



# Legal Impacts of Social Media on Public Sector Organizations

CPM Program Conference  
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TexasMunicipalLawyers.com

# Agenda

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- 1. Uses for Social Media**
- 2. Open Government Concerns**
  - a. Records Retention
  - b. Open Records
  - c. Open Meetings
- 3. Human Resources Concerns**
- 4. Have a Policy**

# **3 Types of Use**

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**A. Agency Use**

**B. Professional Use**

**C. Personal Use**

# Share Content (*Push / Pull*)

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- Announcements
- Introductions
- Stories
- Photos
- Videos
- Regulations
- Events
- Blogs
- Web links



# **Employers' Use of Social Media**

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**A. Marketing & Communications**

**B. Provide Services**

**C. Engage Customers & Citizens**

# City Use of Sites

- Blogs
- Official City Website
- Departmental Websites
- Individual Employee Profiles on Facebook
- Department Profiles on MySpace



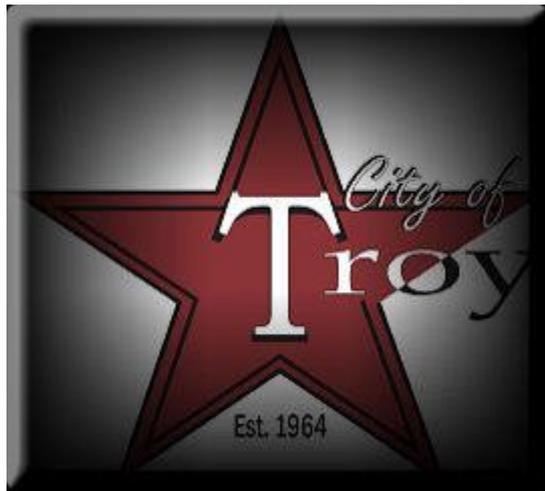
*artfully yours*



# Troy P.D.

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- 07/29 - 3 accidents on the northbound side of IH 35
- 07/30 - Graffiti - 205 College Street
- 08/02 - Warrant arrest on IH 35 northbound at the 310 mile marker
- 08/02 - Accident on IH 35
- 08/05 - Accident on Church Ave.
- 08/09 - Accident on IH 35 southbound
- 08/10 - Accident at 5 N. Central
- 08/11 - Construction theft on W. Main
- 08/13 - Drug Paraphernalia on N. Central



# Security Issues

1. Data Mining
2. Issues for Government Agencies
3. Google saves all searches for 18 months



## EU adds to debate on Internet privacy

Google, Facebook say data rules would hurt economy

By Byron Acohido  
USA TODAY

They may be battling each other tooth-and-nail to win over online advertisers. But Google and Facebook are on the same side in opposing new data-handling privacy laws fast-gelling in the Europe and the U.S.

The European Union has formally proposed strict rules that could restrict much of the systematic tracking and profiling Google and Facebook routinely do of Internet users, as part of delivering targeted ads to them. If Europe's new rules are implemented as expected in 2013, the tech rivals could face hefty fines for any violations.

On Tuesday, Facebook COO Sheryl Sandberg delivered a speech in Munich outlining how Europe's propos-

als could stymie the global economy. Google spokesman Chris Gaither echoed Sandberg's argument. He says the search giant "supports simplifying privacy rules in Europe to both protect consumers online and stimulate economic growth."

Meanwhile, refinements announced this week by Google and Facebook on how each tracks and profiles Internet users added heat to the domestic debate over the need for new data-privacy rules in the U.S.

Google signaled that it will begin cross-referencing user data compiled from its most popular services, including search, Google Apps, Gmail and YouTube.

Users won't be permitted to "opt out" of having their Google activities correlated.

Facebook is making its Timeline mandatory for members. Timeline chronologically displays a member's online activities.

Non-profit SafeGov, which monitors security issues for federal, state

and local government agencies, is alarmed by Google's new policy and says it could put workers who use Google Apps for Government, a paid service, at heightened risk.

"Google should not be data-mining information in e-mails, text messages, searches and documents that workers are putting into Google services," says Jeff Gould, SafeGov security analyst.

"It's a matter of not making government workers unnecessarily exposed to hackers and to inadvertent disclosures of information."

Google Vice President Amit Singh says the new privacy policy for consumer data is superseded by data-privacy provisions in contracts with government agencies and others that use the paid version of Google Apps.

Rep. Ed Markey, D-Mass., asked the Federal Trade Commission to review Google's no-opt-out policy. "We still don't have a law that sets the rules of the road for fair information practices," says Sen. John Kerry, D-Mass.

# Records Retention

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# Records Retention

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## Texas State Library and Archives Commission Electronic Records

- The retention period for a record applies to the record regardless of the medium in which it is maintained. This includes electronic mail (e-mail), websites, and electronic publications.
- The use of social media applications may create public records. Any content (messages, posts, photographs, videos, etc.) created or received using a social media application may be considered records and should be managed appropriately.

