

# STEWARD NOTES

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Can I criticize my employer  
in public?

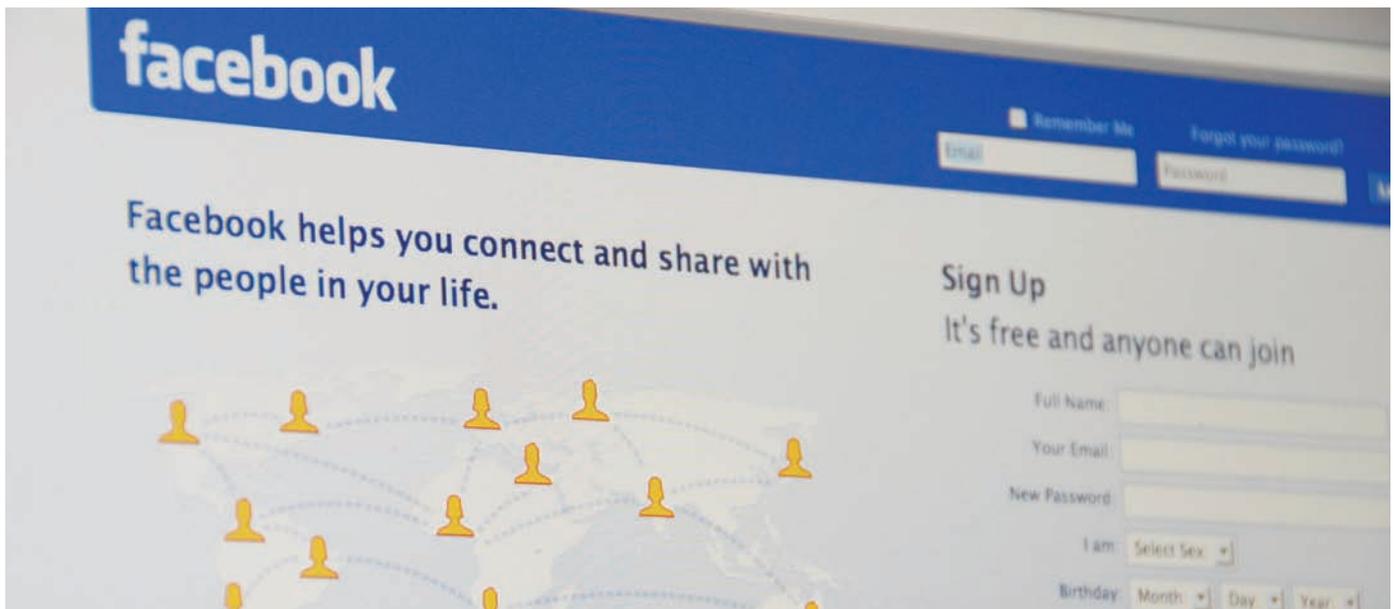
pg. 3

Innocent absenteeism and  
termination

pg. 5

OHS code gets updated  
and improved

pg. 6



## Facebook: your employer's new best friend?

With the advent of Facebook and blogs everything that was once private seems to be becoming public. Big Brother doesn't have to peer into our private lives because we're throwing open the curtains and taking it all off on the Internet.

With the click of a mouse, a photo album of your last vacation is available to anyone who stumbles upon your profile page, as are your latest thoughts on the weather, your boss, or whatever else you decide to post on a whim.

Of all the social networking sites Facebook is often viewed as the most dangerous for the vast amount of personal information users are encouraged to share (hometown, phone numbers, address, e-mail, birthday, workplace, etc.) and the casualness with which users add friends.

AUPE members unconsciously make their identity public to just about anyone interested in knowing it. However most people fail

to consider whether the information they post or the company they virtually keep online would be deemed worthy of discipline or termination.

AUPE Union Rep Carol-Anne Dean confirms that inappropriate or careless use of Facebook is now a factor in many disciplinary cases she deals with while servicing members employed by the Alberta Solicitor General and Public Security Ministry, and says members have been terminated due to guilt by association with a Facebook friend.

