

OPEN GOVERNMENT AND THE NET: BRINGING SOCIAL MEDIA INTO THE LIGHT*

by Alan J. Bojorquez** and Damien Shores***

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

** Alan J. Bojorquez is a lawyer whose practice focuses exclusively on serving municipalities. He graduated from Texas Tech University with his B.A. in 1990, and his J.D. and M.B.A. in 1996. Mr. Bojorquez is the principal at the Bojorquez Law Firm, PLLC, in Austin, Texas.

*** Damien Shores is a third year law student at Saint Mary's University. He received his B.A. in 2004. He currently works at the Bojorquez Law Firm, PLLC, in Austin, Texas.

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I. INTRODUCTION

Although lawyers themselves may be technologically astute, the laws with which they labor inevitably lag far behind. The purpose of this article is to reconcile broad, lumbering statutes designed to achieve open government in Texas with new, rampant technologies, particularly in the area of “social networking” and “social media” websites. Government agency managers and the lawyers who advise them may be surprised to learn the extent the agencies are legally responsible for what agency workers do online.

Services, such as Facebook, Twitter, MySpace, LinkedIn, Blogger, YouTube, and others, represent the fastest growing segment of Internet usage.¹ Between February 2008 and February 2009, Facebook (the most popular social networking website) grew 228% to add 65.7 million new users.² During that period, Twitter saw a 1,374% increase and now has seven million users.³ The growing rate of usage presents unique challenges for public entities and the attorneys who represent them.⁴

This article navigates the web of social networking sites and provides guidance on the application of Texas’s open government laws (primarily the Public Information Act, Open Meetings Act, and Records Retention Act).⁵ What is communicated online to or from local government agents is a legitimate concern for agency managers depending on the content, means of conveyance, and participants. Even unofficial, non-sanctioned postings by an agency employee to friends can trigger obligations under the Records Retention Act, the Public Information Act, and the Open Meetings Act.

The authors of this article clarify the obligations of government agencies to preserve data created online, provide general public access to that data, and avoid public decision-making in cyberspace. Finally, we offer policies,

1. The Social Media Guide Website, <http://mashable.com/2009/04/20/the-fastest-growing-social-sites/> (last visited Nov. 10, 2009).

2. 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].

3. *Id.*

4. *See id.*

5. The authors acknowledge that social media websites pose varied legal challenges to government agencies, such as those involving Employment Law, but this article is limited to mandates and pitfalls of open government legislation.

practices, and procedures government agencies should consider implementing to better manage their obligations under Texas's sunshine laws.

A. Social Media

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 they are “the democratization of information, transforming people from content readers into content publishers.”⁶ The social nature of these websites helps to build online communities of people who share interests, activities, or both, or people interested in exploring the interests and activities of others.⁷ This article uses the terms social media and social networking interchangeably because most of the websites have elements of both.

B. Facebook

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 friends messages, and keep friends updated on the user's status by updating the user's profile.⁸ With Facebook, a user's group of friends or social network is based on his affiliations, such as the city he lives in, the college he went to, or the place where he works.⁹

C. LinkedIn

LinkedIn is a business-oriented social networking website that focuses on professional networking.¹⁰ 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.¹¹ LinkedIn calls the people in the list “connections.”¹² Users can invite users or nonusers to become a connection.¹³ A user can use his connections to form a contact network consisting of his connections, the

6. See DAVE EVANS, *SOCIAL MEDIA MARKETING: AN HOUR A DAY* 33 (2008).

7. See DOUGLAS DOWNING ET AL., *DICTIONARY OF COMPUTER AND INTERNET TERMS* 443 (10th ed. 2009) [hereinafter DOWNING ET AL.].

8. See Facebook, Product Overview, <http://www.facebook.com/press/product.php> (last visited Nov. 6, 2009).

9. See *id.*

10. See LinkedIn, Learning Center, <http://learn.linkedin.com> (last visited Nov. 6, 2009).

11. See *id.*

12. See *id.*

13. See *id.*

connections of each of the user's connections (second-degree connections), and the connections of all second-degree connections (third-degree connections).¹⁴ A user can use this contact network to gain an introduction to someone through a mutual, trusted acquaintance.¹⁵ In this way, LinkedIn is useful to find jobs, professionals, and business opportunities through recommendations by a connection.¹⁶ Contact with any professional on LinkedIn requires a preexisting relationship with that professional or the intervention of a mutual connection.¹⁷ LinkedIn intends for this to build trust among the service's users.¹⁸ Virtually all social networking websites have a gate-keeping feature, which allows the users to determine who they link to or friend, thereby allowing the users to determine who is in *their* social network and who has access to the content that they post on these websites.

D. MySpace

MySpace is a social networking site that allows its users to create profiles, post content, and connect with other users or friends.¹⁹ Users can customize certain fields on their user profile pages ("About Me," "I'd Like to Meet," "Interests," etc.) by entering HTML code into those areas.²⁰ Users can include videos and other flash-based content this way.²¹ MySpace also allows users to upload their own music via MySpace Music, which other users can incorporate into their own profiles.²²

E. Blogs

Blogger is a website that hosts several users' blogs.²³ "Blog" is a contraction of the term "web log."²⁴ A blog is a "personal column posted on the Internet."²⁵ "Blogs often provide commentary or news on a particular subject, such as food, politics, or local news; some function as more personal online diaries."²⁶ Blog editors commonly display entries in reverse-

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See* DOWNING ET AL., *supra* note 7, at 321.

20. *See* Pam G., *How to Customize Your MySpace*, http://www.ehow.com/how_4558497_customize-myspace.html (last visited Nov. 6, 2009).

21. *See* MySpace, Quick Tour, <http://www.myspace.com/index.cfm?fuseaction=userTour.home> (last visited Nov. 6, 2009).

22. *See* MySpace, MySpace – The New Music Player: What's New at MySpace Music, <http://www.myspace.com/aplaceformusic> (last visited Nov. 6, 2009).

23. *See* DOWNING ET AL., *supra* note 7, at 59.

24. *See id.* at 58.

