

Employment Law & the Web



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Lead counsel in the City of Georgetown's successful Texas Supreme Court challenge of an adverse Attorney General's Open Records decision (*Russell v. Cornyn, 2001*)

Publications:

- *Texas Municipal Law & Procedure Manual*, Texas Municipal Clerks Association (5th Edition)
- *Religious Displays at City Hall*, Texas Town & City Magazine, Fall 2005
- *U.S. Supreme Court Validates Moratoriums*, Texas City Attorney Association Newsletter, Summer 2002
- *Sand Dollars: The Need for Coastal Erosion Prevention & Response in Texas*, State Bar of Texas Environmental Law Journal, Winter 1999

Presentations:

- *Give Me A Sign: Municipal Regulating of Signage*, UT Land Use Conference, March 2008
- *Development Agreements*, University of Texas Land Use Law Conference, March 2005
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I. Introduction

The law traditionally lags far behind changes in society. This is especially true in the area of technology. The purpose of this presentation is to reconcile old laws with new technologies, particularly in the area of “social networking” and “social media” websites. Services, such as Facebook, Twitter, MySpace, LinkedIn, Blogger, and many others represent the fastest growing segment of internet usage. To cite some usage statistics, between February 2008 and February 2009 Facebook, the most popular social networking website, grew 228 percent to add 65.7 million new users. Twitter saw a 1,374 percent increase during that same time, growing to seven million users.¹ The growing rate of usage presents unique challenges for human resource personnel across the public/private spectrum. However, in the public arena, the challenges are even more unique when open government laws come into play. This presentation will pay particular attention to: (a) How these social networking sites are dealt with under the Texas Public Information Act and the Texas Open Meetings act; and (b) What personnel policies, practices and procedures cities should consider implementing to increase worker productivity and decrease potential liabilities.

For those who do not know what “social networking,” or “social media” websites are, the definitions on Wikipedia (itself a type of social media website because it allows its users to contribute content) are instructive. “Social media is online content created by people using highly accessible and scalable publishing technologies. It is a shift in how people discover, read and share news, information and content; it’s a fusion of sociology and technology, transforming monologues (one to many) into dialogues (many to many) and is the democratization of information, transforming people from content readers into publishers. Social media has become extremely popular because it allows people to connect in the online world to form relationships for personal, political and business use.”² “A social network service focuses on building online communities of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. Most social network services are web based and provide a variety of ways for users to interact, such as e-mail and instant messaging services.”³

The terms “social media” and “social networking” are used interchangeably in this paper because most of the websites that will be discussed have elements of both. Facebook is a perfect example of a social media website because it allows users to put up and share content like photos, videos, notes, blogs, web links, and news stories, but it is also an excellent example of a social networking site because users can link to other users or “friends,” send them messages, and update their personal profiles to notify friends about themselves. With Facebook, a user’s group of “friends” or social network is based on their affiliations such as the city they live in, the college they went to, or the place where they work.⁴

¹ Texas Workforce Commission, *Texas Business Today*, “Employee Social Networking: It’s Time to Address the Issue,” 4-6 (Spring 2009).

² Wikipedia, *Social Media*, http://en.wikipedia.org/wiki/Social_media (as of Jul. 31, 2009, 12:11 GMT).

³ Wikipedia, *Social Network Service*, http://en.wikipedia.org/wiki/Social_network_service (as of Jul. 31, 2009, 12:15 GMT).

⁴ See Wikipedia, *Facebook*, <http://en.wikipedia.org/wiki/Facebook> (as of Aug. 14, 2009, 14:38 GMT).

LinkedIn is a business oriented social networking website that focuses on professional networking. The purpose of the site is to allow registered users to maintain a list of contact details of people they know and trust in business. The people in the list are called “Connections.” Users can invite anyone (whether a site user or not) to become a connection. A user’s list of connections can then be used to form a contact network consisting of their direct connections, the connections of each of their connections (termed “second-degree connections”) and also the connections of second-degree connections (termed “third-degree connections”). This can be used to gain an introduction to someone you wish to know through a mutual, trusted contact. In this way, LinkedIn is useful to find jobs, people and business opportunities recommended by someone in one's contact network. LinkedIn employs the "gated-access approach," where contact with any professional requires either a preexisting relationship, or the intervention of a contact of theirs. This is intended to build trust among the service's users.⁵ Virtually all social networking websites have a “gate-keeping” feature which allows you to determine who you link to or “friend,” thereby determining who is in *your* social network and who has access to the content that you post on these websites.