"If the nature of your work concerns who you associate with

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## Social networking - reduce the harm *continued*

outside of work, Facebook can become a tool for discipline by the employer. If it can be found that you are in any way associating with inmates or former inmates, your job could be in jeopardy,” Dean said.

Dean specifically warns against members adding old acquaintances you’ve lost touch with, such as former schoolmates.

“Think carefully about that 20 year-old school relationship you rekindle on Facebook. You don’t know how that person’s life has changed over the years and if they’ve been involved with the criminal justice system,” she said.

Recently a prison officer in England made

headlines after getting fired for having 13 criminals on his list of Facebook friends, some of whom were charged and convicted well after he added them as friends.

“At a disciplinary hearing,” London’s popular tabloid *The Sun* reported, “the officer claimed he knew them from school or playing football. He told the hearing: ‘Sometimes when I logged on to my Facebook site there would be twenty-odd friends requests and I just accepted them... I didn’t even check them. I realise now it might have been naive in the job I do.’”

Commenting on the case on his blog, Ontario employment lawyer Garry J. Wise noted the absence of criminal connections

as a fundamental tenet for Corrections employment is not a new concept, but “the digital trail left by Facebook certainly adds a twist – and a significant, new bank of potential evidence in any investigation of criminal or civil misconduct.”

Wise offers some simple advice to all employees: “like all things Facebook, your friend list could at some point become a public document, with unanticipated, adverse consequences.”

Stewards that are active on their worksite should take these lessons to heart and strive to make sure their coworkers are aware of the risks. Speaking up today could prevent a member from losing their job tomorrow.

## Steward Alert: tracking lay-offs

AUPE has begun tracking the number of employees being laid off in all sectors as the Government of Alberta tries to minimize its budget deficit.

Be sure to keep your union informed of any layoffs you see on your worksite. Having these numbers will help us show Albertans the impact government cutbacks are making on the services and programs

they count on everyday.

There are positive signs that the people of Alberta are behind us. A government public opinion tracking poll conducted the week the provincial budget was released in April showed that 77 per cent of Albertans agreed with the key principle of maintaining public sector salaries.

We need to keep up the momentum and take advantage of the positive feelings the people of Alberta have about the work we do. If there’s a threat of layoffs at your worksite, keep your local and AUPE’s antiprivatization committee informed. If you can confirm layoffs have actually happened, be sure to inform your MSO at your nearest regional AUPE office.

### SNAPSHOTS



Union Stewards share a laugh during a Level II Steward course at union headquarters in June.

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## Steward Notes

August 2009

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# FAQ

FAQ is a regular feature that gives AUPE stewards the opportunity to get advice from their union. Something have you stumped? Send your question to [stewardquestions@aupe.org](mailto:stewardquestions@aupe.org).

**Q:**

**As a public sector employee, am I allowed to criticize the government?**

**A.** Many members working in health care and the public service have asked whether they are allowed to criticize their employer. The answer to that question isn't simple.

Those directly employed by the government, or by Alberta Health Services and other agencies, should generally recognize that they could be disciplined for criticizing their employer. Whether that discipline would stand up to a grievance is another matter. A member grievance from 2003 provides some guidance on the issue.

In that case, prisoners in one unit of an Alberta Correctional facility undertook a hunger strike to protest their movement being restricted after a fight took place. The hunger strike was enforced by gang members and raised the tension on the unit significantly. Correctional Peace Officers felt like they were being exposed to an increased risk of violence on the unit, potentially creating an Occupational Health and Safety issue.

A member of the local executive employed at the facility brought those concerns to the attention of the employer and also aired them in an interview with a local radio station. In a second interview with the radio station, the member criticized the employer's response to the concerns, alleging that the employer's decision to speak directly with the inmates, showed a "total" lack of respect for the members and diminished their authority in the prison, increasing the danger they faced "ten-fold."

