THE IMPACT OF SOCIAL NETWORKING ON CITIES

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I. INTRODUCTION

A. What is 'social media'? Web 2.0?

Twitter, Facebook, MySpace, LinkedIn, blogs, and YouTube are just a small handful of social media networks and websites where you can instantly connect with, or be found by one or a million people and provide real time updates of your life, promote whatever you want or just say what's on your mind. We no longer remain anonymous hidden away within the white pages of our telephone books. For that matter, most people no longer even maintain a landline phone. A quick 'google' search can reveal an individual's whole public biography of good and bad on the Internet.

These new tools on the world wide web allow you to control access to the details of your life so that only a few close friends have access, or access can be granted to anyone in the world interested enough to take a look. The web has grown and evolved and often the term Web 2.0 is used. It is difficult to define what 'Web 2.0' is exactly.[1] It seems whatever its technical definition, advances in technology and marketing have combined to create the term Web 2.0 along with the advances of social media. This paper will not focus on the technical differences in the web from the past to the present leading up to Web 2.0, however, it is important to realize that Web 2.0 is a term related to marketing on the web and describes the technological advances that have since been made to the Internet.[2]

Social media has been described as:

- Interactive, not authoritative;

[1] Tim O'Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, September 30, 2005, http://oreilly.com/web2/archive/what-is-web20.html (last visited April 20, 2010).

[2] *Id*. An example cited in the article of a Web 2.0 based innovation is the blog. Personal home pages have existed since the first days of the Internet, but due to technology called RSS, blogs now exist, which are at their core personal home pages.

- Personal, rather than institutional; and,
- Can be focused narrowly on specific groups, rather than casting a broad net over its audience.[3]

In order to further define what social media is and its capabilities, a comparison between traditional print advertising and other electronic methods of communication is helpful. For the governmental entity, rather than the typical "e-government" type of portal that provides public access to the government's information, social media provides more participation by users in an interactive format.[4]

Social media also differs from other traditional advertising or communications tools because in some ways it allows the creator to maintain more control over the information released. This can result in an important benefit to cities as they do not have to rely on a newspaper to report their news, and the newspaper may tend to only print the sensationalized or negative stories.[5]

Social media can also be defined through its revolutionary ability to reach millions of people with relatively little to no cost.[6] Although it may take staff time to create and maintain a city's Facebook page, the cost to pay for space in a newspaper or magazine is eliminated. Additionally, print media does not include the added benefit of targeting a specific audience and the ability to change information instantly.

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[3] Chris Kingsley, Fels Institute of Government Penn Arts and Sciences, *Making the Most of Social Media: 7 Lessons from Successful Cities*, 2010, https://www.fels.upenn.edu/sites/www.fels.upenn.edu/files/pp3-socialmedia pdf (last visited April 21, 2010).

[4] *Id*.

[5] *Id*. at 5.

[6] *Id*. at 6.

B. Why is Social Media Important?

It is hard if not impossible to find a commercial website these days that does not have a link to Twitter or their Facebook page. Not only are retail and commercial sites promoting connection through social media, new research shows that three quarters of the online population has engaged in social media at least once per week, to include either reading a blog, visits to a social network or read (and/or commented) on a message board.[7] With an estimated social media U.S. audience at 127 million, 73 percent equals a potentially large audience with little to no direct marketing costs. As with all new technology the perception is that social media is only a young person's game. The age of social media users does continue to favor the young, but there is a growing percentage of users that mirror the general population, as a majority of all adult users are over the age of 35.[8]

The response to social media from local governments has varied with some embracing the new technology wholeheartedly and others ignoring it.[9] Given the numbers cited above and its prevalence in mainstream, it is no wonder that many cities and other governmental entities are choosing to jump on the bandwagon and use some if not all of these modern communication tools to reach out to their constituents.[10] It allows a city to keep its constituents informed of the city services available as well as market the city beyond its corporate borders to the world beyond.

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[7] http://www.adweek.com (last visited April 21, 2010).

[8] Kingsley.

[9] *Id.*

[10] For purposes of this paper, unless noted otherwise, the general reference to cities may also include a reference to other governmental entities; however, each entity should ensure it is complying with the rules and laws specific to them. This paper was prepared for a specific audience in mind so therefore the focus remains on cities.