MySpace is a social networking site that allows its users to create profiles, post content, and connect with other users or “friends.” MySpace allows users to customize their user profile pages by entering HTML code into such areas as "About Me," "I'd Like to Meet," and "Interests." Videos and flash-based content can be included this way. Users also have the option to add music to their profile pages via MySpace Music, a service that allows bands to post songs for use on MySpace.⁶

Blogger is a website that hosts several user’s blogs. “Blog” is a contraction of the term “web log.” A blog is an entry of commentary, a description of an event or events, a web link, graphics, or video posted on a website. Blog entries are commonly displayed in reverse-chronological order. “Blog” can also be used as a verb, meaning *to maintain or add content to a blog*. Many blogs provide commentary or news on a particular subject, others function as more personal online diaries. A typical blog combines text, images, and links to other blogs, websites, and other media related to its topic. Blogs embody the concept of social media because readers have the ability to interact and leave comments on the blog posts. Most blogs are primarily textual, although some focus on art, photographs, sketches, videos, music, and audio. The collective community of all blogs is known as the “blogosphere.” Discussions “in the blogosphere” have been used by the media as a gauge of public opinion on various issues because all blogs are seen as interconnected and socially networked.⁷

Micro-blogging is another type of blogging, featuring very short posts. Twitter is a micro-blogging service that enables its users to send and read messages known as “tweets.” Tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers who are known as “followers.” Authors can restrict delivery to those in their circle of friends or, by default, allow open access. Users can send and receive tweets via the Twitter website or their mobile device (cell phone, iPhone, Blackberry, ect).⁸

⁵ See Wikipedia, *LinkedIn*, <http://en.wikipedia.org/wiki/LinkedIn> (as of Aug. 14, 2009, 14:41 GMT).

⁶ See Wikipedia, *MySpace*, <http://en.wikipedia.org/wiki/Myspace> (as of Aug. 14, 2009, 15:06 GMT).

⁷ See Wikipedia, *Blog*, <http://en.wikipedia.org/wiki/Blog> (as of Aug. 14, 2009, 15:39 GMT).

⁸ See Wikipedia, *Twitter*, <http://en.wikipedia.org/wiki/Twitter> (as of Aug. 14, 2009, 15:56 GMT).

The power of these social networking/media websites has been harnessed by many cities in the form of city blogs, police department MySpace profiles, and even personal profiles of individual city employees on Facebook to keep citizens and friends informed of events and news. While it is generally considered a good thing to keep citizens informed, problems can occur when too much information is being put out, as well as with the legal requirements pertaining to the types of information shared with others via social networking websites.

II. Texas Public Information Act

The basic premise of the Texas Public Information Act (PIA) is that *all* government information is presumed to be available to the public because, in delegating authority, the people do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.⁹ Under the act, “public information,” means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it.¹⁰ This definition covers paper documents as well as information created and stored on a computer. For example, e-mail regarding public business can be public information, even e-mail transmitted from home through a personal computer via a private internet account.¹¹ As technological capabilities expand, so does the broad application of the PIA. Private text messages made in connection with the transaction of official business by a governmental body have also come under fire as being public information subject to disclosure.¹² Although the Attorney General has yet to issue an opinion regarding public information and social media websites, the definition of “public information” is to be liberally construed to favor disclosure of the information, which is why cities should be cautious about what information goes on a social media website.¹³

To know who will be in the crosshairs of the PIA for the purposes of this presentation, a “governmental body” is defined as a municipal governing body in the state.¹⁴ This can include elected and appointed municipal officials, as well as municipal employees. Therefore, information created by city employees that touches or concerns the transaction of official business, even if communicated via Facebook might be subject to the PIA. The one saving grace for elected officials is that their private correspondence or communications relating to matters the disclosure of which would constitute an invasion of privacy are exempt from the PIA.¹⁵

It is a common misconception that just because these social media sites have user ID’s and passwords, they are private. Actually, these sites are “semi-private,” because the information a user posts can be viewed by other users or by a restricted circle of “friends.” Even if your posts can only be viewed by your “friends,” content created on a private computer or device (i.e. iPhones and BlackBerrys), that is password protected, if its related to official

⁹ Tex. Gov’t Code § 552.001.

¹⁰ *Id.* § 552.002.

¹¹ Tex. Att’y Gen. OR2001-1790.

¹² *See City of Dallas v. Dallas Morning News, LP*, 281 S.W.3d 708 (Tex.App.---Dallas 2009).

¹³ *See* Tex. Gov’t Code § 552.001(b).