# Records Retention

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## Texas State Library and Archives Commission

### Electronic Records

- The retention of social media records is based on content and function. Local governments will need to consult the relevant records retention schedule for the minimum retention periods.
- General e-mail sent or received in the normal conduct of business – **2 years**
- Photographs, images, recordings, and other non-textual media – AV (as long as administratively valuable)
- Internet Cookies – AV
- Website history files – AV
- *Bulletin B, Electronic Records Standards and Procedures*

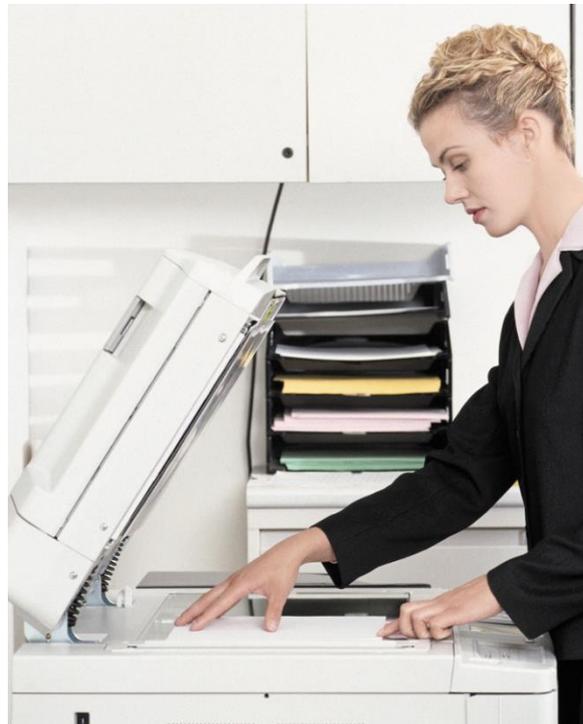
# Open Records

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# Duty to Provide Data

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- Give any existing data ever posted on websites
- Can't simply refer to website



# Public Information Act

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- All data collected, assembled, or maintained by the City in connection with transaction of official business
- All data collected, assembled, or maintained for the City – the City owns the data or has a right of access
- Regardless of format
- Includes paper, film, and digital media

# Attorney General

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- No opinion on Social Media, yet
- E-mail is clearly subject to disclosure under the Public Information Act (PIA)
- Duty to Provide copies of online data



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

# Right to Privacy?

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- Password ≠ Private
- Social Media is only “Semi-Private”
- Personal v. Official:
  - Who has access?
  - What is content?
  - How is it used?
- Anonymous
  - Delaware Case of Mayor “Proud Citizen”

# Personal or Private?

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- City of Dallas case
- Former Mayor Laura Miller
- Blackberry:
  - Device & service paid for with personal funds
  - Utilized personal e-mail address
  - Used to conduct City business
- Trial Court ruled: Public
- Appellate Court overturned
- **S.B. 1368**



# Think Before You Post

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- What happens in Vegas stays on YouTube, Flickr, Twitter, Facebook...
- Does this reveal any potentially embarrassing private information?
- Am I discussing official city business?
- Is this information subject to Open Meetings?
- Is this information subject to Open Records?
- How long must this information be kept?
- What will current or future employers think?
- Who will be able to view the information I post?

# Open Meetings

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# Open Meetings

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- Public business should be conducted in public
- A “Meeting” is:
  1. Deliberations (talking and/or voting)
  2. Quorum (majority)
  3. Governing body (city council, P&Z)
  4. City business
- Action without meetings
- Washington: E-mail Exchange = Meeting

# Freedom of Speech?

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- City of Alpine I & II
- E-mail exchanges by quorum of City Council
- *Rangra v. Brown*
- *Asgeirsson v. Abbott*
  - Vague
  - Overbroad
  - Suppresses speech
  - Discriminates
- TOMA does not censor or prevent speech
- TOMA mandates disclosure

# S.B. 1297

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A communication or exchange of information between members of a governmental body about public business or public policy over which the governmental body has supervision or control does not constitute a **meeting** or **deliberation** for purposes of the Open Meetings Act if:

- (a) the communication is in writing;
- (b) the writing is posted to an *online message board* of similar Internet application that is viewable and searchable by the public; and
- (c) The communication is displayed in real time and displayed on the online message board or similar Internet application for no less than 30 days after the communication is first posted.

# H.B. 2414

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- (1) *videoconference call* is a communication conducted between two or more persons in which one or more of the participants communicate with the other participants through duplex audio and video signals transmitted over a telephone or data network;
- (2) a member or employee of a governmental body may participate remotely in a meeting by a videoconference call if the video and audio of the member's or employee's participation is broadcast live at the meeting
- (3) a member of a governmental body who participates in a meeting by videoconference call shall be counted as present at the meeting for all purposes
- (4) a meeting may be held by videoconference call only if:
  - (a) the governmental body makes available to the public at least one suitable physical space  
located in or within a reasonable distance of the geographic jurisdiction, and
  - (b) there is two-way audio and video available for the public to participate as would at any meeting.