25. *Id.*

26. Glossary – Blog, <http://www.sussexlearningnetwork.org.uk/glossary/B> (last visited Nov. 16, 2009).

chronological order.²⁷ One can also use the term "blog" as a verb, meaning to "add new material to or regularly update a weblog."²⁸ Many blogs provide commentary or news on a particular subject; others function as more personal online diaries.²⁹ "A typical blog combines text, images, and links to other blogs, [websites], and other media related to its topic."³⁰ Blogs embody the concept of social media because readers have the ability to interact and leave comments on the blog posts.³¹ "Most blogs are primarily textual, although some focus on art, photographs, [sketches], videos, music, and audio."³² The "blogosphere" is the collective community of all blogs.³³ The media has used discussions in the blogosphere as a "gauge of public opinion on various issues" because the media sees all blogs as interconnected and socially networked.³⁴

F. Twitter

Microblogging is another type of blogging, featuring very short posts.³⁵ Twitter is a microblogging service that allows users to communicate through updates known as "tweets."³⁶ 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."³⁷ Users can limit delivery of their tweets to their circle of friends or, by default, allow anyone to access their page.³⁸ Users can send and receive tweets directly on the Twitter website or on their mobile device (e.g., cell phone, iPhone, and Blackberry).³⁹

G. Potential for Problems

Many public entities harnessed the power of these social networking websites by creating city blogs, police department MySpace profiles, and even personal profiles of individual government employees on Facebook to keep co-

27. See Greg R. Notess, *The Blog Realm: News Sources, Searching with Daypop, and Content Management*, <http://www.onlinemag.net/sep02/OnTheNet.htm> (last visited Nov. 16, 2009) [hereinafter Notess].

28. THE NEW OXFORD AMERICAN DICTIONARY 179 (2d ed. 2005).

29. See DOWNING ET AL., *supra* note 7, at 58-59.

30. Glossary – Blog, <http://www.sussexlearningnetwork.org.uk/glossary/B> (last visited Nov. 16, 2009).

31. See Notess, *supra* note 27.

32. Communication Tool Wikipedia Links, <http://www.wiserearth.org/article/1f5124a64a23213f5b50884b8e5117b0> (last visited Nov. 16, 2009).

33. See DOWNING ET AL., *supra* note 7, at 59.

34. Phillip Winn, *State of the Blogosphere: Introduction*, <http://technorati.com/blogging/article/state-of-the-blogosphere-introduction/> (last visited Nov. 16, 2009).

35. See DOWNING ET AL., *supra* note 7, at 309.

36. See Twitter Support, Frequently Asked Questions, <http://twitter.zendesk.com/forums/10711/entries/13920> (last visited Nov. 6, 2009).

37. See *id.*

38. See *id.*

39. See *id.*

workers, citizens, and friends informed of events and news.⁴⁰ 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.⁴¹ Well-intentioned efforts to involve the public over the Internet can sometimes thwart investigations or inadvertently disclose confidential, private, or privileged information.⁴² There may also be legal requirements pertaining to specific types of information shared with others via 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.⁴³ The Florida attorney general's opinion is worth mentioning because Florida's legislature worded its public information and sunshine laws similarly to their Texas counterparts, the Texas Public Information Act and the Texas Open Meetings Act.⁴⁴

II. RECORDS RETENTION

The first legal concern facing government agencies seeking to wrangle with social media is the obligation to locate, compile, organize, store and eventually discard the online content. Texas law requires state agencies and local governments to maintain government data in accordance with the records retention acts.⁴⁵ Local governments are to store, and eventually destroy, records in strict accordance with a records retention schedule.⁴⁶ Public entities face the challenge of maintaining records of the comments made by an official or an employee regarding official business on MySpace because a third party maintains the information (e.g., MySpace, Inc. is based in Los Angeles). This is why it is important for government managers to exercise some measure of influence over when, what, and how government officials upload data to the web.

A "local government record" is:

[A]ny document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws

40. See, e.g., Fla. Op. Att'y Gen. 9-19 (2009).

41. See *id.* at 1.

42. Cf. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (A mayor posted defamatory statements on a community blog about city council members.).

43. Fla. Att'y Gen. Op. 9-19 (2009).

44. See FLA. STAT. ANN. § 119.011(12) (West Supp. 2009); *id.* § 286.011 (West 2009).

45. See, e.g., TEX. GOV'T CODE ANN. §§ 441.180-.210 (Vernon 2004); TEX. LOC. GOV'T CODE ANN. §§ 201.001-.009 (Vernon 2008).

46. TEX. LOC. GOV'T CODE ANN. § 201.001.

of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business.⁴⁷

The Texas State Library and Archives Commission (TSLAC) establishes the general records retention schedules.⁴⁸ Government agencies then set their own retention schedules provided that whatever schedule they set is in conformity with the TSLAC's established minimum requirements.⁴⁹ For e-mails, the retention period depends on the information and content within the e-mail. For example, under the TSLAC's own *internal* schedules: (1) governing bodies should keep e-mails containing documents or information sent to the governing body for approval, consideration, or any other action for two years; (2) governing bodies should keep e-mails relating to an employee grievance regarding personnel policies or working conditions for two years; (3) government bodies should retain e-mails containing any complaint made by a person to a government employee, department, or body for two years after the resolution of such complaint; (4) governing bodies should keep e-mails consisting of correspondence or internal memos pertaining to routine administrative matters regarding a policy, program, service, or project by the governmental body for two years; (5) governing bodies should keep e-mails consisting of correspondence or internal memos pertaining to the development of a policy, program, service, or project by the governmental body for five years; and (6) governmental bodies can delete e-mails consisting of correspondence or internal memos containing routine information as soon as they are no longer administratively significant.⁵⁰

Although there is no current TSLAC 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 e-mails and would be content-based.⁵¹ Thus, government employees and officials should understand the type of information they release into cyberspace and should consider whether they need to retain the information. Records managers and information technology personnel should review the publication *Bulletin B, Electronic Records Standards and Procedures* to ensure that their electronic records program follows the law.⁵² *Bulletin B* is a publication of Local Government Code sections 205.001-.009, and Texas Administrative Code (TAC) sections 7.71-.79.⁵³ Considering the obligations of government agencies

47. *Id.* § 201.003(8).

48. TEX. GOV'T CODE ANN. § 441.158 (Vernon 2004).

49. TEX. LOC. GOV'T CODE ANN. § 203.042 (Vernon 2008).

50. Texas State Library and Archives Commission, Local Schedule GR (3rd Edition), <http://www.tsl.state.tx.us/slr/recordspubs/gr.html> (last visited Nov. 6, 2009).

51. *See id.*

52. *See* Texas State Library and Archives Commission, *Electronic Records Standards and Procedures Local Government Bulletin B* (1998), available at <http://www.tsl.state.tx.us/slr/recordspubs/lbullb.pdf>.