As with all new technological tools, critical legal issues may arise that were never issues before. For example, what are the implications of a quorum of the city council acting and participating in a live chat online? What is the impact on the retention and release of open records in the new digital world? It often happens that technology outpaces the law, and this paper may raise more questions than it provides answers; however, the goal is to start thinking about these issues. A review of the current law and its interpretation by the courts will assist you in providing guidance to your client to the extent possible, and assist your client in achieving their marketing and communication goals within the confines of the law.

II. OPEN GOVERNMENT

The purpose of open government is to allow the public a transparent view into the daily workings of government. The Public Information Act and Open Meetings Act both work to allow the public access to local governmental documents, and ensure that decisions are made in public and not behind closed doors, respectively. Section 552.001 of the Public Information Act sets forth in the preamble of the Act that since we are a representative form of government, the Act is to maintain the people's control "over the instruments they have created." Not only are the laws in place to promote transparency, the Office of the Attorney General has the duty to construct the Public Information Act liberally in favor of open government.[11] Given the importance of these two Acts and the impact social media might have on the transparency and openness of governmental entities, the Texas Senate State Affairs Committee is currently studying both Acts to ensure that government continues to be open to the public and review the effect that technology, including social media, has on the communications of governmental

[11] TEX. GOV'T CODE § 552.001(b).

bodies.[12] Until such time as there is a recommendation and the law is amended, the current Acts will be analyzed here.

A. Public Information Act

Cities are clearly governmental bodies subject to the Public Information Act, and subject to any allowable exceptions, must therefore provide information when requested by the public in conformance with the requirements of the Act.[13] This paper will not go into the details of the Act's requirements and permissible exceptions to disclosure. For further information, the Texas Attorney General maintains a helpful handbook on its website along with the full text of the statute.[14]

In order to ensure that the public has access to every possible type of document possessed by a city, the definition of "public information" is very broad. Section 552.002 of the Texas Government Code provides that public information includes all information that the governmental body can access or is owned by the governmental body that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business."

Not only does the Act specify what public information is, it continues in subsection (c) to provide a laundry list describing the general forms in which the media containing public information may exist, to include a book, paper, letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory. The Act also provides, with some limitations, if

[12] *See* TML's Legislative Update at http://tml.org/leg_updates/legis_update051410h_socialmedia.asp (last visited May 20, 2010).

[13] TEX. GOV'T CODE § 552.003(1)(A)(iii).

[14] www.oag.state.tx.us (last visited May 21, 2010).

the public information exists in an electronic or magnetic medium then the requestor may request a copy in an electronic medium, and the governmental entity must provide a copy in the requested medium, if it has the technological ability to produce a copy in the requested medium.[15]

Although there are some exceptions to disclosure, given these broad definitions of what a public record is – everything maintained by a governmental entity and in just about any form, just like electronic mail is a public record, it is likely that social media websites utilized and maintained by governmental entities would be found to be public information subject to disclosure when requested by the public. As this information is placed in the public domain by the entity itself to be accessed by any third party, no exception to disclosure under the Act would be available to prevent further release of the information.

It may seem unlikely that a member of the public would request a copy of a Facebook page or a random tweet for a specific date or time. A requestor may have political aspirations, wish to contradict an incumbent in office, or may need the information for a civil suit. The reason for the citizen's request[16] or likelihood of a request coming in is irrelevant as the Public Information Act in section 552.203 places an affirmative duty on the public information officer to see that public records are protected from deterioration, alteration, mutilation, loss, or unlawful removal and that they are repaired as necessary, or be subject to the penalties provided

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[15] TEX. GOV'T CODE § 552.228 (Material must be produced if the entity has the technological ability to produce a copy in the requested medium and it will not violate the terms of any copyright agreement between the governmental body and a third party. The governmental body is not required to purchase any software or hardware to accommodate the request.).

[16] *See id.* at § 552.222(a)-(b). (a governmental body may not inquire into the purpose for which information will be used).

in the chapter.[17] Public records may only be destroyed as provided by statute.[18] However, even if the governmental entity has the statutory authority to destroy records it may not do so while they are subject to an open records request.[19]

What does this mean to a city that adds and removes information and attachments from a website or social media site multiple times on a daily basis? It may depend on what the city does with the information once it is removed from the site. Is it destroyed, lost forever, or archived somewhere permanently or temporarily? As there are penalties for the violation of this section of the Act, as well as other applicable statutes, it is important that staff is aware of the requirements for retention and destruction of social media information and treat them as public records. This also leads to a practical discussion with staff of the potential cost and availability of server space to store all documents, and the need to routinely evaluate the content of the information to determine how long it should be retained as set forth in a records retention schedule and policy.