The member was disciplined with a two-day suspension for the interviews. The employer's letter of suspension said, in part:

*"I have reviewed all available information and determined that you disclosed internal security related information and inaccurate statements to the media in these interviews... You have been advised that public statements regarding department policy and practices are to be provided to the media by designated government spokespersons and as you are not a designated spokesperson, you are not authorized to provide public statements regarding department policy and practices."*

The member grieved the suspension. After hearing arguments from the union and employer, the arbitration panel chair wrote:

*"The parties were in agreement as to the tests to be applied in cases of discipline imposed on a union official. The tests are whether the impugned statements, in this case two interviews given on [the]... radio by the Grievor, were malicious in that they are knowingly or recklessly false."*

*"That a union official has a right and perhaps a duty to speak out is not at issue. The question, in the case of a union official who is also an employee, is where the balance lies between fidelity obligations as an employee and obligations as a union official."*

The arbitration board chair used an on Ontario case involving the City of Toronto to clarify. The arbitrator in that case said:

*"...it has been found that the integrity of the collective bargaining process demands that employee representatives be free to speak without fear of reprisal... Such comment is not beyond the scope of protected speech if based on facts that are true or reasonably believed to be true. However, if based on falsehoods that are known or ought reasonably to be known, such comment is not protected."*

Using this test the arbitration board reviewed the transcript of the grievor's radio interviews to assess the truthfulness of the statements made by the grievor. In its decision the board said:

*"The Board understands why the Grievor's public criticisms of the Director would*

*have been unwelcome to the Employer, but concludes that the Grievor did not misrepresent the facts as to what occurred [during the hunger strike]...*

*There is no factual basis, however, for the assertion that the Director's approach increased danger "ten-fold"...The Board concludes that the Grievor's comments about the increase in danger due to the Director's intervention were knowingly or recklessly false and a distortion of the true situation."*

The board also concluded:

*"The Grievor also insinuates that the Director is not impartial. This is a serious personal allegation that, in the Board's opinion, does not have a basis in fact... the facts do not justify the Grievor's opinion about the degree of disrespect allegedly demonstrated by the Director. The Grievor's statements in this regard were not only knowingly or recklessly false – they were personal and offensive."*

In its award the board rescinded the two-day suspension for being "excessive" and ordered that the Grievor be compensated for lost wages. The Grievor didn't get away without any discipline, however – a letter of warning was substituted for the suspension.

For Stewards, two key lessons come from this decision. The first is that a union representative has a right to criticize their employer in circumstances that affect other union members, and such speech is therefore protected from employer reprisals. The second lesson is that the criticism has to be factual, or else it can lead to discipline.

Unfortunately, this case alone doesn't tell the whole story, as this particular ruling didn't deal with any free speech arguments based Canada's Charter of Rights and Freedoms. That topic will be dealt with in the next issue of Steward Notes, but for now, rest assured that not even the Charter can protect members from discipline in all circumstances.

# Mental health issues linked to musculoskeletal disorders

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New research by the Institute for Work and Health establishes a link between workers disabled by musculoskeletal disorders, particularly back and upper-body injuries, and depression. The IWH study found that for those whose depressive symptoms persist, sustainable work-returns are less likely.

symptoms are getting the help they need—only one in eight of these workers are diagnosed with depression.

“Returning to work and regular routines can have a positive impact on worker’s mental health,” said Nancy Carnide, IWH Research Associate. Among those who struggle to return to work, depressive symptoms appear

injury. The workers were interviewed one month and six months after an injury.

One month after injury, just under half of the workers reported symptoms of depression. After six months, the group had almost equally split into two: those whose symptoms had resolved and those who still reported high levels of depressive symptoms.

Almost one in four people among those who had been unable to return to work or had tried to return to work but had left work again six months after the injury showed depressive symptoms. This is more than double the rate of the injured workers who returned and stayed at work.

Doctors have a window of six months to spot and diagnose depressive symptoms, but by catching the problem early, workers can more easily make the transition back to work, according to the study.

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Few workers with depressive symptoms are getting the help they need—only one in eight of these workers are diagnosed with depression.