53. *Id.*

to locate and retain government records in accordance with the law, there is a legitimate government interest in what digital records agency personnel are creating in the first place.

III. TEXAS PUBLIC INFORMATION ACT

The basic premise of the Texas Public Information Act (PIA) is that *all* government information should be available to the public because our constitutional form of representative government requires an informed citizenry.⁵⁴ In delegating authority to the government, 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.”⁵⁵ Under the PIA, “public information” is data “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body[,] and the governmental body owns the information or has a right of access to it.”⁵⁶ This definition is very broad and specifically includes various forms of media.⁵⁷ Examples of media include: “(1) paper; (2) film; (3) a magnetic, optical, or solid state device that can store an electronic signal; (4) tape; (5) Mylar; (6) linen; (7) silk; and (8) vellum.”⁵⁸ One can store public information on several forms of common media, such as books, documents, and photographs, but one can also store it by “*voice, data, or video representation held in computer memory.*”⁵⁹ As technological capabilities expand, so does the broad application of the PIA. Governmental entities are responsible for more than just paper records. They now generate, transmit, and store electronic images and digital blips. Implicit in the PIA is that it only governs information already in existence.⁶⁰ The PIA does not require a governmental body to conduct research, collect raw data, answer legal questions, or construct new records.⁶¹ Nor does the PIA require a governmental body to continually inform the public when information comes into existence.⁶² The statute only requires that the governmental body compile information on hand into a record, if so requested.⁶³

54. See OFFICE OF THE ATTORNEY GENERAL, PUBLIC INFORMATION HANDBOOK 1 (2008), available at http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf.

55. TEX. GOV'T CODE ANN. § 552.001(a) (Vernon 2004).

56. *Id.* § 552.002(a) (Vernon 2004).

57. See *id.* § 552.002(b).

58. *Id.*

59. *Id.* § 552.002(c) (emphasis added).

60. A&T Consultants, Inc. v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995) (request for public information that requires a governmental body to program or manipulate existing data is not considered a request for the creation of new information).

61. *Id.*

62. See *id.*

63. See *id.*

A. *Who Is Subject to the Act?*

As a general rule, it is wise for government employees and officials to operate under the assumption that they are subject to the PIA. The PIA applies to “governmental bodies,” which are entities within the executive or legislative branches of state government, such as county commissioner’s courts, municipalities, school districts, counties, and governmental and non-governmental entities that receive public funds.⁶⁴ It does not include the judicial branch of the government (although the judiciary is not subject to the PIA, many court records are available for review by the public through the respective court clerk’s office).⁶⁵

The governmental body definition includes elected and appointed officials, as well as government employees.⁶⁶ Information created by government employees that touches on 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.⁶⁷ This privacy interest is the same as the common law tort of invasion of privacy through disclosure of private facts.⁶⁸ There are two requirements for the common law tort: “(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.”⁶⁹

B. *E-mail*

Statutes charge the Office of the Attorney General of Texas (Attorney General) with the job of interpreting the PIA.⁷⁰ The Attorney General has specifically stated that Texas recognizes work-related electronic mail (e-mail) as information that may be subject to the PIA and often public disclosure.⁷¹

An e-mail that is merely in the “trash bin” or “recycle bin” is still public information because the public entity is still maintaining the e-mail within the meaning of the PIA.⁷² Once the public entity deletes the e-mail from either location, however, the Attorney General determined that this is beyond the PIA’s definition of maintaining information, and it is not public information.⁷³

64. TEX. GOV’T CODE ANN. § 552.003(1)(A) (Vernon 2004).

65. *Id.* § 552.0035 (Vernon 2004).

66. *Id.* § 552.003(1)(A).

67. *Id.* § 552.109 (Vernon 2004).

68. *See Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

69. *Id.* at 685.

70. *See* § 552.011 (Vernon 2004).

71. Tex. Att’y Gen. ORD-654 (1997).

72. Tex. Att’y Gen. OR2001-3366 (2001).

73. *Id.*

C. Personal v. Official

The fact that a message is of a nature generally regarded as personal is not as dispositive as in the past. Personal notes, e-mails, and appointment calendar entries can be subject to the PIA.⁷⁴ Correspondence related to public business in the possession of a member of a governing body is subject to the PIA even if it was sent to the member's home address.⁷⁵ Whether a particular piece of information is public is a fact specific inquiry that requires consideration of the following factors: (1) who prepared the material; (2) who had control or access; (3) the nature of the material; (4) whether it was used in the course of conducting government business; (5) whether public funds were expended to create the material; (6) the purpose of the material; and (7) whether the government entity requires creation of the material.⁷⁶

Even e-mail transmitted from someone's home through a personal computer via a private Internet account can be public information if it concerns public business.⁷⁷ Even though they may only be in the possession of one person, home e-mails can be public information if they relate to government business or an official or employee maintains them in the performance of public duties.⁷⁸ In one particular instance, the Attorney General reasoned that home e-mails are public records subject to the PIA because the city councilmember solicited citizens to communicate with her as a councilmember on her personal computer by including her home e-mail address on her city-issued business card.⁷⁹ Accordingly, given that the councilmember made the decision to transact city business in this manner, the Attorney General deemed the city responsible for complying with a request for information, the scope of which included the councilmember's home e-mail files.⁸⁰

As technological capabilities expand, so does the broad application of the PIA. For example, private text messages and e-mails 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.⁸¹

Recently, a Dallas County District Court held that any responsive e-mails sent or received by privately owned personal computers (or any other personal electronic device, such as a Blackberry, belonging to Dallas municipal officials)

74. See, e.g., Tex. Att'y Gen. ORD-635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to PIA); Tex. Att'y Gen. ORD-626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are subject to PIA); see also, Tex. Att'y Gen. OR2005-06753 (2005); Tex. Att'y Gen. OR2005-01126 (2005); Tex. Att'y Gen. OR2003-1890 (2003).

75. Tex. Att'y Gen. ORD-425 (1985).

76. See Tex. Att'y Gen. ORD-635 (1995).

77. Tex. Att'y Gen. OR2001-1790 (2001).

78. *Id.*

79. *Id.*

80. *Id.*

81. See Dallas Morning News, L.P. v. City of Dallas, No. 06-06607-J (191st Dist. Ct., Dallas County, Tex. Nov. 20, 2007).

were public information.⁸² The court's ruling disregarded whether municipal e-mail servers processed the e-mails (i.e., the court concluded that the e-mails related to official city business to or from the mayor were public even if they were transmitted through *private* e-mail accounts on a *privately owned* device).⁸³ The Dallas Court of Appeals reversed the trial court's ruling and held that "[a] municipal governing body *is* a 'governmental body' . . . [but] [a]n individual [mayor or city employee] *is not* a 'governmental body' for purposes of the [PIA]."⁸⁴ This ruling indicates that the Dallas Court of Appeals does not consider the Blackberry e-mails public information either.

