

## **COMMON COUNCIL SOCIAL MEDIA POLICY August 2011**

### **Introduction**

Our world is undergoing a fundamental shift in the way we communicate. Traditional communication mediums, such as letters, phone calls, newspapers, television and even email, are all giving way to the use of social media. Facebook currently claims a membership of nearly more than double the population of the United States.<sup>1</sup> Flickr, YouTube, Hulu and Wikipedia are now common household terms. Google is no longer just a noun, it is a recognized verb.<sup>2</sup> The professional journalist's printed editorial has given way to the layperson's blog. Personal communications devices make it possible for anyone to access his or her favorite social media virtually anywhere at any time.

The Common Council Organizational Committee Subcommittee to Develop Council Social Media Policy comprised of Ald. Lauren Cnare, Ald. Bryon Eagon and Ald. Chris Schmidt met from February 2011 to April 2011 to develop a social media policy and guidelines for members of the Common Council.

The subcommittee recognized that the Madison Common Council seeks to actively inform, serve, and engage citizens and that social media provides an opportunity to reach a large audience directly by allowing for greater personal interaction between elected officials and residents.

When properly used, it can be an effective tool for the Common Council to:

- openly, directly, and publicly communicate with citizens
- develop new and/or improved relationships with constituents and community partners
- seek input from citizens on key issues or services provided
- promote educational information directly to constituents

### **Purpose**

The intent of this policy is to promote the safe, orderly, responsible and consistent use of social media by members of the Common Council.

The City's vision statement reads: "The City of Madison will be a safe and healthy place for all to live, learn, work and play." Social media and alder specific webpages can facilitate that vision by providing useful and real-time information to the public. Social media can enhance and promote the City's image; can share valuable information regarding availability of community services, City operations and activities; and, can facilitate a dialogue between the alder and their constituents.

However, without guidance and oversight, the use of social media may result in the alder sending out inconsistent messages and confusing the public they serve. Furthermore, the inappropriate use of such media can lead to liability, threaten the vitality/safe operation of the City's Information Technology resources and result in the loss of important public records and historical documents. Additionally, the City must ensure full accessibility in all of its website and social media venues.

Alders are asked to comply with the terms of this policy. The City retains the right to edit or remove any content that violates this or any other policy of the City or any applicable law.

---

<sup>1</sup> Facebook's active membership exceeds 500 million. See <http://www.facebook.com/#!/press/info.php?factsheet>

<sup>2</sup> Google. Dictionary.com. *Collins English Dictionary - Complete & Unabridged 10th Edition*. HarperCollins Publishers. <http://dictionary.reference.com/browse/google> (accessed: October 18, 2010).

### **The Role of Council President**

The Common Council President, in consultation with the Information Technology Department Director, shall be the final approving authority on any request to employ social media. They will approve any use of social media that is consistent with city objectives, business practices and the policies stated herein.

### **The Role of the Information Technology Department**

The use of social media is not without its risks. Common Council members may not always have a good understanding or appreciation of these risks. Therefore, to protect the integrity of our records and to safeguard the City's substantial investment in IT resources, the Information Technology Department shall be the lead agency in the use of and implementation of social media.

1. The Director of the Information Technology Department shall review all tools and applications for use of social media and shall make a recommendation to the Common Council President and Common Council Executive Committee on each such application. In making his/her recommendation, the IT Director shall:
  - a. Consider any comments of the City Attorney;
  - b. Give no effective "grandfathering" to any use in place before the adoption of this policy.
2. The IT Director shall:
  - a. Maintain a list of social media tools approved for use by Common Council members.
  - b. For each such approved social media tool the IT Director shall:
    1. Develop operational and use guidelines;
    2. Implement City, departmental and divisional branding standards;
    3. Develop enterprise-wide design standards;
    4. Manage accounts on social media sites;
    5. Act as the Administrator of social media sites;
    6. Create social media applications and RSS feeds; and
    7. Set-up security settings on social media sites.
  - c. Maintain a list of each Common Council member's use of social media tools to include:
    1. The login and password information for each alder;
    2. Define the repositories for all data.
3. Use of social media should generally meet one of the following criteria:
  - a. The communication of time sensitive information in a real time manner (i.e. public meetings; city events; open houses, etc.).
  - b. Marketing/promotional efforts designed to reach a demographic that favors the social media under contemplation.
  - c. To solicit feedback or input from the largest possible audience on a distinct proposal or plan before the City.
4. The City's website and connected web pages will remain the City's primary and predominant presence on the Internet. Therefore:

- a. Any use of social media should be accessible through or linked to the appropriate web pages on the City's website.
  - b. Content posted to a social media website should contain links directing users back to the City's websites where additional in-depth information, forms or other online services are available for the public.
  - c. The City's website should be the repository. Data will be "pushed" to social media tools. The City has a central data repository that receives online submissions and updates from database applications in various City agencies. In turn, these submissions and updates are pushed out near real-time to a variety of other channels including the City of Madison's website, RSS feeds, SMS messaging, Twitter and Facebook.
  - d. RSS feeds should be built or scripted by IT or approved staff to ensure compliance with records retention laws.
5. The IT Director shall respond to complaints/inquiries at the point of contact and may, in consultation with the Common Council President, edit or remove any presence or content that violates any provision of this or any other policy or law;

The IT Director shall maintain a record of the original social media presence as it existed before any action taken by the IT Director.

6. The IT Director shall determine whether a social media tool or site permits the preservation of the City's presence in a manner that comports with the City's duties and obligations under the Wisconsin Public Records Laws. The IT Director shall apply Sec. 3.70(3)(b)9, MGO (see Appendix A), in determining whether to approve any social media for use by City Divisions, Departments or staff.
7. The IT Director shall periodically conduct training on the appropriate use and the mechanics of social media.
8. The IT Director shall promptly report the discovery of any criminal activity or law violation to the Madison Police Department and shall cooperate with any investigation of the same.
9. The IT Director has the authority to grant limited exceptions to this policy. Such exceptions shall take into account the principles of information and infrastructure security and such exceptions shall be granted in writing only.

### **The Role of the Office of the City Attorney**

Use of social media raises several legal issues. First, the City must comply with the Wisconsin Public Records laws and Open Meetings laws. Unfortunately, these laws have not been substantially updated since long before social media and the internet became available. Thus, close consultation with the City Attorney may be required when employing social media so as to appropriately address public records and open meetings considerations.

Second, use of social media may implicate First Amendment freedom of speech considerations. When the City opens up a public forum, that is to say, when the City creates a place to exercise freedom of speech rights, the City can only place viewpoint neutral, time, place and manner restrictions on participant's speech. In other words, the government cannot ban nor otherwise interfere with speech that it does not like or that it simply disagrees with. However, when the City creates a more limited forum the City enjoys far broader authority to restrict the conduct and speech of those people using that forum. In a limited public forum, government may restrict the content of public speech or may ban such speech altogether.

The City employs social media for the express and limited purposes of communicating the City's various messages, its vision of the City and for receiving certain limited communications from the public. The City employs social media in order to promote the City's government speech<sup>3</sup> and to allow the public a limited venue in which to communicate with the City. The City thus does not intend to create any open public forums for expressive activity. The City intends to monitor and where appropriate remove or restrict content that is inconsistent with or in violation of this policy.

Therefore, the City Attorney shall:

1. Review each application for the use of social media and provide the applicant and the IT Director with feedback/recommendations concerning the proposed use of social media.
2. Ensure that, consistent with sec. 3.70(3)(b)9, MGO, the City's use of social media complies with applicable public records laws and retention schedules.
3. Ensure that each application reflects consideration of the First Amendment principles at issue in the use of that particular social media and appropriately avoids creating public forums.
4. Conduct appropriate training in the legal issues associated with the usage of social media, such training to be conducted in coordination with the social media training provided by the IT Director.

### **The Role of Council Members**

Common Council members may suggest appropriate social media opportunities that will advance the City's ability to communicate with the public. The goal of this policy is to promote, not to inhibit, the orderly and appropriate use of social media.

1. A Common Council member that identifies a social media opportunity must have approval of the Common Council Executive Committee to pursue an application for such use with the IT Director.
2. If the Common Council Executive Committee approves such requests, the Common Council member shall submit an application to the IT Director that sets forth:
  - a. The identity of the social media;
  - b. The name, title and contact information for the staff person(s) responsible for working with IT staff;
  - c. The purpose and benefits of utilizing the social media;
  - d. Any rules the Department/Division has developed regarding the use of the social media.
3. All usage of social media shall comply with the City's Ethics Code and all applicable laws.
4. All social media sites and tools shall contain a clear and conspicuous notice to users that the City is using the medium as a means of communicating with the public on the limited subject matter at hand. Furthermore, this notice shall inform the user that once posted; the City reserves the right to delete, at its discretion, any submission that contains:

---

<sup>3</sup> See Pleasant Grove City, Utah v. Summum, 129 S.Ct.1125, 172 L.Ed.2d 853 (2009).