What if there is a request for information previously posted on a social media site? Cities need to be aware that social media services are under no obligation to archive or maintain storage of any information on their sites let alone what may be governmental public information, and it is recommended that cities take action to store their own data.[20] Cities' webmasters or system administrators can maintain a record of what is posted officially on the city's website.[21] Other

[17] *See also* GOV'T CODE § 552.351 (penalty for willful destruction, mutilation, removal without permission or alteration of public records).

[18] See generally Attorney General Opinions DM-40 (1991) (deleting records), JM-830 (1987) (sealing records), MW-327 (1981) (expunging or altering public records).

[19] TEX. LOCAL GOV'T CODE § 202.002(b); TEX. ATT'Y GEN. ORD-505 at 4 (1988).

[20] Kingsley at 9.

[21] *Id.*

services such as The Internet Archive,[22] Twitter XML, TweetTake and TwitterBackup may also be options to archive websites and Twitter content.[23] Another possible method of accessing tweets will be through the Library of Congress. Twitter has donated its digital archive of public tweets to the Library of Congress since its inception in March of 2006.[24] There are approximately 50 million tweets per day, although not all of them will be available online.[25] A city should review and consult the retention policy and availability of documents of each social media network it utilizes. Regardless of what may be retained by the social media network, the city should probably not rely upon a third party to satisfy their duties and responsibilities imposed by the law.

Another option to the services listed above is to take a daily screen snapshot of the city's internet presence. Other cities like West Palm Beach and Tampa do this daily for their Facebook pages; however, these snapshots in time do not include all comments or conversations that are posted, but only what is shown at that exact moment.[26] Also, these snapshots would not capture what individual council or staff members may be otherwise posting on the Internet. Public employees' work-related e-mails may be subject to public disclosure under the Texas Open Records Act,[27] and it is likely that these types of postings would be as well. Policies should be implemented to ensure the city staff are not making entries that indicate it is the city's official

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[22] Available at http://www.archive.org.

[23] Kingsley at 9.

[24] *See* http://www.loc.gov/today/pr/2010/10-081.html (last visited May 20, 2010).

[25] *Id.*

[26] Kingsley at 9-10.

[27] TEX. GOV'T CODE § 552.002; *see* Tex. Att'y Gen. ORD-654 (1997).

position on a matter or issue, and they are advised of the potential disciplinary action their employer may take against them for violation of same.

B. Open Meetings

It is critical to a free society that decisions regarding the public be held in the light of day. The public has a right to participate and hear the deliberations and decisions made by their elected officials that affect their money, property and quality of life. In recognition of the necessity of transparency in government Texas has adopted the Open Meetings Act.[28]

Just like the Public Information Act, for purposes of the Open Meetings Act, a municipal governing body is clearly subject to the requirements of the Act and with certain exceptions, all of its meetings must be open to the public.[29] Governmental bodies may only make decisions by the body as a whole that constitutes a quorum at a properly called meeting.[30] In order to provide for participation by the public, notice must be posted in a place readily accessible to the general public at least 72 hours prior to the scheduled meeting,[31] and advise the public of the date, hour, place and subject of each meeting held by the governmental body.[32] Failure to comply with these and other applicable requirements of the Act renders any governmental actions voidable.[33]

The Act defines a meeting as a gathering that is conducted by the governmental body at which a quorum is present, called by the body at which members receive and give information, ask and receive questions regarding public business or public policy over which the

[28] TEX. GOV'T CODE chapter 552.

[29] *Id.* § 551.001(3)(C).

[30] *See Webster v. Tex. & Pac. Motor Transp. Co.*, 166 S.W.2d 75, 76-77 (Tex. 1942); *Fielding v. Anderson*, 911 S.W.2d 858, 864 (Tex. App.—Eastland 1995, writ denied).

[31] *Id.* § 551.043. *See also id.* § 551.043(b) (related to notice posting requirements on the Internet).

[32] TEX. GOV'T CODE § 551.041.