Nonetheless, the risk that private e-mails could become public information still remains. Although the Attorney General has yet to issue an opinion regarding public information and social media websites, the statute requires the Attorney General to liberally construe the definition of public information to favor disclosure of the information,⁸⁵ which is why public entities should be cautious about what information goes on a social media website.

Furthermore, it is a common misconception that just because these social media sites have user identifications and passwords, they are private.⁸⁶ Actually, one could more accurately characterize these sites as semi-private because only other site users or a restricted circle of friends can view the information a user posts.⁸⁷ Even if only a user's friends can view the posts, content created on a private computer or hand-held device (e.g., iPhones, Treos, and Blackberrys), "if [it is] related to official business[,] it is [about] as private as your least private friend."⁸⁸ A few examples of how online exchanges can become public information include: Planning and Zoning Commission members with mutual friends on Facebook leaving comments to the same friend about an urban redevelopment deal; a public school teacher posting a negative blog about a fellow teacher; e-mails from the county judge to the sheriff; text messages between city council members discussing upcoming agenda items; and Twitter posts between state agency commissioners regarding their positions on upcoming commission votes.⁸⁹

In light of the PIA implications, public employees and officials should exercise commonsense and discretion when posting a comment on Twitter or sending a message via Facebook.⁹⁰ Elected officials in particular should be

82. *Id.*

83. *Id.*

84. *City of Dallas v. Dallas Morning News, LP*, 281 S.W.3d 708, 713 (Tex. App.—Dallas 2009, no pet.) (emphasis added).

85. *See* TEX. GOV'T CODE ANN. § 552.001(b) (Vernon 2004).

86. Clarissa M. Rodriguez, Denton, Navarro, Rocha & Bernal, P.C., Address at the Hogwild 2009 Seminar: *Public Information: What Do You Mean the Media Can Ask for My Facebook Account?* (June 26, 2009).

87. *Id.*

88. *Id.*

89. *See id.*

90. *Id.*

“wary of campaign [versus] official business sites and communications.”⁹¹ One way for a public entity to avoid problems is to provide *dedicated* cell phones and establish e-mail addresses for officials and employees.⁹² These actions would allow public entities to maintain some control over the records for these types of communications, which can be quite burdensome to do.

D. Requests

The information posted on social networking websites is open to the public by the very nature of it being available for all of the public to see. Yet, the fact that people can view the information online, at least select members of the public, does not relieve the government entity from the statutory obligation to provide the information to other members of the public upon request.⁹³ Issues arise where an individual makes an open records request for a public entity to produce the information posted on these websites. The law states that:

If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.⁹⁴

Upon request, the public entity would have to provide any existing data that was ever put up on these websites.⁹⁵ A governmental body does not fulfill its duty under the PIA by simply referring a requesting party to the governmental body’s website to obtain the requested public information.⁹⁶ Though such a request may never come, compliance with such a request would prove cumbersome.

Another concern is whether the content of friends’ websites and postings is public information as well. Generally, one should not characterize the content of a friend’s websites and postings as public information because the person maintaining the website does not do so in connection with the

91. *Id.*

92. *Id.*

93. *See* TEX. GOV’T CODE ANN. § 552.228(b) (Vernon 2004).

94. *Id.*

95. *See id.*

96. *See* Tex. Att’y Gen. ORD-682 (2005).

transaction of official business.⁹⁷ If a public entity did create or utilize such content in the course of conducting government business, however, that content could be public information subject to mandatory disclosure upon request.⁹⁸ Regardless of whether the government agency has reservations about the nature of the content, the purely practical difficulties of processing such a request would likely prove burdensome.

E. Selective Disclosure

A governmental body that seeks to withhold certain information from the public at large cannot selectively disclose that information to particular members of the public.⁹⁹ This prohibition against selective disclosure, however, does not apply to the intra-agency transfer of information to members of the governing body or certain members of particular types of volunteer citizen advisory boards.¹⁰⁰ At this point, the law offers no guidance on whether limiting access to online postings of otherwise public information via social media would constitute prohibited selective disclosure.

F. Exempt Information

As explained above, sometimes members of the public request information that is public but is not subject to disclosure because it is privileged, confidential, or subject to a discretionary exception.¹⁰¹ There are also situations in which the requestor requests information that is not public and is not in any way subject to the PIA. For example, requestors sometimes seek data that the public entity has never maintained or directed, and therefore, is not public information.¹⁰² The Attorney General has previously concluded that “raw data . . . maintained by a private consultant and provided to the . . . governmental body, only on an as-needed basis through a direct telephone link to the consultant's computers, [is] not subject to the [PIA] . . . when collection of the data is not dependent on the authority of the governmental body.”¹⁰³ Only the raw data that the governmental body actually accessed, stored, or used is subject to the Act.¹⁰⁴ Public entities that receive a request for information that they have no control over or access to should consider seeking an Attorney General ruling and raise these arguments.¹⁰⁵

97. See § 552.002(a) (Vernon 2004).

98. See, e.g., § 552.008(b) (Vernon 2004) (must disclose confidential information to a legislative member if the request is made for a legislative purpose).