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The study said that pervasive depressive symptoms among those with musculoskeletal disorders affect recovery and can later interfere with returning to work. Few workers with depressive

to be higher, and recurrences of work disability are more likely.

The IWH study charted the mental health of about 600 workers who had not been diagnosed with depression prior to the

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# CREOD study looks at work-related asthma among cleaners

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## Does your job leave you out of breath?

A recent study by the Centre for Research Expertise in Occupational Disease compared a number of work environments for the incidence of asthma among employees. The study finds that the workers who experience work-related asthma symptoms are aggravating an existing condition in the course of their day-to-day tasks, rather than experiencing new-onset asthma as a result of their work.

The study found that men and women who clean in public buildings, such as schools

show more work-related asthma symptoms than other workers. Female cleaners in public buildings show work related-asthma symptoms three to four times more frequently than workers in other settings.

Like women, men who work in public buildings are more frequently diagnosed with asthma. However, men were more likely to experience work-related symptoms while using chemical products with respiratory irritants or which are known to cause sensitization. Some tasks that involve these kinds of chemical products include waxing and wax-stripping floors, spot-cleaning carpets, oiling furniture and

cleaning tiles and grout.

Some recommendations for policy changes based on the study’s results are:

- Safety training for cleaners should include education on the potential for cleaning agents to exacerbate asthma in those workers who have asthma.
- Cleaners with asthma may need additional hygienic measures to limit exposure to cleaning products, particularly those used in tasks such as waxing and wax-stripping floors, spot cleaning, and/or to look for less irritating cleaning products.



# Innocent absenteeism: you can be terminated for being sick too often

Members often mistakenly believe that they can never be fired for taking time off work due to physical or mental illness. While it is true that federal and provincial human rights legislation and the employer's duty to accommodate disabled employees provide significant employment protections for members, that protection is never absolute.

Over the years a number of labour arbitration boards have ruled that employers do have a right to dismiss an employee in a non-disciplinary manner if the employee is unable to hold up their end of the employment bargain, even if it is due to illness.

A July 24, 2008 Alberta Labour Relations Board decision by arbitrator Andy Sims clarifies the criteria that must be satisfied for an employer to terminate an employee for non-culpable or "innocent" absenteeism.

## Case background

A Correctional Services employee had established an ongoing poor record of attendance from 2001 to 2005, culminating in his dismissal. The continuing absences, more than 90 days in

2003 for example, were typically reported as general or casual illness or, in the absence of a physician's letter, were taken as unpaid leave days.

The employer provided the employee with several letters stressing the importance of regular attendance and stating the

disciplinary in nature, but also warned of possible termination. Two meetings with two separate doctors were held with the employee, in which the employer asked the doctors to answer whether the employee was able to perform his work on a regular and sustained bases, what restrictions or limitations would the employee have in

Employers do have a right to dismiss an employee in a non-disciplinary manner if the employee is unable to hold up their end of the employment bargain.

employer's expectation that he improve his attendance record. The employee stated that his high level of absenteeism was due to "normal minor causes of sick leave, some personal losses, and the effects of what he viewed as harassment."

The employer's attendance management letters explicitly stated that they were non-

performing his job duties, and what the prognosis was for the employee's future attendance at work.

In each case the doctors found the employee was physically fit for work, that were no medical limitations to the duties

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# Innocent absenteeism *continued*

he could perform, and that there was no medical reason to believe the employee could not improve his attendance in the future. One of the physicians stated he believed the employee's attendance could be improved through counselling.

The employee was offered help through the Employee Assistance Program, but refused to take advantage of the service. The employee told the employer that he had suffered periods of depression and believed he had taken anti-depressants to deal with it. He also told one of the physicians that he suffered stress due to

Regarding the first two questions in the test arbitrator Sims found that the employer had provided sufficient evidence to answer yes to both its obligations and therefore 'passed the test.' The union argued the employer failed the test on the latter two questions.

AUPE argued the fact that both doctors who met with the grievor found no medical condition preventing him from returning to work established that there was no reason to believe he could not improve his attendance record. The union also argued that the grievor was suffering a disability –

minimize the grievor's stress.

