From: Robert Long
Subject: Facebook

Good afternoon.

You'll recall that the Board asked to discuss Facebook at the COW. Specifically, the issue was how Facebook interacts with the Open Meetings Act. I had hoped to come to you with a fairly well-developed policy outline to give you a better direction on options and rules to live by. Unfortunately, I've spent the better part of a day researching this stuff and hit something of a brick wall.

I had thought that the IML had put out a publication on social media, but that is not the case. There's a dearth of authoritative publications out there. Julie Tappendorf, a lawyer at Ancel, Glink, has presented seminars on the topic generally, but her focus has been much more on the issue of employees' use of Facebook and being disciplined for ranting about their bosses or elected officials. That wasn't particularly helpful since we're talking about something quite different. I did communicate with her though, as she seems to be trying to develop a bit of a specialty in the area and she confirmed that to date the Attorney General hasn't taken any position on social media and OMA issues. She also solicited me to hire her to write a policy, but I don't think that she can do more than we can if we think this through together.

One place that's taken a more proactive approach is Minnesota, where they're considering amending their OMA to specifically allow comments on social media. I found an interesting article debating the competing, yet parallel policies behind this and you might want to look at it. http://blandinonbroadband.org/2014/05/11/open-meeting-vs-social-media-in-mn-legislature/ But, even if this is the law in Minnesota now or in the future, it's not the law in Illinois.

Instead, we're left with a 20th century open government law that doesn't recognize the primary communication tool of a whole lot of people 15 years into the next century. To me, the law should allow the Village to maintain an official Facebook page where all ideas can be openly discussed by all elected officials. That seems like a very logical extension of the OMA and the policy underlying it, and I think it's what good, responsive government should be going forward. But, I don't think we can safely do that at present.

Not everyone has practical access to Facebook. That seems to be a matter of some concern to commentators I've found. But almost no one has access to a reliable local news source either, or if they do, they pay next to no attention to it. I find that issue pretty meaningless, but I'm not certain that the AG will think as I do since she's not telegraphed her point of view. Theoretical equal access to government decision-making appears to be the demanded norm, and with that access issue, any number of people who don't have Facebook accounts or use computers at all would have limited access to the real-time decision-making process.

Trying to limit Facebook to strictly comply with OMA raises a lot of issues too. What if one trustee responds to a comment. Does he or she stake "turf" over that comment stream, blocking others from participating for fear of violating OMA? Remember that OMA does have theoretical criminal penalties, so that's a serious concern. It's always been the law that any one person can say anything he or she wants without violating OMA, so such a tactic is legal even if the ethics are questionable. This concern underlied the suggestion I gave over the holidays to let the Administrator post the responses. Funneling all your responses through the Administrator works, so long as he is given the editorial discretion

to decide whether to post a response and how to phrase it. Otherwise, if he's subject to being commanded to post something, he's just acting as a puppet and that will not insulate the person behind the post from the OMA violation.

One alternative is using the private message function in your responses. Each of you can individually respond to any citizen, and as long as your comments don't merge to form a thread, there won't be a virtual meeting. Of course, you'll find yourself answering the same question repeatedly unless the Administrator posts a public statement. Thus, it looks like this would work best for limited scope issues like a burned out bulb in a streetlight. It wouldn't much help with EMS issues.

Another alternative is to be a little more aggressive and separate the messages out into threads and assigning the board liaison to respond (when appropriate) to the threads coming within his or her area. This does have the potential for weighting the discussion with one liaison's point of view, to the exclusion of others, but at least that liaison will be subject to harsh criticism from his or her fellow board members if this gets used for inappropriate purposes, such as grandstanding or campaigning. A reasonable policy using this model would include an amendment to our board rules embodied in the Village Code and would include some language requiring the liaison to limit responses to factual information and not statements of opinion or politicking.

A fourth and final alternative is simply banning you all from responding and I think that's overkill. But other than these alternatives, I can find no others being considered either locally or nationally. I might well have missed something in my searching, and I'm certainly hopeful one or more of you has some ideas that might better fit, but for now my recommendation remains to use the Administrator and respond to citizens privately. As always, your thoughts and comments will be important in shaping the final policy.

Bob

Robert J. Long
Attorney at Law
Daniels, Long & Pinsel, LLC
19 North County Street
Waukegan, IL 60085
Office: 847-623-5900
Fax: 847-406-4422