[33] *Id.* § 551.141.

governmental body has supervision or control.[34] The Act specifies the limited circumstances when the body may close the meeting to the public,[35] or conduct the meeting by telephone or videoconference.[36] If the governmental body's attorney is not an employee of the body, then the governmental body may consult with its attorney by telephone conference call, videoconference call or communications over the Internet.[37]

Governmental bodies have to avoid circumventing the requirements of the Act and engaging in "walking quorums." In *Esperanza Peace and Justice Center v. City of San Antonio,*[38] a "walking quorum" occurred when the mayor met with less than a quorum of council members individually in person and over the phone. The decision on the budget had been made that night in private and ratified the next day at the public meeting. The court held that such action would violate the spirit of the Act if the governmental body could circumvent the Act by "'walking quorums' or serial meetings of less than a quorum, and then ratify at a public meeting the votes already taken in private."[39]

In 2005, the Attorney General further clarified applicable provisions of the Act, and based on the hypothetical facts presented opined that a violation of the Act would occur if successive phone calls of less than a quorum were made.[40] Based on the definitions, the Act did not require a governmental body's members to be in each other's physical presence to constitute

[34] *Id.* § 551.001(4)(B).

[35] *Id.* § 551.071-088.

[36] *Id.* §§ 551.121 and 551.127, respectively.

[37] *Id.* § 551.129.

[38] 316 F. Supp. 2d 433 (W.D. Tex. 2001).

[39] *Id.* at 476.

[40] *Id.*, citing TEX. ATT'Y GEN. OP. GA-0326 (2005).

a quorum,[41] and that "the physical presence of a quorum in a single place at the same time is not always necessary for violation of [the Act] to occur."[42]

Relying on the definition of "verbal" in the dictionary, the AG has interpreted that violations of the Act may be possible even if the deliberation occurs through nonspoken exchanges such as written materials or electronic mail.[43] The AG was of the opinion that limiting the definition of "deliberation" to only the spoken word would essentially allow a loophole as violations could occur through notes or e-mails.[44]

While the Act never specifically references or defines the term "social media," given the broad definitions of "meeting", "verbal" and "deliberation," and interpretation by the courts and Attorney General, it is likely that a violation of the Act may occur if less than a quorum, intending to circumvent the Act, deliberates public policy through the use of text messaging, chat rooms, instant messages, comments on Facebook pages or walls, or tweets to each other. Just as council and commission members are cautioned about hitting "reply all" on an e-mail where all members are copied or advised to avoid polling other members regarding agenda matters before a meeting, or using staff to do so, governmental bodies should be educated that those same actions utilizing social media sites may constitute a violation of the Texas Open Meetings Act and subject violators to fines and/or criminal penalties.[45]

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[41] *Id*. at 5.

[42] TEX. ATT'Y GEN. OP. DM-95 (1992).

[43] TEX. ATT'Y GEN. OP. JC-0307 (2000).

[44] *Id*.

[45] *Id. See* TEX. GOV'T CODE § 551.143(b) (providing for a fine of not less than $100 or more than $500, confinement in the county jail for not less than one month or more than six months, or both.).

III. RECORDS RETENTION

Texas Government Code chapter 441, subchapter J, in conjunction with Local Government Code chapter 203, provides cities with uniform requirements for preservation and retention of local government records as well as the destruction and alienation of public records, while chapter 202 of the Local Government Code provides for the proper procedure to destroy public records.

As with the Public Information Act the definition of a "local government record" is very broad and in part, means "any 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 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."[46] The local government must designate a records management officer[47] and must establish a records management program.[48] Records may be maintained and stored on microfilm[49] or through electronic storage.[50] These regulations should be consulted for the exact requirements for storage, permissible methods of storage, retention times, and destruction. What is important to know is that it is a Class A misdemeanor if an officer or employee of a local

[46] TEX. GOV'T CODE § 441.151(8). The term "local government record" does not include: (A) extra identical copies of documents created only for convenience of reference or research by officers or employees of the local government; (B) notes, journals, diaries, and similar documents created by an officer or employee of the local government for the officer's or employee's personal convenience; (C) blank forms; (D) stocks of publications; (E) library and museum materials acquired solely for the purposes of reference or display; or (F) copies of documents in any media furnished to members of the public to which they are entitled under Chapter 552, or other state law.

[47] TEX. LOCAL GOV'T CODE § 203.025.

[48] *Id*. at § 203.026.

[49] *Id*. at § 204.001, et seq.