Further clarifying the last point and supporting its dismissal of the grievance the panel drew on a recent Supreme Court case dealing with the employer's responsibility to accommodate an employee to the point of undue hardship.

In that case the court stated "the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed non-discriminatory."

## The lessons

Stewards should be aware that members with significant records of absenteeism are at risk of dismissal, even if they have valid medical reasons for those absences. If a member is in such a situation, being able to establish that the attendance record can be improved is essential to avoiding termination or other forms of discipline. The case above shows that establishing the possibility that the attendance record can be improved may require more than a medical opinion: the member may also need to demonstrate that improvement through better attendance.

Finally, an important lesson regarding an employer's duty to accommodate comes out of this case in that it establishes that an employee must be a willing participant in such accommodation efforts, and that dismissal is justified in cases where, despite the employer's best efforts in providing an accommodation, the employee is still unable to fulfill their end of the employment bargain for the foreseeable future.

Dismissal is justified in cases where, despite the employer's best efforts in providing an accommodation, the employee is still unable to fulfill their end of the employment bargain for the foreseeable future.

perceived harassment by his supervisors. He never provided any medical evidence to substantiate his claims and was terminated for excessive innocent absenteeism.

## The arguments

The employee grieved the termination and the case proceeded to arbitration where a panel ultimately denied the grievance. In its decision the panel used a test set out in another case to determine whether the employer was justified in dismissing an employee for "excessive innocent absenteeism."

The test cited asks: "1) was the absenteeism excessive; 2) was the employee warned that his or her absence was excessive and failure to improve could result in discharge; 3) was there a positive prognosis for regular future attendance at the time of dismissal; and 4) if the absenteeism was caused by illness or disability, did the employer attempt to accommodate the employee up to the point of undue hardship prior to dismissal?"

depression – and as such was owed a duty of accommodation by the employer.

## The decision

The arbitration panel rejected the first union argument writing that "the length, volume and pattern of absences up to that point [the termination], and the absence of any improvement in the face of repeated counseling and warnings, raised a clear inference that such a pattern was likely to continue" and that the grievor did nothing "to support a suggestion that improved attendance could be expected."

The panel also rejected the union's argument that the employer had not fulfilled a duty to accommodate the grievor. "In our view, [the grievor] actively resisted seeking any accommodation because of his own view that it was the employer causing or at least justifying his absences by its harassment." The panel also noted that efforts had been made, according to the union's own suggestion, to

# OH&S Code updates now in effect

Important changes made to the Alberta Occupational Health and Safety Code took effect on July 1, 2009, including strengthened measures to protect workers who regularly lift heavy loads, such as clients, residents, or patients.

In June 2008, AUPE provided its members with a guide to the consultation conducted by the provincial government suggesting improvements for those at risk for musculoskeletal injuries, such as those working in the health care sector.

Thanks in part to the responses from AUPE, the new Code has expanded definitions to include more situations that occur in a variety of workplaces. Part 14 of the Code, "Lifting and Handling Loads," now requires employers to perform "hazard assessments" on all loads with the potential for musculoskeletal injuries to workers, and to "ensure all reasonably practicable measures are taken to eliminate or reduce

that potential." More binding wording in part 14 ensures a clear understanding of responsibilities on the part of the employer and the employee.

"This is a major win for all Albertans who regularly deal with heavy loads in the workplace," said AUPE OH&S Union Rep Dennis Malayko.

In addition, health care facilities built or significantly renovated after July 1 must ensure that appropriate patient handling systems are incorporated into design and construction. A safe patient handling program must be implemented and reviewed annually.

The area of fall protection in the Code has expanded to adopt standards recognized inter-provincially and internationally. Minor changes have been made to work alone standards and a new definition is included to convey the risks of working in confined spaces.

There are also changes to the Occupational Exposure Limits (OEL's) for chemical hazards, which have been expanded to include biological hazards. Employers must now provide personal protective equipment in the potential contact with airborne biohazardous materials. According to the Code, workplaces are required to update their biological hazard assessments in the event of a pandemic like the H1N1 virus.