99. See *id.* § 552.007(b) (Vernon 2004).

100. See Tex. Att’y Gen. ORD-666 (2000).

101. See *id.*

102. See Tex. Att’y Gen. OR2001-3366 (2001).

103. Tex. Att’y Gen. ORD-492 (1988).

104. *Id.*

105. See Tex. Att’y Gen. OR2002-1728 (2002).

G. Confidential Information

Information made “confidential by law, either constitutional, statutory, or by judicial decision” is also non-public information.¹⁰⁶ Display of information in a public forum, like the Internet, does not waive the confidentiality of such information. A person commits an offense if he distributes information considered confidential under the terms of the PIA, and such a violation is a misdemeanor constituting official misconduct.¹⁰⁷ Examples of information made confidential by statute include, but are not limited to, medical records that a physician creates, records used or developed in an investigation of alleged child abuse or neglect, communications between a patient and a mental health professional, and communications between attorney and client.¹⁰⁸

H. Violations

The PIA carries stiff criminal penalties, though convictions are rare. A public official commits a criminal violation under the PIA if the public official, “with criminal negligence . . . fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by [the Act].”¹⁰⁹ The following violations carry the jail terms and fines described below, in addition to such violations constituting an act of official misconduct.¹¹⁰ Fines and penalties include: (1) refusing to provide public data: six months in jail, \$1,000 fine, or both; (2) providing confidential data: six months in jail, \$1,000 fine, or both; and (3) destroying governmental data: three months in jail, \$4,000 fine, or both.¹¹¹ An official, however, has an affirmative defense under section 552.353 if the official reasonably believed that the PIA did not require public access to the information, and if the official: (1) reasonably relied on a court order or Attorney General decision; (2) properly requested a decision from the Attorney General and such a decision is pending; or (3) not later than ten days after the receipt of an Attorney General decision holding that the information is public, filed a petition or cause in a Travis County District Court against the Attorney General seeking relief from complying with the Attorney General’s decision, and such petition or cause is pending.¹¹² Additionally, it is a defense to prosecution if an agent of the official responsible for public information reasonably relies upon a written instruction

106. TEX. GOV’T CODE ANN. § 552.101 (Vernon 2004).

107. *Id.* § 552.352(b)-(c) (Vernon 2004).

108. *See, e.g.*, TEX. OCC. CODE ANN. § 159.002(b) (Vernon 2004); TEX. FAM. CODE ANN. § 261.201(a) (Vernon 2008); TEX. HEALTH & SAFETY CODE ANN. § 773.091 (Vernon 2003).

109. TEX. GOV’T CODE ANN. § 552.353(a) (Vernon 2004).

110. *See id.* § 552.353.

111. *Id.* §§ 552.351-53.

112. *Id.* § 552.353.

from said official instructing the agent not to disclose the information requested.¹¹³

Public officials who willfully destroy, remove, or alter public information that may be responsive to future public information requests also commit a criminal violation under the PIA, possibly subjecting that official to the penalties described above.¹¹⁴

IV. TEXAS OPEN MEETINGS ACT

The Internet exchanges that create virtual records can also create virtual meetings. The ease with which people can freely exchange facts and opinions on social networking sites with anyone creates endless opportunities for cyber meetings that purposefully or inadvertently violate the Texas Open Meetings Act (TOMA).¹¹⁵ Online postings can quickly evolve into illegal gatherings, simultaneously generating an evidentiary digital paper trail.¹¹⁶ As such, one can use anything a person posts against that person.¹¹⁷ The premise behind TOMA is similar to that behind the PIA, which is that the government should conduct public business in public.¹¹⁸ 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.¹¹⁹

A. Meetings

TOMA defines a “meeting” 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.”¹²⁰ 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.¹²¹ Under TOMA, a “governing body” includes the following: a school board; county commissioner’s court; city council; “a deliberative body that has rulemaking or quasi-judicial power and that is

113. *Id.*

114. *Id.*

115. *See generally* TEX. GOV’T CODE ANN. §§ 551.001-.146 (Vernon 2004).

116. *See* Robert J. Barfield & Ryan K. Turner, *Technology Issues and Evidence*, Texas Municipal Court Education Center (2009).

117. *Id.*

118. *See* OFFICE OF THE ATTORNEY GENERAL, PUBLIC INFORMATION HANDBOOK (2008).

119. *See* § 551.002 (Vernon 2004).

120. *Id.* § 551.001(4).

121. *See id.* § 551.001.

classified as a department, agency, or political subdivision of a county or municipality;” a school district board of trustees; and other groups.¹²²

TOMA defines “quorum” as “a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body.”¹²³ Given these definitions, if there are five city council members and three were chatting about public business online, that dialogue could constitute an open meetings violation.¹²⁴ Even if the three city council members were posting messages online regarding city business with a broader network of friends, TOMA still comes into play.¹²⁵ It is not even necessary that the online communications be directly between governing body members to trigger the application of TOMA.¹²⁶

Discussing public business or policy is not limited to “spoken communications.”¹²⁷ A meeting triggers certain requirements (e.g., notice) under TOMA.¹²⁸ Failure to follow these TOMA requirements results in violations that expose members of the governmental body to criminal and civil penalties, which this article will discuss in more detail later.¹²⁹

B. Action without Meeting

If a quorum of a governmental body agrees on a joint statement on a matter of governmental business, the deliberative process through which the governmental body reaches that agreement is typically subject to the requirements of TOMA, and the governmental body does not automatically escape those requirements by avoiding the actual physical gathering of a quorum in the same place at the same time.¹³⁰ Neither the courts nor the Attorney General have established the applicability of TOMA to social networking by government officials. Nonetheless, by following the legal rulings thus far on situations involving less technologically complicated means of communications, we can anticipate how Texas courts or the Attorney General would opine when faced with the question of social networking as meetings. The courts can also consider telephone conferencing a violation of TOMA, depending on the facts.¹³¹ Thus, governing bodies should be particularly careful to avoid deliberating through e-mail. Deliberation is not

122. *Id.* § 551.001(3).

123. *Id.* § 551.001(6).

124. *See generally id.*

125. *See generally id.*

126. *See* Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners’ Ass’n, 2 S.W.3d 459 (Tex. App.—San Antonio 1999, no pet.) (gathering of citizens and quorum of water district board members constituted an illegal meeting even though someone other than the governing body organized and conducted the meeting, and members of the governing body did not speak directly to one another).

127. *See* Op. Tex. Att’y Gen. No. DM-95 (1992).

128. *See, e.g.,* TEX. GOV’T CODE ANN. §§ 551.001, 551.041 (Vernon 2004).

129. *See id.* § 551.143 (Vernon 2004).

130. Op. Tex. Att’y Gen. No. DM-95 (1992).

131. *See* Hiitt v. Mabry, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ).

limited to spoken communications.¹³² Discussing public business via written notes or e-mail may constitute a deliberation that is subject to TOMA.¹³³ A Washington state 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.¹³⁴

Given these definitions, a meeting can occur if a quorum of a governing body discusses public business via e-mail or over the Internet.¹³⁵ For example, if a majority of a city council discussed the desire to get more squad cars on a Facebook posting about the police department's old squad cars, that could be a meeting under TOMA. If not properly noticed, such a meeting would be a violation of TOMA. Therefore, TOMA encourages caution when members of governmental commissions participate in these social networking sites or blogs.