[50] *Id*. at § 205.001, et. seq.

government knowingly or intentionally violates chapter 202 of the Local Government Code or rules adopted under it.[51] Personal liability may be avoided if the records management officer or other officer or employee destroys records in compliance with the chapter.

This may create conflicts between the records manager and communications officer or other employee charged with implementing and maintaining an active social media page. Cities may cautiously consider treating social media entries as they do other electronic documents based on the content of the posting and determine whether or not the record should be retained and for how long.[52] If a record is required to be retained under the city's retention schedule, the coordination with the city's IT staff will also be necessary to ensure compliance as some city's servers automatically clean the system after a certain period of time or based on other criteria. IT staff should be made aware of the requirements under the law to avoid these issues.

IV. PERSONNEL MATTERS[53]

Since the availability of the Internet at the workplace, employers have lost money due to lost productivity in the workplace. Due to lost revenue and other legal reasons discussed in detail below, employers have a legitimate reason to regulate and monitor their employee's use of workplace equipment for personal reasons. For example, as discussed above, public employees' work-related e-mails may be subject to public disclosure under the Texas Public Information Act.[54]

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[51] *Id*. at § 202.008.

[52] *See id.* at § 203.042 (Retention Periods). *See* also the website of the Texas State Library and Archives Commission for rules, forms and publications (http://www.tsl.state.tx.us/).

[53] Thank you Brad Young with Bickerstaff Heath Delgado Acosta LLP for your substantial contribution to this section of the paper. Your paper entitled "Employee E-mail and Internet Use Policies" (available at http://www.bickerstaff.com/publications.php) was an invaluable resource.

[54] TEX. GOV'T CODE § 552.002; *see* Tex. Att'y Gen. ORD-654 (1997).

While the employer may establish a policy regarding an employee's use of the Internet and e-mail in the workplace, including social media sites, the employer must be careful not to violate an employee's statutorily or constitutionally protected free speech and privacy rights. Suits against employers are on the rise and tend to fall into one of four general categories: claims under the Electronic Communications Privacy Act of 1986 ("ECPA"), state common law tort claims, Fourth Amendment search and seizure claims, and First Amendment free speech claims. The following sections briefly outline these various claims.

A. The Electronic Communications Privacy Act of 1986

The ECPA protects most electronic communications, including e-mail, from interception, attempted interception, disclosure, use and unauthorized access.[55] This federal law applies to both public and private employers, and violation can subject the employer to both criminal and civil penalties, including preliminary or other equitable or declaratory relief, monetary damages, punitive damages, attorney's fees, and other reasonable costs of litigation.[56]

It is important to carefully review the definitions and exceptions to the Act. Section 2511 clearly applies to the unlawful "interception" of electronic communications.[57] The Fifth Circuit has recognized that the word "interception" only applies to e-mail messages retrieved while they are in transit, and not after they have been saved in electronic storage.[58] The Act provides an

[55] 18 U.S.C. §§ 2510-11, 2701-2; *see also* TEX. PENAL CODE § 16.02 (making it a criminal offense under Texas law to intentionally intercept, endeavor to intercept, or procure another person to intercept or endeavor to intercept a wire, oral, or electronic communication).

[56] 18 U.S.C. § 2520(b). Criminal penalties can include imprisonment up to five years, fines, or both. 18 U.S.C. § 2511(4).

[57] 18 U.S.C. § 2511.

[58] *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 461-2 (5th Cir. 1994); *see also Bohach v. City of Reno*, 932 F.Supp. 1232, 1236 (D. Nev. 1996) (rejecting police officers' ECPA claim that police department unlawfully "intercepted" stored messages sent over the department's computerized paging system).

exemption for the "person or entity providing a wire or electronic communications service,"[59] so if the employer owns the network and does not read the e-mail before it reaches its destination, that employer probably has the right to store those e-mail messages on the server and to open and read them later.[60]

The Act also provides an important exception if there is consent, and prior consent of the employee may provide the most effective defense for the employer. It is not an offense to intercept information sent over e-mail where "one of the parties to the information has given prior consent to such interception."[61] Prior consent also protects the disclosure of the contents of an e-mail.[62] Therefore, the extent to which an employer may be able to legally monitor employee e-mail may depend on the extent to which the employer's e-mail and Internet use policy effectively limit e-mails, or disclaims an employee's privacy rights.[63]

B. State Common Law Tort Claims

The state common law tort claim of invasion of privacy is a second area of litigation involving employer monitoring of employee e-mail and Internet use. The employee must establish that he or she had a "reasonable expectation of privacy" in his or her e-mail communications in order to prevail.[64] In *Smyth v. Pillsbury Co.*[65] an employee sued for wrongful

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[59] 18 U.S.C. § 2701(c)(1) (creating exception to unauthorized access provision of ECPA).

