



Public Records & Public Forums:
*How to Apply Established Case Law
With Rapidly Emerging Social Media Platforms*

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Introduction

- Use of social media, email, and texting by officials and city employees is transforming government

CHALLENGE:

How are courts using established case law to address new communication technologies as their use by public entities becomes ubiquitous?

Introduction

Key areas where “old” case law meets “new” technologies

First Amendment

- Application to forum classification to various social media platforms

CA Public Records Act

- Application to content on social media platforms

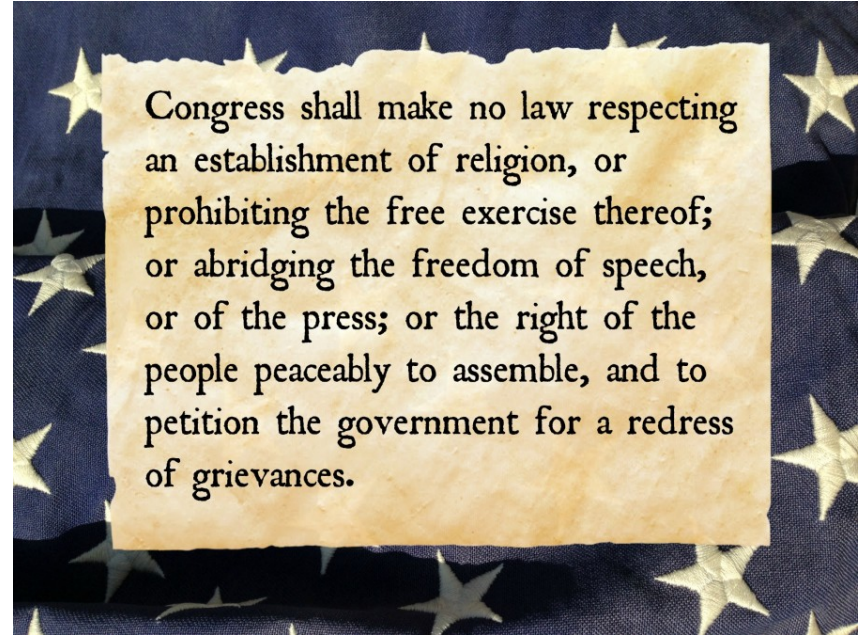
CA Public Records Act

- Application to content on personal accounts and devices of public entity employees

First Amendment

What is First Amendment Forum Classification?

1. Categorize spaces
2. Apply established legal standards



Main Categories of Forum Classification



Two Categories of Forum Classification

- **Traditional public forum**
 - Where people have traditionally been able to express their ideas: town square, park, public street
- **Non-public forum**
 - Government property traditionally not open to the free exchange of ideas: courthouse lobby, prison, military base



Public Forum Restrictions

Content Neutral:

1. **Reasonable** time, place and manner;
2. **Narrowly-tailored** to serve a significant government interest; *and*
3. Leaves open ample **alternative channels** of communication.

Content Based:

1. Subject to **strict scrutiny**;
2. Must be **least restrictive** means to achieve compelling government interest; and
3. **Presumptively invalid**

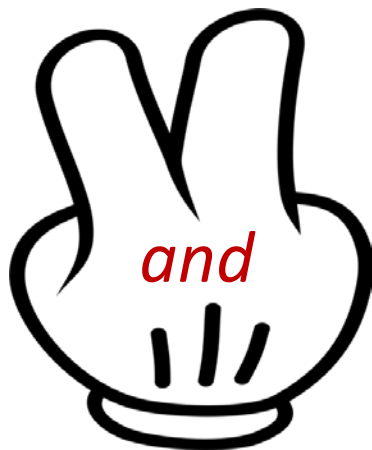
Level of Scrutiny Depends on Forum

Non-Public Forum Restrictions

Most lenient test

Restrictions need only be:

Reasonable



Viewpoint neutral

Level of Scrutiny Depends on Forum

Designated Public Forum

*Designated
Public
Forum*

- Government intentionally opens non-traditional areas for First Amendment activity

*Same strict
review as
public forum*

- State university meeting facilities for student groups
- School board meetings
- Municipal auditorium dedicated to expressive activity
- Interior of city hall - when city opens building to display art but does not consistently enforce restrictions

Limited Public Forum

Limited Public Forum

- Non-public forum opened to First Amendment activity but limited to certain groups, topics

Same review as non-public forum

- Public library meeting rooms
- Public school property
- State's specialty license plate program

How Courts Determine Classification

- ✓ Designation of *public* or *limited public* forum depends on terms of use

More consistently
enforced and
objective restrictions



More likely forum
deemed a *limited*
public forum

Government-Operated Social Media Platforms

How should they be classified?

- Are they a traditional public forum?
- Is social media the modern public square for discourse of ideas?
- Is it more akin to a bulletin board where only designated topics can be discussed?
- Do you need to be concerned with electeds' social media platforms?