"Every member should feel empowered to question whether their employer has followed through with a proper hazard assessment," said Malayko.

The complete updated Code is available on the Alberta Employment and Immigration website.

<http://employment.alberta.ca/SFW/307.html>

## SNAPSHOTS



Union Stewards in training listen in on a lecture at a Level 1 Steward course at AUPE headquarters in June.

## Steward Notes

August 2009

# STEWARD TRAINING

Upcoming  
courses and  
training

AUPE is offering the following courses and training seminars being offered from May to the end of the year. Contact your regional office to register or get more information.

### Lethbridge - 1-800-232-7284, press 8

OH & S Advocate Level 1	Sept. 10 & 11, 2009
Introduction To Your Union	Sept. 15, 2009
Mobilizing	Oct. 6, 2009
Respect In The Workplace	Oct. 29, 2009
Union Steward Level 2	Nov. 4 & 5, 2009
Contract Interpretation	Nov. 19, 2009

### Calgary - 1-800-232-7284, press 7

OH & S Advocate Level 1	Sept. 16 & 17, 2009
Union Officer Training	Sept. 24 & 25, 2009
Introduction to Your Union	Sept. 29, 2009
Union Steward level 1	Oct. 7 & 8, 2009
Introduction to Your Union	Nov. 3, 2009
OH & S Advocate Level 1	Nov. 9 & 10, 2009
Union Steward Level 2	Nov. 17 & 18, 2009

### Red Deer - 1-800-232-7284, press 6

Introduction To Your Union	Sept. 25, 2009
OH & S Advocate	Sept. 28 & 29, 2009
Union Steward Level 1	Sept. 30th & Oct. 1st, 2009
Contract Interpretation	Oct. 15th, 2009
Union Steward Level 2	Nov. 12 & 13, 2009
Respect In The Workplace	Nov. 25, 2009

### Camrose - 1-800-232-7284, press 4

Introduction to Your Union	Oct. 21, 2009
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### Edmonton - 1-800-232-7284, press 1

Union Steward Level 2	Sept. 10 & 11, 2009
OH & S Advocate Level 1	1 Sept. 30 & Oct. 1, 2009
Introduction To Your Union	Oct. 1, 2009
Respect In The Workplace	Oct. 2, 2009
Union Steward Level 1	Oct. 7 & 8, 2009
Contract Interpretation	Oct. 13, 2009
Union Officer Training	Oct 14 & 15, 2009
Union Steward Level 2	Oct. 27 & 28, 2009
Introduction To Your Union	Nov. 6, 2009
Union Steward Level 1	Nov. 26 & 27, 2009
Mobilizing	Nov. 20, 2009

### Athabasca - 1-800-232-7284, press 5

Introduction to Your Union	October 20, 2009
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### Peace River - 1-800-232-7284, press 2

OH & S Advocate Level 1	Sept. 22 & 23, 2009
Introduction To Your Union	Oct. 6, 2009
Union Steward Level 1	Oct. 15 & 16, 2009
Union Steward Level 2	Nov. 12 & 13, 2009
Respect In The Workplace	Nov. 24, 2009

### Grande Prairie - 1-800-232-7284, press 9

Mobilizing	Oct. 27, 2009
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Steward Notes is published by the Alberta Union of Provincial Employees to provide information of technical interest to AUPE Union Stewards, worksite contacts and other members. Topics deal with training for union activists, worksite issues, disputes and arbitrations, health and safety, trends in labour law, bargaining and related material.

For more information, contact the editor.

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The role of the Union Steward is among the most important in the labour movement. Stewards are the front line of defence for union members in the workplace.

The goal of Steward Notes is to help today's AUPE union stewards do their jobs effectively. To help us, we encourage readers to submit story ideas that deserve exposure among all AUPE stewards.

Story suggestions for Steward Notes may be submitted for consideration to Communications Staff Writer Mark Wells by e-mail at m.wells@aupe.org or by mail. Please include names and contact information for yourself and potential story sources.

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