[60] *See* Andrew M. Low, *E-Mail, Voicemail, and Employees' Right to Privacy: Monitering Employees' Electronic Communications*, COLO. LAWYER, Oct. 2000, at 13.

[61] 18 U.S.C. § 2511(2)(d).

[62] 18 U.S.C. § 2702(b)(3).

[63] *See Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983) (holding employee, who only agreed to limited employer monitoring of telephone use, reasonably relied on limits set out by agreement); *see also McVeigh v. Cohen*, 983 F.Supp. 215, 219 (D.C. 1998) (finding Navy violated its own "don't ask, don't tell" policy by calling Internet service provider to investigate whether the alias "boysrch" on e-mail was traceable to a particular officer).

[64] *See Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 100-1 (E.D. Penn. 1996).

discharge and invasion of privacy following his termination because of inappropriate e-mail messages he sent to his supervisor over the company e-mail system.[66] The court found that there was no "reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system regardless of any reliance on any assurances by management that such communications would not be intercepted by management."[67] The court applied a balancing test and determined that "the company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system [outweighed] any privacy interest the employee may have in those comments."[68] At least one Texas court has held that even though the plaintiff had created a personal password, the plaintiff had no reasonable expectation of privacy in the contents of his e-mail messages such that the employer was precluded from viewing the messages.[69]

C. Virtual Harrassment and Workplace Violence

As employees connect with each other on their personal pages on Facebook or other websites, there is the potential that harassment can occur whether it be sexual in nature, gender, race, religion, age or national origin. Employers need to be careful of attempting to enforce personnel policies for conduct that occurs off-duty and not using public equipment or resources.[70]

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[65] *Id.*

[66] *See id.* at 98. The company alleged in its motion to dismiss that the e-mails "concerned sales management and contained threats to 'kill the backstabbing bastards' and referred to the planned holiday party as the 'Jim Jones Koolaid affair.'" *Id.* at 98 n. 1.

[67] *Id.* at 101.

[68] *Id.*

[69] *See id.* at *4.

[70] Brian Molinari, Prima Facie Law Blog, *Virtual Harassment: When Online Behavior Becomes a Real-World Problem*, November 19, 2009, http://www.primafacielaw.com/articles/social-media (last visited April 2, 2010).

Violent messages against other coworkers and the public in general is often posted on social media sites. At least one New Jersey case has raised the issue that there may be a duty to prevent co-worker harassment or injury to another if the employer knows or has reason to know that such harassment or threats are occurring on the company's website.[71]

D. Fourth Amendment Claims

Public employees are offered additional privacy protection under the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures.[72] In order for a search or seizure to be *unreasonable*, however, the employee must have a *reasonable* expectation that his or her computer activity is private.[73] The Supreme Court has recognized that public employees' expectations of privacy in their offices, desks and files "may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."[74]

When evaluating Fourth Amendment claims courts may consider a public employer's e-mail and Internet use policies. Employees had no reasonable expectation of privacy with regard to Internet use where a governmental employer's official policy informed employees that the employer would conduct "electronic audits" to identify, terminate, and prosecute unauthorized activity.[75] A court has also held that police officers had a diminished expectation of privacy in a

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[71] Brian Molinari, Prima Facie Law Blog, *Social Media Sites: A Useful Tool for Exposing Violent Employees?* March 25, 2010, http://www.primafacielaw.com/2010/03/articles (last visited April 2, 2010), citing *Blakey v. Continental Airlines*, 164 N.J. 38 (2000) (involving a pilot's claims for sexual harassment and defamation stemming, in part, from a co-worker's postings on an electronic bulletin board on company's Internet.).

[72] *See O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) ("Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment.").

[73] *See id.*

[74] *Id*. at 717.