- Spam, advertising or include links to other sites that would not be permitted under the City's Web Linking Policy [APM 3-13](#).
- Endorsement or opposition of political campaigns (applies to Federal, State, Local and/or personal aldermanic campaigns)
- Irrelevant to or off topic content as compared to the particular purpose the social media is being used to communicate about.
- Content that promotes, fosters, or perpetuates discrimination in violation of the Madison Equal Opportunities Ordinance, sec. 39.03, MGO (see Appendix B).
- Sexual content or links to sexual content or that advocates, encourages or promotes illegal activity of any kind.
- Commercial advertisements or otherwise promotes or solicits commerce, particular services, products, or political candidates, causes and/or organizations.
- Content that infringes upon or violates any copyrights, trademarks or legal ownership interests of any other party.
- Information that may tend to compromise the safety or security of an individual or the public.
- Content that violates any City of Madison policies or any local, state or federal laws.
- Vulgar or profane language, personal attacks of any kind, or offensive comments that target or disparage any ethnic, racial, or religious group.

All social media sites and tools shall also contain a clear and conspicuous notice to users that comments posted to the social media constitute public records subject to disclosure under the Wisconsin Public Records Laws. Such notice, whenever possible, shall appear in such a manner so that a person must view and/or acknowledge the notice prior to posting their comments. These notices may be posted by hyperlink. Anytime content is removed because of a violation of these rules, the person removing such content shall retain a copy of the removed content and where possible, shall include the date time and identity of the poster.

5. Common Council members are responsible for keeping their social media presence fresh and current.
6. Common Council members are responsible for responding completely and accurately to any request for public records related to their social media presence.
7. Common Council members should be aware that social media often contains the capacity for direct communications such as chat, instant messaging and text messaging that are very similar to email. However, such means of communication are not captured in the City's searchable email archive database. Therefore, if the social media contains such features the Council members shall comply with the requirements of sec. 3.70(3)(b)9, MGO or forgo/disable the use of such communication tools.
8. Social media shall not be used to avoid duties and responsibilities imposed by the Wisconsin Public Records Laws and/or Open Meetings Laws.
9. Common Council members should be mindful that for most of the public, these social media venues might be their only contact with the City. Thus, communications on social media should be respectful and professional. Care should be taken to ensure that content is accurate, informative and timely.

10. Avoid disclosing or posting any information that would compromise the health, safety or security of any person, group, organization, building or facility.
11. Whenever posting links to or on a page/site with links to external sources the Common Council member shall include the following disclaimer:

*“The City of Madison, Wisconsin is not responsible for the content provided on "related" and "promoted" links that are accessible from this page. All viewers should note that these related links, videos, content and comments expressed on them do not reflect the opinions and position of City of Madison government or its officers and employees.”*

### **Photo Permission & Copyrights**

(Memo from Katherine Noonan, Assistant City Attorney dated July 28, 2011)

Using photographs and/or published material on Alderperson pages of the City’s website implicates both the right to privacy and issues of intellectual property, e.g., copyright.

#### **> Right of Privacy**

Wisconsin did not have a right of privacy statute until 1979. The current law, Wis. Stat. §995.50, is modeled on Restatement (Second) of Torts and both recognizes a right of privacy and provides relief for one whose privacy is invaded. Wis. Stats. §995.50(2) specifies that “invasion of privacy” means:

- (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
- (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
- (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.
- (d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct. (s. 942.09 is titled, Representations depicting nudity.)

As guidance for determining whether an invasion of privacy has occurred, Wis. Stat. §995.50(3) states that:

*“The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.”*

There is little reported Wisconsin case law applying or interpreting Wis. Stat. §995.50, however, many jurisdictions model their legislation on the same Restatements provision and are similarly guided by common law.

Although (2)(b) above relates specifically to photographs, privacy violations under (2)(a) and (c) also may occur from the use of photographs. General questions to ask when contemplating putting a photograph on a web page are: 1) is the method/context of taking the photograph an invasion of privacy? (Wis. Stat. §995.50(2)(a)); 2) is the photograph used in a way that is an invasion of privacy? (Wis. Stat. §995.50(2)(b)); and 3) is information conveyed to others by a photograph an invasion of privacy? (Wis. Stat. §995.50(2)(c)). I will discuss each issue below.

