Legal Q&A
By Bill Longley, TML Legal Counsel

Must information posted on a city's social media Web site be retained?

Information on a city's social media Web site (Facebook, Twitter, LinkedIn, etc.) must be retained in accordance with the applicable records retention schedules.

The problem is that there is little guidance governing how to classify the information on social media sites (e.g., wall posts, tweets, etc.). The general rule is that whether and how a city must retain the information would depend not on the format of the information, but upon the actual content.

The Local Government Records Act is codified in Chapters 201 through 205 of the Texas Local Government Code, and places basic requirements on local governments to designate a records management officer and establish a records management program. TEX. LOC. GOV'T CODE §§ 203.025(a), 203.026(a). The Act grants authority to the Texas State Library and Archives Commission (TSLAC) to promulgate records retention schedules that provide the minimum retention periods for local records. TEX. LOC. GOV'T CODE § 203.042. Any records management program established by a city must at least comply with the retention schedules created by TSLAC. *Id.* Further, a city that has not created its own records management program must comply with the TSLAC retention schedules.

Because TSLAC has not addressed social media information in any of its records retention schedules, it is probably safest to treat the information in a similar manner as e-mail correspondence is treated under the retention schedules. TSLAC retention schedules do not establish specific retention periods for all e-mails, but instead provide that e-mails must be kept for certain amounts of time, depending on the content of the e-mail. Information from a city's social media site would likely need to be treated in accordance with this general rule that applies to e-mails: Whether and how to retain the information would depend not on the format of the information, but upon the actual content.

TSLAC's records retention schedules are available on the Internet at www.tsl.state.tx.us.

Is a Facebook or Twitter post made by a city employee or city official subject to the Public Information Act (PIA)?

A Facebook or Twitter post made by a city employee or city official could be considered subject to the PIA if the post or tweet related to official city business. For purposes of the PIA, "public information" is defined as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for a governmental body. TEX. GOV'T CODE § 552.002(a).

Recent litigation has highlighted the question of whether the definition of "public information" includes a city official's private text messages and e-mails on personal accounts made in connection with the transaction of official business. *See City of Dallas v. The Dallas Morning*

News, LP, 281 S.W.3d 708 (Tex. App.—Dallas April 9, 2009). The trial court in the case agreed with the *Dallas Morning News'* argument that when a mayor engages in communication by personal e-mail relating to her authority as mayor, the e-mail becomes public information. *City of Dallas*, 281 S.W.3d at 713. The City of Dallas, on the other hand, argued that the e-mails do not meet the statutory definition of "public information," regardless of whether the e-mails relate to the transaction of official business, because they are not collected, assembled, or maintained by or for the city, and the city does not own or have the right of access to them. *Id.* at 714. The Dallas Court of Appeals remanded the case back to trial court to determine the level of access the City of Dallas had to the requested e-mails, and the case is still pending.

The PIA requires the attorney general to liberally construe the definition of public information to favor disclosure of information when issuing a ruling to a governmental body. TEX. GOV'T CODE § 552.001(b). As a result, at least until ongoing litigation clarifies how to treat private e-mail correspondence by a city official, city officials and employees should operate under the assumption that any discussion of official city business on social media sites would be considered open to the public. This does not mean that all information relating to city business posted on such a site would have to be disclosed to a requestor, as the exceptions to disclosure under the PIA could still apply. *See* Tex. Att'y Gen. Op. OR2009-07029 (determining that certain information on a Facebook account could be withheld under Section 552.108(a)(2) of the Government Code).

Because of the strong possibility that comments on Facebook or Twitter involving city business could be considered to be public information, city officials and city employees should exercise particularly careful judgment when posting on these sites.

Could communication between councilmembers on a Facebook page or Twitter account constitute a violation of the Texas Open Meetings Act (Act)?

Interaction between councilmembers on a social media Web site could very likely result in a violation of the Act. Any gathering of members of a city council is subject to the requirements of the Act (including 72 hours notice, an agenda, and minutes or a tape recording) if a quorum of the council engages in a "deliberation" of public business. *See* TEX. GOV'T CODE § 551.001(4). "Deliberation" is defined in the Act as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business." TEX. GOV'T CODE § 551.001(2). The attorney general has opined that a verbal exchange described in the definition of "deliberation" is not limited to spoken words. Tex. Att'y Gen Op. No. JC-0307 (2000).

The Act has been interpreted to apply to situations in which members of a governmental body act as a body, but are not in each other's physical presence. *See* Tex. Att'y Gen. Op. No. DM-95 (1992). For instance, members of a governmental body would violate the Act by holding secret telephone deliberations. *Hitt v. Mabry*, 687 S.W.2d 791, 794-96 (Tex.App.—San Antonio 1985, no writ). Similarly, charges have been brought against city councilmembers who have exchanged e-mails regarding the placement of an item on a future agenda. *See Rangra v. Brown*, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006).

If a councilmember creates a post on his or her personal Facebook page or Twitter account regarding city business, and multiple other city councilmembers continue the discussion of city business through their comments in response to the post, the interaction could certainly be construed as a "deliberation" under the Act, given the aforementioned cases and opinions. Although there is not yet a case or attorney general's opinion applying the Act to social networking by elected officials, past opinions indicate that communication among a quorum of councilmembers outside of an open meeting would constitute a violation of the Act.

The Florida attorney general recently issued an opinion on the issue pursuant to Florida's Government in the Sunshine Law, an open meetings law that is similar in substance to the Act. The opinion concluded that discussions held on Facebook may be subject to the Florida open meetings law: "While there would not appear to be a prohibition against a board or commission member posting comments on the city's Facebook page, members of the board or commission must not engage in an exchange or discussion of matters that foreseeably will come before the board or commission for official action." Fla. Att'y Gen. Op. 9-19 (2009).

If a city has a Facebook page, but does not maintain an official Web site, must the city post notice of a city council meeting on the Facebook page to comply with the Texas Open Meetings Act (Act)?

Under the Act, a city with a population of less than 48,000 that maintains a Web site must post notice of any council meeting on the Web site. TEX. GOV'T CODE § 551.056(b). "Notice" under this provision of the Act would likely mean only the date, place, and time of the meeting. In contrast, a city with a population of more than 48,000 must post the full agenda of any city council meeting on the city's Web site. TEX. GOV'T CODE § 551.056(c).

The Web site notice requirements apply only to a governmental body that "maintains an Internet Web site or for which an Internet Web site is maintained." TEX. GOV'T CODE § 551.056(b). Even if the content is technically controlled by the Facebook administrator, it may be difficult to distinguish a city's Facebook account from any other service that hosts a city's Web site. Consequently, the safest course of action for a small city that has a Facebook page, but no official Web site, may be to post notice of any upcoming meetings on the Facebook page.