¹⁴ *Id.* § 552.003(1)(A)(iii)

¹⁵ *Id.* § 552.109

business, it is about as private as your least private friend. A few examples of how information can become public information include:

- Planning and Zoning Commission Members with mutual “friends” on Facebook, leaving comments about city business to the same friend.
- Posting a negative blog about an issue affecting the city, or about a fellow city official or employee.
- Emails or text messages between council members discussing public business.
- Twitter posts between officials regarding their vote positions.

Not only do the above actions constitute public information but could cause other problems for the city such as:

- Potential allegations of unethical behavior.
- Potential violations of Open Meetings Act.
- Potential for digging the city or yourself into a hole regarding a position on an issue.
- Potential for charges of corruption or other criminal charges.

In light of the PIA implications and other potential issues, city employees and officials should exercise common sense and discretion when posting a comment on Twitter or sending a message via Facebook. Elected officials in particular should be wary of campaign versus official business sites and communications. One way for a city to avoid problems is to establish dedicated cell phones and email addresses for employees and officials. This allows cities to maintain some control over the records for these types of communications, which can be quite burdensome to do.

Records Retention

Once PIA laws are implicated, a city must turn over the records in the format requested by the requestor or request an Attorney General Open Records Decision (ORD). This means that how a city goes about maintaining its records is very important. The challenge for cities in this regard is how does a city go about maintaining records of comments made by a city council member on Myspace, considering that the information is maintained by a third party (i.e., Myspace Inc. based in Los Angeles). This is why it's important for cities to maintain control over the content posted on behalf of the city.

The Texas State Library and Archives Commission (TSLAC) establishes the general records retention schedules and city councils then set their own retention schedules provided that whatever schedule they set is in conformity with the minimum requirements established by TSLAC.¹⁶ For emails, the retention period depends on the information and content within the email. For example, under the TSLAC's own *internal* schedules:

- Emails containing documents or information submitted to a governing body for consideration, approval, or other action should be kept for two years;
- Emails regarding an employee grievance relating to personnel policies or working conditions should be kept for two years;

¹⁶ Tex. Loc. Gov't Code § 203.042.

- Emails containing a complaint made by the public to a government employee, department, or body should be retained for two years after the complaint has been resolved;
- Emails containing correspondence or internal memos with routine administrative matters involved with a policy, program, service, or project by the local government should be retained for two years;
- Emails containing correspondence or internal memos regarding the development of a policy, program, service, or project by the local government should be retained for five years; and
- Emails containing correspondence or internal memos with routine information such as requests for publications, meeting notices, or even planning can be deleted as soon as they are no longer administratively significant.¹⁷

Although there is no current established policy for the preservation or destruction of blogs, comments, instant messages, and tweets, it appears that the retention time would strongly correlate to that of emails and would be content based. Thus, understanding the information conveyed and how long it needs to be retained should be considered whenever a city employee or official is putting information out into cyber-space. Records managers and information technology personnel will want to review the publication

Bulletin B, Electronic Records Standards and Procedures to ensure that your city's electronic records program follows the laws. Bulletin B is a publication of Local Government Code §205.001 to §205.009 and Texas Administrative Code (TAC) 7.71-7.79.¹⁸

III. Texas Open Meetings Act

The premise behind the Texas Open Meetings Act (TOMA) is similar to that behind the Public Information Act, which is that public business should be conducted in public. The general rule is that every meeting is open to the public because citizens have the right to observe their government in action. More specifically, every regular, special, or called meeting of a governing body must be open to the public.¹⁹ A “meeting” is defined as, a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.²⁰ It is important to scrutinize gatherings of members of the governing body because TOMA applies to assemblies of government officials that take place outside the “traditional meeting” context. Under the act, a “governing body” can include the following: a county commissioners court, a municipal governing body, a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality, a school district board of trustees, and other groups.²¹ A “quorum” is defined as a majority of a governmental body, unless defined differently by

¹⁷ Texas State Library and Archives at <http://www.tsl.state.tx.us/slr/recordspubs/gr.html>.

¹⁸ Texas State Library and Archives at <http://www.tsl.state.tx.us/slr/recordspubs/lbullb.pdf>.

¹⁹ See Tex. Gov't Code § 551.002.