#### *1. Wis. Stat. §995.50(2)(a) - Method/Context – Intrusion in a Private Place.*

As a general rule, taking photographs in a public place, even without consent, is not an invasion of privacy. *Ladd v. Uecker*, 2010 WI App 28 (photographing a problem attendee at Major League baseball parks); *Berg v. Minneapolis Star & Tribune Co.*, 79 F.Supp. 957 (1948, DC Minn) (photographing a party to a divorce during an open court proceeding); *Forster v. Manchester*, 189 A2d 147 (1963) (surveillance on a public street of a claimant on automobile insurance policy); *Munson v. Milwaukee Board of School Directors*, 969 F.2d 266 (7th Cir., 1992) (surveillance from a public street of a school district employee suspected of residency violation).

A photograph taken in a place that a reasonable person would consider private, however, such as a person's home, may be an invasion of privacy if done so "in a nature highly offensive to a reasonable person." Sec. 995.50(1)(a). Surreptitious videotaping of woman in her bedroom by her husband was an invasion of privacy. *In re Marriage of Tigges and Tigges*, 758 NW2d 824 (Iowa 2008). The Iowa Supreme Court held that videotaping his wife in a place where she had an expectation of privacy was "highly offensive to a reasonable person", and that it was irrelevant that no compromising behavior was recorded. *Id.* at 830. Recording voices of neighbors from outside the boundary of the neighbors' property was not an invasion of privacy. *Poston v. Burns*, 2010 WI App 73. The court determined that recording voices on neighboring property with a recorder on a window sill of one's own home was not an intrusion a reasonable person would consider highly offensive. *Id.* at ¶28.

In all cases, consent to being photographed generally is an absolute defense to an allegation of invasion of privacy, even when a photograph is taken in a place a reasonable person would consider to be private.

Before posting a photograph on a web page, it is important to determine that the photograph was taken in an appropriate context and, if necessary, whether or not the subject of the photograph consented to being photographed. In addition to right of privacy concerns, it may be prudent to consider safety, or other issues before using photographs. For example, even though posting a photograph of a child in a public location may not be an invasion of privacy, parents may not want images of their children displayed in such a manner. Obtaining consent to use photographs of this nature may be a wise option.

#### *2. Wis. Stat. §995.50(2)(b) - Use/Misappropriation*

Although this subsection relates to the use of photographs, the right of privacy it addresses is more of a property right than an issue of personal identity. Just prior to the effective date of Wis. Stat. §995.50, the Wisconsin Supreme Court decided *Hirsch v. S.C. Johnson, Inc*, 90 Wis.2d 379 (1979). In that case, S.C. Johnson marketed a shaving gel for women called "Crazylegs",

even though it knew that Elroy Hirsch was nicknamed “Crazylegs” and had not obtained Hirsch’s permission. Because the court found that Hirsch had a cause of action under common law, the decision informs the analysis of this subsection of the right of privacy statute. The court found evidence that a jury could conclude that the “Crazylegs” name had commercial value. A Michigan court similarly found commercial exploitation when a company marketed portable toilets called “Here’s Johnny”. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Circ.).

This type of privacy violation typically occurs in a commercial context because it requires that a photograph is used for advertising or trade purposes. For that reason, it is not likely to be an issue with an alderperson’s web page. It is unclear, however, whether non-commercial promotion could be considered “advertising”, therefore, any use of a photograph or language with a known commercial identification should be considered carefully. If use of photographs were considered to be related to a political campaign to benefit the user, a court might view it similarly to the commercial use in *Hirsch*. Finally, use of photographs under this section requires the written consent of the person(s) represented in the photograph, or in the case of minors, permission of a parent or guardian.

### *3. Wis. Stat. §995.50(2)(c) - Publicity and Private Facts*

A violation of this provision requires publicity of private facts that would be highly offensive to a reasonable person of ordinary sensibilities, by a person who unreasonably or recklessly fails to consider whether there is legitimate public interest in the publicity. *Zinda v. Louisiana Pacific*, 149 Wis.2d 913 (1989). Determination of this type of privacy violation is very fact-specific.