[75] *See United States v. Simons*, 206 F.3d 392 (4th Cir. 2000). In *Simons*, the defendant, an electronic engineer with the Foreign Bureau of Information Services component of the CIA, faced prosecution for accessing and downloading child pornography over the CIA's computer system. *See id.* at 395.

police department's pager system, where the Chief had issued an order stating that messages sent over the system would be "logged on the network," and that messages that violated the Department's discrimination policy were banned from the system.[76] Even in the absence of a written policy, however, a search of an employees' computer may still be reasonable where the search is directly related to suspected employee misconduct.[77]

While all of these cases focus on a policy or expectation of privacy in regards to electronic mail or internet usage, the analysis of social media usage by employees and the right of employers to monitor employees, is analogous if not identical. Courts would likely consider the similarities between the two technologies, if not consider them identical, and balance the factors discussed above. The U.S. Supreme Court may give us some indication of its analysis of fairly new technology when it renders its opinion in the case of *City of Ontario, California, et al., v. Quon*,[78] which involved a police officer sending sexually explicit text messages on his city owned pager.[79] The Court heard oral arguments in the *Quon* case in mid-April of this year, and hopefully a decision will give cities an indication of the proper balancing of permissible intrusions into private messages on employer owned equipment, and an employee's expectations of privacy.

E. First Amendment Claims

Public employees are also subject to First Amendment free speech protections. The Fourth Circuit has held that a Virginia law did not infringe upon the First Amendment rights of state employees where state employees were prohibited from accessing sexually explicit material

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[76] *See Bohach*, 932 F.Supp. at 1234-35.

[77] *United States v. Slanina*, 283 F.3d 670 (5th Cir. 2002).

[78] http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf (last visited May 21, 2010).

[79] *Id.*

on computers owned or leased by the state, except in conjunction with an agency-approved research project.[80] However, at least one commentator has suggested that an employer may have a *duty* to report child pornography that the employer discovers on it computers under a federal public health statute on child abuse reporting.[81]

F. Copyright Infringement

The Federal Copyright Act protects an author's exclusive rights in copyrighted work,[82] and its protections extend to copyrighted material downloaded from the Internet.[83] The Act applies to governmental entities "in the same manner and to the same extent as any nongovernmental entity."[84] Under the theory of *respondent superior*, courts have held that an employer can be vicariously liable for the copyright infringements of its employees.[85] Even more troubling, it is no excuse from liability that the employer was not aware its employees were violating copyright law.[86]

The Act includes an exception for material that is reproduced for a "fair use," which the Act defines as "purposes such as criticism, comment, news reporting, teaching (including

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[80] *See Urofsky v. Gilmore*, 216 F.3d 401, 416 (4th Cir. 2000).

[81] Robert J. Nobile, *An Employer's Duty to Report Child Pornography Found in the Workplace,* GUIDE TO EMPLOYEE HANDBOOKS 9:69, NOV. 2007 (citing 42 U.S.C. § 13032(b)(1), which requires providers of "electronic communication services" to the public to report apparent child pornography to the National Center for Missing and Exploited Children).

[82] 17 U.S.C. § 106.

[83] *See, e.g., A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001) (finding users who downloaded copyrighted music violated reproduction rights); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F.Supp. 543, 551(N.D. Tex. 1997) (finding copyright violation where company downloaded unauthorized copies of protected images).

[84] 17 U.S.C. § 501(a).

[85] S*ee Shapiro, Bernstein & Co. v. H.L. Green* Co., 316 F.2d 304, 307 (2nd Cir. 1963); *Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F.Supp. 1257, 1262 (S.D. Tex. 1989).

[86] *See Swallow Turn Music v. Wilson*, 831 F.Supp. 575, 580 (E.D. Tex. 1993).

multiple copies for classroom use), scholarship, or research."[87] Therefore, material downloaded for one of these purposes will ordinarily not constitute copyright infringement; however, due to the employer's potential exposure, the employer needs a clear policy that outlines the legitimate ways that employees may use the Internet at work or as part of a social media site.

Cautious employers should implement a clear e-mail and Internet use policy, that includes the use of social networking sites, and make sure each employee understands and agrees to it.[88] The common thread to nearly all of these cases is consent: once employees understand their rights and responsibilities regarding the employer's computer hardware, software, and network equipment employees become free to use these valuable resources in their daily work without exposing the employer to future liability stemming from its misuse.