Under TOMA, the presence of the following factors together qualify as an open meeting, and therefore, subject the meeting to the provisions of the Act: a quorum of a governmental body, with or without another person present, which is meeting to deliberate or take formal action on the public business or public policy under the supervision or control of that governmental body.¹³⁶ The city of San Antonio violated TOMA when its city council, via several small meetings in the city manager's office, each containing less than a quorum, agreed to strip a pro-gay and lesbian group of its funding from the city's budget and signed a consensus memorandum as to the proposed budget.¹³⁷ It is for the reasons mentioned above that TOMA should be of concern to public entities when it comes to participation on social media and networking sites, especially when a quorum of public officials discusses official business by e-mail or by comments to a blog.

A recent case involving the city of Alpine, Texas, reveals the point. In *Rangra v. Brown*, members of the Alpine City Council brought suit against the Attorney General, challenging the constitutionality of TOMA's criminal penalties.¹³⁸ The officials filed suit after the district attorney indicted the public officials for violating TOMA by discussing public matters by a quorum via e-mail outside of an open meeting.¹³⁹ The Fifth Circuit stated that, unlike public employees, elected officials are different because their role in society makes it imperative that society allow them to express themselves freely on matters relevant to the public.¹⁴⁰ The court also considered section 551.144 of TOMA to be content-based because whether a quorum of public officials may

132. See Op. Tex. Att'y Gen. No. JC-0307 (2000).

133. See *id.*

134. *Wood v. Battle Ground Sch. Dist.*, 27 P.3d 1208 (Wash. Ct. App. 2001).

135. See Op. Tex. Att'y Gen. No. JC-0307 (2000).

136. TEX. GOV'T CODE ANN. § 551.0035 (Vernon 2004).

137. *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001) (citing as authority a previous version of this paper by Bojorquez).

138. *Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009), *reh'g granted*, 576 F.3d 531 (5th Cir. 2009).

139. *Id.*

140. *Id.* at 524.

communicate with each other outside of an open meeting depends on whether the content of their speech refers to “public business.”¹⁴¹ The court remanded the case to the trial court so the state can try to establish that the Texas legislature narrowly tailored section 551.144 to further a compelling state interest.¹⁴² Until the trial court releases its result, however, it is in the best interest of cities and other public entities to ensure that members of their governing bodies avoid deliberating on public business through e-mail, comments, and blogs.

C. *Quorum & Subcommittees*

Generally, a quorum of the governing body must be present for a gathering to qualify as a meeting and thus fall under TOMA.¹⁴³ There have been Attorney General and court opinions, however, that have applied TOMA to meetings of committees comprised of members of a governing body even though a quorum of the full governing body was not present.¹⁴⁴ When applying TOMA so broadly, courts and the Attorney General have closely analyzed two key factors: (a) the committee’s authority and (b) the committee’s membership.¹⁴⁵

The committee may fall under TOMA if it exercises substantial delegated control over public business that is not contingent on subsequent action by the entire board.¹⁴⁶ If the composition of the committee weighs the debate in favor of whatever recommendation the committee renders, the committee may have to comply with TOMA.¹⁴⁷ For example, if five of the twelve city council members who serve on the committee—less than a quorum of the board—were in favor of the committee’s recommendation, the council only needs two more votes from the remaining council members to go along with whatever action the committee recommends.¹⁴⁸ Also, while a committee consisting of three of twelve members may not represent a quorum of the council, that committee of three may constitute a governing body in and of itself if the council has delegated to the committee authority over city business or the council frequently rubber stamps the committee’s recommendations regarding city business.¹⁴⁹

141. *Id.* at 521-22.

142. *Id.* at 526.

143. TEX. GOV’T CODE ANN. § 551.001(4)(A) (Vernon 2004).

144. Op. Tex. Att’y Gen. Nos. JC-0060 (1999), JM-1072 (1989), and H-238 (1974).

145. *See* Op. Tex. Att’y Gen. No. JC-0060 (1999).

146. *Id.* (an “evaluation committee” including the county judge, one commissioner, and seven other individuals appointed by the commissioners court to recommend an architect and negotiate a contract was determined to be a “governmental body” subject to TOMA).

147. *Finlan v. City of Dallas*, 888 F. Supp. 779, 785-86 (N.D. Tex. 1995) (involving an “Ad Hoc Committee—Downtown Sports Development Project” appointed by the mayor to negotiate with the owners of professional basketball and hockey teams regarding their proposed move from a city-owned arena).

148. *See id.*; *see also* Op. Tex. Att’y Gen. No. JC-0060 (1999).

149. *See* Op. Tex. Att’y Gen. No. JC-0407 (2001).

D. Conversations of Less Than a Quorum

In a civil case where the plaintiffs sought injunctions to prevent members of the governing body from discussing business outside of properly noticed meetings, the court required evidence that the members of the governing body attempted to circumvent TOMA.¹⁵⁰ Evidence that one board member of a five-member district occasionally discussed the agenda for future meetings on the phone with another board member did not constitute a TOMA violation.¹⁵¹ Nor did evidence that a board member questioned another board member about an agenda while preparing for a meeting constitute a TOMA violation.¹⁵² The court concluded that when two members meet together, they do not constitute a quorum.¹⁵³ Without the presence of a quorum, they did not have a meeting as defined by the Act, and therefore, did not violate TOMA.¹⁵⁴

E. Enforcement

Members of a governing body who knowingly take actions in violation of TOMA may subject themselves to prosecution by county or district attorneys.¹⁵⁵ District courts have jurisdiction over criminal violations of TOMA as misdemeanors involving official misconduct.¹⁵⁶ Thus, the public should present complaints to the district attorney or criminal district attorney. The Attorney General has no independent enforcement authority, but local prosecutors may request assistance from the Attorney General in prosecuting criminal cases, including those arising under TOMA.¹⁵⁷

F. Conspiracy

“A member . . . of a governmental body commits an offense if the member . . . knowingly conspires to circumvent [TOMA] by meeting in numbers less than a quorum for the purpose of secret deliberations”¹⁵⁸ The punishment for an offense is a \$100-\$500 fine, one to six months confinement, or both.¹⁵⁹

150. Harris County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps, 999 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

151. *Id.* at 169.

152. *Id.*

153. *Id.*

154. *Id.* at 170.

