlling," as it was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits" of the state-established tax scheme.

IMLA will be following this case; a decision is expected by June 2012. ML

Inside Canada

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Decisions by the Divisional Court under the MCIA are relatively few and far between. For this additional reason, the majority decision, while it stands, should be regarded as a major warning light to councillors who might even think about entering into a financial transaction with their municipality. In the words of the majority judgment:

> "The question that must be asked and answered is 'does the matter to be voted upon *have a potential* to affect the pecuniary interest of the municipal councillor?'"... As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest. The e-mail he sent on July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest...
>
> Robert Tuchenhagen had been a member of the City Council for almost twelve years. He should have been aware of the need to avoid placing himself in a position of conflict. It is difficult to understand how, when, on July 2, 2008, he advised the Realty Department that he might be interested in making a bid, he would not see that he was demonstrating a personal pecuniary interest that would conflict with that of the municipality and the electors he served.

With respect to the defence of inadvertence, the court held as follows:

> This [his active role at Council prior to acquiring a pecuniary interest] was only exacerbated when, on July 21, 2008, he arranged to view the property as part of his consideration as to whether to make a bid and then, at the meeting of the Committee of the Whole that evening, failed to declare an interest. This is not inadvertence; it is fairly characterized as being willfully blind or reckless.

As to the significance of the decision, and the danger signals raised, in the words of the dissenting judgment:

> ...this extraordinarily broad interpretation of what constitutes an indirect pecuniary interest (the conclusion of the majority of the Divisional Court) appears to be without precedent and takes the conflict provisions to new heights. This extremely broad, novel interpretation of the scope of the MCIA, which is a penal statute, should also be a factor in determining whether the saving provisions [inadvertence or error in judgment – MCIA, s. 10(2)] should apply.

Be forewarned!