# Human Resources

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# Common Tool in Employment

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- 37% of employers in 2012 used Social Media to screen potential employees
- Of those, 35% have at least once decide not to make job offer based on content posted online.
- 50% of those attributed decision not to hire on:
  - Provocative Photos
  - References to Drinking & Drug usage
  - Bad mouthing previous employers & colleagues

Press Release, CareerBuilder (Apr. 18, 2012)

# Reach Beyond Interview Process

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- Present Self Professionally?
- Good Fit?
- Qualifications?
- Well-Rounded?
- Creative?
- Communication Skills?
- Reasons Not To Hire?

# Employer Liability

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## **1. Discrimination**

- a. Sex, Race, Color, Religion, National Origin, Pregnancy, Age, Disability, Veteran Status, Genetic Info
- b. Disparate Treatment or Disparate Impact

## **2. Harassment**

## **3. Retaliation**

# Have a Policy

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# Agency Policy

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1. Restriction of personal use on City resources
2. Agency business performed on agency resources
3. Apply to computers & phones
4. Clarify Role & Opinions
5. Protect privacy, confidentiality & privileges
6. Remember respect & safety
7. Work comes first



# Agency Policy (cont.)

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8. Reflection on Agency's image
9. Caution with trade secrets, competitive info
10. Plagiarism will not be tolerated
11. Honor logos or trademarks
12. Online activities can have job consequences

*<http://www.texasmunicipallawyers.com/files/publications/Sample-Social-Media-Policy.pdf>*

# Agency Policy

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- Mandatory staff meeting
- Distribute agenda to all officials & employees with discussion of the policy as action item
- Have all officials & employees sign attendance roster & hand out copies of the policy
- Discuss it & hold a question & answer session
- Pass out copies of policy receipt acknowledgment forms for everyone to sign
- Collect signed forms before adjourning

# Courtroom Drama

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Employee sued Employer after being terminated upon Employer finding photos of Employee on Facebook dancing and playing frisbee while on FMLA leave for a “serious medical condition” that allegedly left her “completely incapacitated.”

*Jaszczyn v. Advantage Health Physician Network (2012)*

# Courtroom Drama

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- Anonymous caller informed fire department female firefighter trainee had MySpace account with “fresh out of the shower” photos posing bare showing shoulders & backside.
- Department issued oral reprimand.
- When trainee demanded info about the photos, she was terminated for her “combative tone” and “disrespect toward administration”.
- Trainee sued alleging disciplined & terminated based on race & gender.

*Marshall v. Mayor of Savannah (2010)*

# Courtroom Drama

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- Employers can't retaliate against an employee because of the employee's relative's protected activity (e.g., Free Speech).

*Thompson v. North America Stainless* (2011)

# Courtroom Drama

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- Employers can conduct work-related audits of pager text messages and discipline employees for inappropriate content.
- For example, police officers can be disciplined for sending sexually-explicit material via city-issued devices.
- No 4<sup>th</sup> Amendment Search problems



*City of Ontario v. Quon* (U.S. Supreme Court 2010)

# Courtroom Drama

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- Male employee posted photo on Facebook of female co-worker asleep at her desk with thong and buttocks showing.
- When female employee learned of photo 8 months later, reported it to H.R. who disciplined the Male employee.
- Female employee sued Employer alleging sexual harassment and retaliation after furloughed. She lost.

Yancy v. U.S. Airways (2012)

# Courtroom Drama

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- Employee filed suit alleging termination in retaliation for posting on Facebook, “anyone know a good EEOC lawyer? I need one.”
- Court found that one-week proximity between Facebook post and termination, combined with Employer’s awareness of the post, was sufficient to make a case.
- Ultimately, Court found for Employer because employee couldn’t show the Employer’s stated, legitimate, non-retaliatory reasons were pretext.

*Deneau v. Orkin* (2013)

# Courtroom Drama

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- Teacher friended students on MySpace to communicate about homework.
- Teacher also posted photos of naked men and engaged students in “peer-to-peer level exchanges”.
- School didn’t renew teacher’s contract.
- Court upheld:
  - Teacher’s behavior was disruptive of school activity, and
  - School’s interest in preventing this behavior outweighed the teacher’s speech protection.

*Spanierman v. Hughs (2008)*

# Thank you!

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**Acknowledgment:** Credit is given to Courtney Perez of the Carter Stafford firm for her paper, "Social Media Policies And The Public Employer: Lessons From The Private Sector", 25<sup>th</sup> Suing & Defending Governmental Entities (July 2013), which was influential and educational in preparing this material.