155. TEX. GOV'T CODE ANN. § 551.144 (Vernon 2004).

156. TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2005).

157. *See generally id.*

158. § 551.143(a) (Vernon 2004).

159. *Id.* § 551.143(b).

G. Closed Meeting without Authorized Exception

If a member of a governmental body knowingly calls, aids in calling, or participates in a closed meeting that is unauthorized, the punishment is a \$100-\$500 fine, one to six months imprisonment, or both.¹⁶⁰

H. Closed Meeting without Minutes

A governmental body member “commits an offense if the member participates in a closed meeting of the governmental body knowing that a certified agenda of the closed meeting is not being kept or that a tape recording of the closed meeting is not being made.”¹⁶¹ Section 551.145 makes this offense a Class C misdemeanor.¹⁶²

I. Ignorance Is No Excuse

Members of a governmental body have no room for mistakes. The Texas Court of Criminal Appeals has held that under the plain language of TOMA, the courts can find a government official guilty of violating TOMA if the official calls or participates in an impermissible closed meeting, even when the official is unaware of the illegality of the meeting.¹⁶³ According to a lower court, TOMA “is not concerned with whether the actor knows the meeting is prohibited.”¹⁶⁴ The Court of Criminal Appeals found no good faith exception in the statute.¹⁶⁵

J. Affirmative Defense

A governmental official has an affirmative defense to prosecution for a closed meeting if the official acted in reasonable reliance on: (a) a court order; (b) a written court opinion containing an interpretation of Chapter 551; (c) a written Attorney General opinion containing an interpretation of Chapter 551; or (d) the written advice of the attorney for the governing body.¹⁶⁶

160. *Id.* § 551.144.

161. *Id.* § 551.145(a) (Vernon 2004).

162. *Id.* § 551.145(b).

163. *See Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998) (en banc).

164. *Tovar v. State*, 949 S.W.2d 370, 373 (Tex. App.—San Antonio 1997), *aff'd*, 978 S.W.2d 584 (Tex. Crim. App. 1998) (en banc).

165. *See Tovar*, 978 S.W.2d at 586-87.

166. § 551.144 (Vernon 2004).

K. Actions are Voidable & Other Penalties

Actions taken by a governmental body that violate TOMA are voidable.¹⁶⁷ For example, a single challenge to a city's alleged failure to comply with TOMA could invalidate an *entire* annexation.¹⁶⁸ Other penalties associated with TOMA violations can include injunctions, attorney's fees, and negative media coverage, which can result in a public relations nightmare.¹⁶⁹ Specifically, the Texas Government Code states that "[a]n interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."¹⁷⁰ The law allows courts to assess litigation costs and reasonable attorney fees incurred by a party who substantially prevails in an action by mandamus or injunction to reverse a TOMA violation.¹⁷¹ "In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law."¹⁷² TOMA violations can be costly and can disgrace an otherwise effective governing body.

V. POLICY SUGGESTIONS

Use of social media, while keeping people informed, also has the extra consequence of causing administrative and legal headaches.¹⁷³ Just as personal phone usage at work was an issue that employers had to address, they must also address personal use of e-mail, Internet, and social networking and social media sites.¹⁷⁴ In most cases, employers are not paying their employees to use social networking sites, so monitoring usage for time spent on these sites is important.¹⁷⁵ Furthermore, these websites steal large amounts of bandwidth, which can slow down the Internet for all employees, thereby negatively impacting operations.¹⁷⁶ Revealing sensitive information poses security risks to companies by intentionally or unintentionally opening the network to viruses and malicious software hiding on some of these websites.¹⁷⁷ Many companies,

167. *Id.* § 551.141 (Vernon 2004).

168. *City of San Antonio v. Hardee*, 70 S.W.3d 207, 212-13 (Tex. App.—San Antonio 2001, no pet.) (plaintiffs claimed that written memorandum accomplished the annexation rather than an authorized action of the city council meeting in conformity with TOMA).

169. *See* § 551.142(a)-(b) (Vernon 2004).

170. *Id.* § 551.142(a).

171. *Id.* § 551.142(b).

172. *Id.*

173. *See* Texas Workforce Commission, *supra* note 2, at 4.

174. *Id.*

175. *See id.*

176. Hilton Tarrant, *What Facebook Costs Business*, MONEYWEB, Aug. 16, 2007, <http://www.moneyweb.co.za/mw/view/mw/en/page292671?oid=154231&sn=2009%20Detail> (last visited Nov. 6, 2009).

177. *See* Carla Pendergraft, *New Web Technologies for Cities: Blogs and Twitter*, TEXAS TOWN & CITY, April 2009, at 15.

and some governmental bodies, block access to Facebook, Twitter, and MySpace entirely, or limit access to certain times.¹⁷⁸ For example, the city administrator for West Lake Hills, Texas, recently ordered his information technology (IT) consultant to block Facebook and MySpace on the city servers Monday through Friday, between the hours of 8:00 a.m. and 5:00 p.m.¹⁷⁹ Employees working after hours are free to go to those websites though.¹⁸⁰ This is an effective, low-tech solution to the risks posed by usage of these websites while on the clock. If a public entity chooses to maintain a net presence via a blog, moderating the blog is a good idea to prevent intrusive comments from readers. The City of Georgetown, Texas, posted its blog moderation policy on the Internet.¹⁸¹ Many state agencies have their own policy regarding social media websites.

A. *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. Because social networking sites are available twenty-four hours per day, seven days per week, another area of concern is what employees post or blog about when they are not at work.¹⁸² Although what an employee does when they are not on duty is strictly his own business, some Internet postings can become a concern, especially in the area of privacy.¹⁸³ For example, a mayor writing on his blog about his personal problems with the police chief might come back to haunt the mayor, and the city as a whole, when the city fires the police chief for performance reasons, and the police chief 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 another "no-no," as it is a major violation of that person's privacy and can come back to haunt the poster when he looks for a job.¹⁸⁴ Even anonymous Internet postings on a community blog have backfired against the poster.¹⁸⁵ In a case out of Delaware, a mayor posted defamatory statements about city council members under the pseudonym "Proud Citizen."¹⁸⁶ Seeking to serve the anonymous poster with a defamation lawsuit, the council members obtained a court order forcing the Internet Service Provider (ISP) to turn over

178. See John E. Dunn, *Worried Companies Block Facebook*, PCWORLD, Aug. 27, 2007, http://www.pcworld.com/article/136226/worried_companies_block_facebook.html (last visited Nov. 6, 2009).