V. CONCLUSION

A. What are other cities doing?

Across the nation cities are using a variety of combinations of social media sites. At least one website maintains a database of governmental agencies and elected officials that are using social media and lists a variety of networks used by the various entities.[89] This database can be searched by state or name of an elected official. For example, the site shows that the City of Austin uses Facebook and Twitter. Austin has recently referred the matter of crafting a social media policy to its technology committees in order to address many of the concerns raised here as well as its relation to the city's lobbyist requirements.[90] On the other hand, the City of San

[87] 17 U.S.C. § 107.

[88] *See, e.g.*, Sindy J. Policy, *The Employer as Monitor: Keeping an Eye On Net Use and E-Mails Can Prevent Litigation*, BUSINESS LAW TODAY, Nov./Dec. 2000, at 9.

[89] http://gov2social.cloudapp.net/SocialResource/ViewMedia (last visited May 21, 2010).

[90] http://www.ci.austin.tx.us/telcommission/downloads/20100512bk-soc-media-bandc-presentation.pdf (last visited May 21, 2010).

Jose, California has already adopted an aggressive policy requiring councilmembers to disclose e-mails and text messages received during City Council meetings from lobbyists, special interests or individuals with a financial stake in the topic being discussed.[91] Rather than re-inventing the wheel, San Jose's and other cities policies can be found on the Internet for review and comparison.[92]

B. Practical Tips

The report from the Penn Fels Institute of Government, *Making the Most of Social Media*, has been cited earlier in this paper, and provides useful tips learned from other successful cities and their use of social media.[93] Of the 79 cities surveyed, six Texas cities were questioned and their populations ranged from 30,000 to 250,000 or more.[94] In summary, the report summarizes seven "promising practices" as follows:

- Face your fears. The report advises, as does this paper, that legal counsel be consulted to address some issues such as open records and sunshine laws. The Fels Institute found that Florida was one of the states where entities should have a concern over open records laws as its attorney general has issued an opinion that social media is not exempt.[95]

There is often a worry by cities that the time to manage and maintain a social media tool will involve too much time. Most of those interviewed by the Institute disagreed with this myth

[91] http://www.msnbc.msn.com/id/35972792/ns/technology_and_science-wireless and http://www.sanjoseca.gov/clerk/Agenda/20100302/20100302_0304.pdf (last visited May 21, 2010).

[92] http://socialmediagovernance.com/policies.php and http://munigov.org/ (last visited May 21, 2010).

[93] Kingsley at 8.

[94] The Texas cities surveyed were Corpus Christi, Houston, Dallas, Irving, Richardson and the Town of Flower Mound. *Id*. at 27.

[95] *Id*. at 9.

and recommended a centralized control over the content and use of press releases and interns that are familiar with this medium.[96]

Another concern was the public criticism that would be posted with little to no control by a city on a Facebook page, for instance.[97] However, this is likely to occur regardless of the available medium, and is part of the public's free speech right to comment on their public officials.

- Manage up. The report found that those cities that involved key staff and policy makers early on to establish a clear vision of how they wanted to use these tools were the most successful.[98] The policy should include a list of the internal workflow and responsibilities and expressly state the expectations of those who participate in the social media sites.[99]

- Get your team straight. The team members of staff and elected officials will have a great impact on your city's success with social media, and should be clearly identified.

- Build your audience. Through the use of traditional press, a city's website and constant cross-promotion of the city's presence can enhance a city's success in reaching out to the public.[100]

- Find your voice. Successful cities make a commitment to post on a regular basis depending on the media being used, and have the resources ready to post.[101]

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[96] *Id*. at 10.

[97] *Id*. at 11.

[98] *Id*. at 13.

[99] *Id*. at 13.

[100] *Id*. at 16.

[101] *Id*. at 18.

- Self-evaluate. Cities should track the size and growth of your audience, and monitor the public's usage.[102]

- Get started. Each city's experience and needs will be different but it is clear these tools are not a passing phase or just for teenagers. After consultation with your governing body and/or management leaders and legal counsel, these tools can facilitate communication with the local population as well as those abroad.[103]

The authors of the report acknowledge that there are no hard and fast rules as to which tools will work best in each city, but the above seven practices have been shown to work better than others.[104] Given the large targeted audience that can be addressed at little to no cost, the utilization of social media can greatly benefit a city so long as cities are careful to create clear policies beforehand that will help staff and elected officials avoid many of the legal pitfalls described herein.

[102] *Id.* at 24.

[103] *Id.* at 24-25.

[104] *Id.* at 6.