Publicity means to disclose a matter to the public at large or to a limited number if such disclosure would likely become public knowledge. Examples of publicity include disclosure of prisoner’s HIV status to jail employees and inmates (*Hillman v. Columbia County*, 164 Wis.2d 379 (Ct. App. 1991)); disclosure in a company’s newsletter of employee’s termination for falsifying employment forms (*Zinda v. Louisiana Pacific*, 149 Wis.2d 913 (1989)); EMT’s disclosure of the basis for an emergency call to only one person, when that person was known to have “loose lips” (*Pachowitz v. LeDoux*, 265

Wis.2d 631 (Ct. App. 2003). A violation does not require that the publicity result in any specific mental or emotional distress. *Marino v. Arandell Corporation*, 1F.Supp.2d 947 (E. D. Wisc. 1998). There is little doubt that posting a photograph or other personal information on a web page could be publicity.

Private facts are those personal facts that individuals wish to keep to themselves or share with limited persons in their lives, however, the privacy law does not shield the hypersensitive from a typical level of public exposure. *Zinda v. Louisiana Pacific Corporation*, 149 Wis.2d at 929-930. Private facts may include health care status and treatment, basis for employment termination, financial account information, and sexual relationships. *Hillman v. Columbia County*, 164 Wis.2d 379 (Ct. App. 1991); *Zinda v. Louisiana Pacific*, 149 Wis.2d 913 (1989); *Pontbriand v. Sundlun*, 669 A.2d 856 (R.I. 1977); and *Ozer v. Borquez*, 940 P.2d 371 (Colo. 1997). This type of privacy violation typically involves written or spoken communication, however, it is possible that a private fact could be communicated by a photograph. It is important to note that a private fact that is accessible as a public record is not protected by this law.

A privacy violation under this subsection also requires that the publicity and private fact be “highly offensive to a reasonable person”. Generally, if the associated publicity of a private fact



made public would make a person feel seriously aggrieved, this element of the violation is met. *Zinda v. Louisiana Pacific Corporation*, 149 Wis.2d at 930.

### **> Copyright and Web Pages**

As a general rule, use of another's intellectual property implicates copyright law, whether it involves use of a photograph or other image, or a written, audio, or visual product. The intellectual property of another need not have formal copyright registration to be protected, and material on the internet is considered "published" intellectual property.

Some use of copyrighted work without permission is allowed under the Fair Use doctrine. 17 USCA §107. Determination of fair use is based on four considerations.

- a. The purpose and character of the use. Commercial use is less favored than personal, nonprofit, and educational use are more favored.
- b. The nature of the use. Creative work is favored over more fact-based work.
- c. The amount of work used. Although there is no absolute limit, the less work used, the more likely it will fall under the fair use exception.
- d. The effect on the market for or value of the work. The more a use negatively impacts the market and value, the less likely it is to be considered fair use.

One way in which internet use has dealt with the issue of copyright infringement is through the use of linking. Linking, however, is not without risk. Always make sure that the identity of the owner is clear, and remove information if and when an owner requests. Also, links should go directly to the site of the work. Don't make a link open into a frame showing your own identity or site name as it may confuse a reader as to the ownership of the work. If you link to a page other than the home page of another site, try to include a link to the home page.

If use of copyrighted work does not fall under the fair use exception or is not done through linking, it is important to obtain permission for use. For example, a variety of art exists on the internet, some of which is free, other is free as long the user has purchased the software containing the art and uses it in the manner allowed by the software owner (e.g., Claris Home Page, Microsoft Front page, Adobe PageMill). In addition, there are sites that contain licensed art and require permission for use. These site often have an agreement online. Such agreements should be avoided because they typically require the user to indemnify the site against copyright infringement and such indemnification requires Common Council approval.

**In conclusion, if you want to include on your page on the City website photographs or other intellectual property that does not belong to you, consider carefully the source of the work, how it was obtained, how you intend to use it, and whether permission is required for its use. Finally, the City's [APM No. 3-13](#), which is titled, **Web Linking Policy**, should be followed.**

### **Review & Appeal Procedure**

The IT Director shall respond to complaints/inquiries at the point of contact and may, in consultation with the Common Council President, edit or remove any presence or content that violates any provision of this or any other policy or law.

If the Common Council member disagrees with the determination made by the IT Director and Common Council President, the Common Council member may appeal to the Common Council Executive Committee for review. The Common Council Executive Committee's decision shall be final. Any action taken by the Common Council Executive Committee may be used as a guideline to be incorporated into the Common Council Social Media Policy.