179. Telephone Interview with Robert Wood, City Administrator for the City of West Lake Hills, Texas, in West Lake Hills, Tex. (Nov. 16, 2009).

180. *Id.*

181. See City of Georgetown, Texas, Moderation Policy, www.georgetown.org/pdfs/ModerationPolicyforCitywebsites.30Jul08.pdf.

182. Texas Workforce Commission, *supra* note 2, at 4.

183. See *id.*

184. See discussion *supra* Part III.G.

185. See, e.g., *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

186. *Id.* at 454.

the Internet Protocol (IP) address, thereby identifying the anonymous poster as the mayor.¹⁸⁷ Thinking before speaking is very sound advice, and that is especially true for Internet postings. Questions to consider before posting include: (1) Does this reveal any potentially embarrassing private information? (2) Am I discussing official business? (3) Is there a quorum present? (4) Is this information subject to the PIA? (5) If so, how long do I need to retain this information? (6) What will my current or future employers think about what I post? (7) Who will be able to view the information I post?

The Internet is very much a public forum, so be mindful. Most employers 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 one’s previous or current employer.¹⁸⁸ 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 him.

B. Privacy

Employers have the right to monitor phone usage, e-mails, general Internet use, and work sites via video camera.¹⁸⁹ An analysis of the situation in light of the Fourth Amendment to the U.S. Constitution determines whether an employee has a constitutionally protected reasonable expectation of privacy.¹⁹⁰ An employee has a reasonable expectation of privacy if the employee is able to successfully demonstrate a subjective and objective basis for that expectation with respect to the employee’s work.¹⁹¹ Obviously, a public employee’s privacy interest in the place of employment is far more limited than courts would afford in that person’s home.¹⁹² Employees generally have little or no expectation of privacy regarding electronic data, such as e-mails, particularly those transmitted through the employer’s network.¹⁹³ In a recent district court case regarding a justice of the peace (JP) in Wood County, Texas, the court concluded the JP had no expectation of privacy in his office’s computer hard drive because the county, in conjunction with the JP’s employment, owned the computer that transmitted or stored the communications.¹⁹⁴ Furthermore, the court found that the JP took no precautions to secure the computer or its

187. *See id.*

188. *See* Michelle Conlin, *You Are What You Post*, BUSINESSWEEK, March 27, 2006, http://www.businessweek.com/magazine/content/06_13/b3977071.htm (last visited Nov. 6, 2009).

189. Darrell G-M Noga & Robert M. Rosen, *An Illusion of Privacy? Exploring Recent Employee Confidentiality Issues and Related Recent Legislative and Legal Developments*, Address at Texas Municipal Human Resources Association Employment Law Seminar (2009), available at <http://www.tml.org/2009/EmpLaw/Illusion-Priv.pdf> [hereinafter Noga & Rosen].

190. *See* U.S. v. Ward, 561 F.3d 414, 417 (5th Cir. 2009).

191. Noga & Rosen, *supra* note 189.

192. *See* O’Connor v. Ortega, 480 U.S. 709, 725 (1987).

193. Noga & Rosen, *supra* note 189.

194. *See* Pack v. Wood County, No. 6:08cv198, 2009 U.S. Dist. LEXIS 57103 (E.D. Tex. July 30, 2009).

contents, such as a password or locking his office door.¹⁹⁵ This line of cases, plus the fact that users intentionally post the information that they upload to a social media website in a public forum, support the conclusion that employees are unlikely to have a reasonable expectation of privacy in social media communications.¹⁹⁶

C. Telecommuting

Telecommuting is another area of concern as many public entities now allow their employees and officials to work from home.¹⁹⁷ At home, there is a reasonable expectation of privacy, so the probability that a court will consider the employee's home private is high; however, the court will not consider the employee's use of her computer or telephone systems private.¹⁹⁸ 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."¹⁹⁹ It is best to provide a telecommuting policy that notifies the employee that as a condition of employment at home, the employer retains the right to inspect the employee's computer files, inspect documents the employee prepares or uses in the scope of employment, and monitor the employee's computers and telephone lines during work hours without notifying the employee.²⁰⁰ If a public entity decides to implement some sort of monitoring option, it should seek legal counsel's opinion first. Any information created, sent, or received by a telecommuting official or employee either in the scope of her employment, concerning public business, or both, is subject to the PIA and TOMA.²⁰¹ Employers should make any telecommuting official or employee aware of her legal obligations and to adhere to her employer's Internet use policies when working from home.

D. Online Harassment

Additionally, the Texas legislature recently added section 33.07 to the Penal Code to make it a third-degree felony if a person "uses the name or persona of another person to create a web page or to post one or more messages on a commercial networking site: (1) without obtaining the other person's consent; and (2) with the intent to harm, defraud, intimidate or threaten any

195. *Id.* at *23.

196. Noga & Rosen, *supra* note 189.

197. See Eve Tahmincioglu, *The Quiet Revolution: Telecommuting*, <http://www.msnbc.msn.com/id/20281475> (last visited Nov. 6, 2009).

198. Kristina N. Klein & Ashley Z. Hager, *Telecommuting: Legal Considerations*, <http://www.troutmansanders.com/firm/media/mediadetail.aspx?media=815> (last visited Nov. 6, 2009).

199. *Id.*

200. *Id.*

201. See TEX. GOV'T CODE ANN. §§ 551.002, 552.002 (Vernon 2004).

person.”²⁰² Under section 33.07(b), it is a Class A misdemeanor offense to send an

“electronic mail, instant message, text message, or similar communication that references . . . identifying information belonging to any person: (1) without obtaining the person’s consent; (2) with the intent to cause the recipient . . . to reasonably believe that the other person authorized . . . the communication; and (3) with the intent to harm or defraud any person.”²⁰³

Note that the Texas legislature enhanced the Class A misdemeanor charge to a third-degree felony if the offender committed the offense “with the intent to solicit a response by emergency personnel.”²⁰⁴

VI. CONCLUSION

Social networks are excellent tools that give users the opportunity to create and communicate with new communities, but users must be wary of what they post. A reasonable social networking or 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 one should not say anything about others that they would not want said about themselves. 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, PIA, TOMA, defamation, and copyright), social norms, and business practices that warrant thoughtful consideration and communication with public officials and employees.

202. TEX. PENAL CODE ANN. § 33.07(a) (Vernon Supp. 2009).

203. *Id.* § 33.07(b).

204. *Id.* § 33.07(c).