²⁰ *Id.* § 551.001(

²¹ *Id.* § 551.001(3).

applicable law or rule or the charter of the governmental body.”²² Given these definitions, if there are five city council members and three were discussing public business together over the internet, it would be an open meetings violation. Even if the three city council members were discussing city business with a third party, TOMA still comes into play. Open meetings violations can carry civil and criminal penalties.²³

It is for the reasons mentioned above that TOMA should be of concern to cities when it comes to participation on social media/networking sites, especially when a quorum of city officials discusses city business by email or by comments to a blog. A recent case out of Alpine, Texas is revealing. The case, *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009), arose from alleged violations of the Texas Open Meetings Act (“TOMA”) by certain members of the Alpine City Council for their discussion of public matters via email by a quorum of public officials outside of an open meeting. The Fifth Circuit stated that unlike public employees, elected officials are different because their role in society makes it imperative that they be allowed to freely express themselves on matters relevant to the public. The Court also considered section 551.144 of TOMA to be content-based because whether a quorum of public officials may communicate with each other outside of an open meeting depends on whether the content of their speech refers to “public business.” The case has been remanded back to the trial court so the State can try to establish that section 551.144 is narrowly tailored to further a compelling state interest.²⁴ However, until the results of the trial courts decision is released, it is in the best interest of cities to ensure that members of their governing bodies avoid deliberating on public business through email, comments, and/or blogs.

IV. Other Legal and Productivity Concerns

The instant para-flow of information flashing on your screen from sites like Twitter and Facebook, while keeping you informed, also has the unintended (or intended) consequence of forcing us *all* to spend more time on these sites, which can cause productivity problems. Just as personal phone usage at work was an issue that had to be addressed, so must personal usage of email, internet, and now social networking/social media sites. In most cases, employees are not getting paid to use social networking sites, so monitoring usage for time spent on these sites is important. Many companies and some governmental bodies block access to Facebook, Twitter, and Myspace entirely, or limit access to certain times.

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. Because social network sites are available 27/7, another area of concern is what your employees post or blog about when they are not at work. Although what an employee does when they are not on duty is strictly their own business, some internet postings can become a concern, especially in the area of privacy. For example, a mayor blogging about his personal beef with the police chief might come back to haunt the mayor and city as a whole when the police chief gets fired for performance reasons and decides to bring suit against the city for what he feels is the result of a personal vendetta. Discussing someone’s medical conditions over the internet is

²² *Id.* § 551.001(6)

²³ *See* Tex. Gov’t Code § 551.143.

²⁴ *See Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009).

another “no-no,” as it is a major violation of that person’s privacy, and can come back to haunt them when they are looking for a job. Even anonymous internet postings on a community blog have come back to haunt the poster. In a case out of Delaware, a mayor was posting defamatory statements about city council members under the pseudonym “Proud Citizen.” Seeking to serve the anonymous poster with a defamation lawsuit, the council members got a court order forcing the Internet Service Provider (ISP) to turn over the IP address, thereby identifying the anonymous poster as the mayor.²⁵ Thinking before you speak is very sound advice, and that is especially true for internet postings. Things to consider before you post includes:

- Does this reveal any potentially embarrassing private information?
- Am I discussing official city business?
- Is there a quorum present?
- Is this information subject to the PIA?
- 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 employer’s now Google their applicants names to see what they post or what information is floating around out there, whether it be party pictures with drugs and alcohol present, racist remarks, or rants about ones previous or current employer. In many cases, if one does not have access to Facebook, Myspace, or LinkedIn, they will find another employee to log-in, and in some cases, even “friend” an applicant to dig up more information on them.

Telecommuting is another area of concern as many city’s now allow their employees and officials to work from home. At home, there is a reasonable expectation of privacy, so the probability that the employee’s home will be considered private is high; however, the employees use of his/her computer or telephone systems will not be considered private. The most common way to remove that expectation of privacy is to obtain signed waivers and acknowledgements that telecommuting employees understand that certain aspects of their 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, inspect documents prepared or used by the employee in the scope of employment, and monitor computers and telephone lines during work hours without notice. If a city decides to implement some sort of monitoring option, seek legal counsel’s opinion first. Any information created, sent, or received by a telecommuting official or employee in the scope of their employment and/or concerning public business is subject to the PIA and TOMA. Any telecommuting official or employee should be made aware of their legal obligations and adhere to the city’s internet use policy(s) when working from home.

²⁵ See *Doe v. Cahill*, 884 A.2d 451 (Del. Supr., 2005).

V. Policies for Cities

Given the multitude of concerns raised by social networking website use at the workplace, it is wise to set up and implement a policy that establishes prudent and acceptable practices regarding the use of the internet. What follows is a sample policy written by the Texas Workforce Commission regarding use of social media by employees.²⁶ As with any policy, it is best to have it reviewed by an employment and/or municipal law attorney to ensure the policy is relevant, legally sound, and meets a city's particular needs.

While the City of SAMPLE encourages its officials and employees to enjoy and make good use of their off-duty time, certain activities on the part of its officials and employees may become a problem if they have the effect of impairing the work of any official or employee; harassing, demeaning, or creating a hostile working environment for any official or employee; disrupting the smooth and orderly flow of work within the City; or harming the goodwill and reputation of the City of SAMPLE among its citizens or in the community at large. In the area of social media (print, broadcast, digital, and online), officials and employees may use such media in any way they choose as long as such use does not produce the adverse consequences noted above. For this reason, the City of SAMPLE reminds its officials and employees that the following guidelines apply in their use of social media, both on and off duty:

- 1. If an official or employee publishes any personal information about themselves, another official or employee of the City of SAMPLE, a citizen, or a vendor in any public medium (print, broadcast, digital, or online) that:**
 - a. Has the potential or effect of involving the official or employee, their co-workers, or the City of SAMPLE in any kind of dispute or conflict with other officials or employees or third parties;**
 - b. Interferes with the work of any official or employee;**
 - c. Creates a harassing, demeaning, or hostile working environment for any official or employee;**
 - d. Disrupts the smooth and orderly flow of work within the City, or the delivery of services to the City's citizens;**
 - e. Harms the goodwill and reputation of the City of SAMPLE among its citizens or in the community at large;**
 - f. Tends to place in doubt the reliability, trustworthiness, or sound judgment of the person who is the subject of the information; or**
 - g. Reveals private information;**

the official(s) or employee(s) responsible for such problems will be subject to counseling and/or disciplinary action, up to and potentially including termination of employment, depending upon the circumstances.

²⁶ Texas Workforce Commission, *Texas Business Today*, "Employee Social Networking: It's Time to Address the Issue," 4-6 (Spring 2009).

- 2. No official or employee of the City of SAMPLE may use City equipment or Facilities for furtherance of non-work-related activities or relationships without the express advance permission of (designated member of management).**
- 3. Officials or Employees who conduct themselves in such a way that their actions and relationships with each other could become the object of gossip among others in the City, or cause unfavorable publicity for the City of SAMPLE in the community, should be concerned that their conduct may be inconsistent with one or more of the above guidelines. In such a situation, the employees involved should request guidance from (a designated member of management) to discuss the possibility of a resolution that would avoid such problems. Depending upon the circumstances, failure to seek such guidance may be considered evidence of intent to conceal a violation of the policy and to hinder an investigation into the matter.**
- 4. Should you decide to create a personal blog, be sure to provide a clear disclaimer that the views expressed in the blog are the author's alone, and do not represent the views of the City of SAMPLE.**
- 5. All information published on any official or employee blog(s) should comply with the City of SAMPLE'S privacy and/or data policies. This also applies to comments posted on other social networking sites, blogs, and forums.**
- 6. Be respectful to the City of SAMPLE, co-workers, citizens, vendors, and partners, and be mindful of your physical safety when posting information about yourself or others on any forum. Describing intimate details of your personal and social life, or providing information about your detailed comings and goings might be interpreted as an invitation for further communication - - - or even stalking and harassment that could prove dangerous to your physical safety.**
- 7. Social media activities should never interfere with work commitments.**
- 8. Your online presence can reflect on the City of SAMPLE. Be aware that your comments, posts, or actions captured via digital or film images can affect the image of the City of SAMPLE.**
- 9. Do not discuss City citizens, vendors, issues, or business without express consent to do so.**
- 10. Do not ignore copyright laws, and cite or reference sources inaccurately. Remember that the prohibition against plagiarism applies online.**
- 11. Do not use any City of SAMPLE logos or trademarks without written consent. The absence of explicit reference to a particular site does not limit the extent of the application of this policy. If no policy or guideline exists, the City of SAMPLE'S officials or employees should use their professional judgment and follow the most prudent course of action. If you are uncertain, consult your supervisor or manager before proceeding.**

Finally, should your City decide to adopt such a formal policy, all officials and employees should sign copies of the policy and be trained in its meaning. The best way to do that would be to:

- Hold a mandatory staff meeting;
- Distribute an agenda to all officials and employees in which discussion of the policy appears as an action item;
- Have all officials and employees sign an attendance roster and hand out copies of the new policy;
- Discuss it and hold a question-and-answer session with everyone present;
- Pass out copies of acknowledgment of receipt of policy forms for everyone to sign specifying the policy received;
- Collect the signed forms before adjourning the meeting.

VI. Conclusion

Social networks are excellent tools that give users the opportunity to create and communicate with whole new communities, but users must be wary of what they post. A reasonable social networking/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,” that you should not to say anything about others that you would not want said about yourself. While 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 act, open meetings act, defamation, and copyright), social norms, and business practices that warrant thoughtful consideration and communication with your officials and employees.

This paper and any accompanying presentations are intended for general educational purposes only, and do not constitute legal advice.