Government-Operated Social Media Platforms

Knight First Amendment Institute at Columbia University, et al. v. Trump, et al., No. 17-cv-5205 (NRB) (S.D.N.Y. 2017)

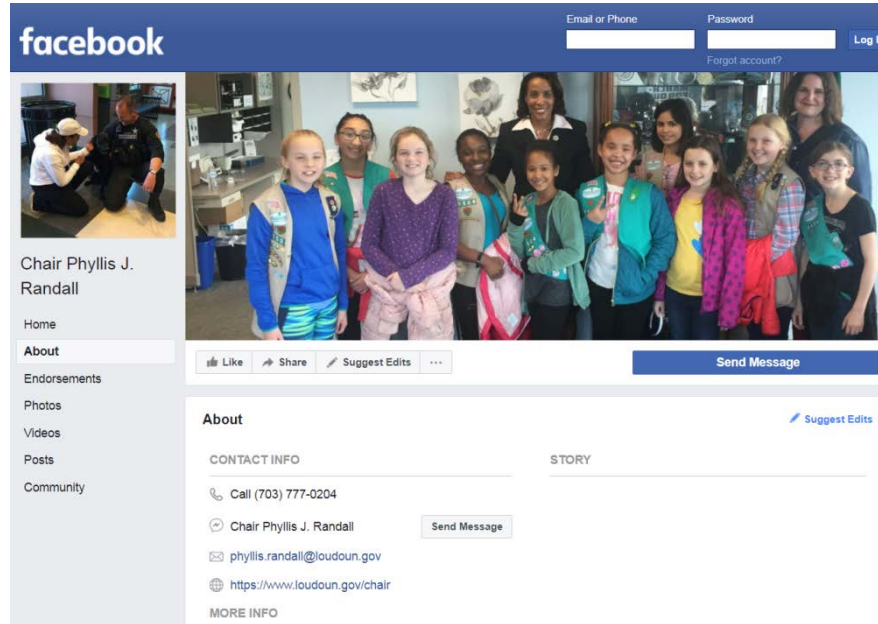
- Seven Twitter users sue President Trump for blocking them from his official social media account



- *“Trump is right. The government should protect the people. That’s why the courts are protecting us from him.”*
- *“To be fair you didn’t win the WH: Russia won it for you”*

Government-Operated Social Media Platforms

*Brian C. Davison vs. Loudon County Board of Supervisors, et al.,
No. 16-cv-932 (JCC/IDD) (E.D.V., 2017)*





Government-Operated Social Media Platforms

Brian C. Davison vs. Loudon County Board of Supervisors, et al., No. 16-cv-932 (JCC/IDD) (E.D.V., 2017)

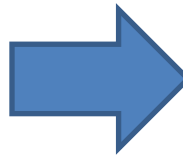
- Defendant acted under color of state law in maintaining her “Chair Phyllis J. Randall” Facebook page
- Banning Plaintiff from her page for 12 hours violated plaintiff’s right of free speech
- County not held liable, but Board Chair held liable in her individual capacity
- No injunctive relief, but declaratory judgment granted

Social Media as Non-Public Space

- Social media platform solely for government's speech

Example

Facebook page for
providing information
with no option for
any public discussion
or comments



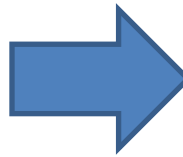
**First amendment
does not apply**

Social Media as *Limited* Public Forum

- Social media with some limits on public discourse

Example

Public official's
twitter account on
which he/she
discusses public
business



Challenge

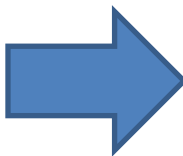
Reasonable and
viewpoint neutral
restrictions and
enforcing limitations
in evenhanded fashion

Social Media as *Designated* Public Forum

- Social media with no limitations and no policy in place

Example

Facebook page with
no limits on public
comments

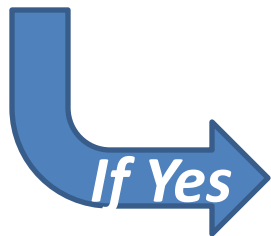


Risk

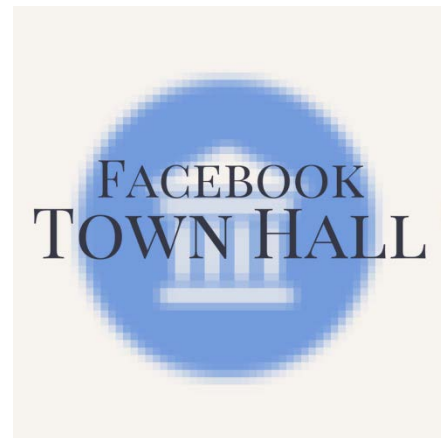
Likely viewed as public
forum for exchange of
ideas where government
retains little ability to
restrict, block, delete
offensive comments

What Should Cities Do?

- Carefully consider if a city wants social media platforms to serve as town halls for public comment and expression



Courts unlikely to tolerate
most restrictions of the
speech that occurs





California Public Records Act

California Public Records Act (CPRA)

- Public records
 - “any writing containing information relating to the conduct of the public’s business, owned, used, or retained by any state or local agency regardless of physical form or characteristics”
- CPRA grants any person
 - Access to public records held by state and local agencies unless an exception applies



California Public Records Act (CPRA)

- Today's Challenge
 - Enacted in 1968 – long before prevalence of electronic communications
 - Until 2017, unclear whether CPRA applied to personal accounts



California Public Records Act (CPRA)

- In 2017, California Supreme Court addressed whether CPRA extends to personal accounts
- *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017)



San Jose Case



San Jose Case – the issue and holding

- Requester sought emails and text messages sent and/or received on private devices used by mayor and members of city council

City's position = these were not public records

Holding: CPRA extends to otherwise “public records” even if sent through personal accounts



San Jose Case – the Court's reasoning

- **“Local agencies”**
 - Can only act through individuals
- **“Public records”**
 - Do not lose public character because employee “takes them out the door”
- **As policy matter**
 - Allowing public employees to avoid CPRA by simply “clicking” into a personal account would undermine CPRA



San Jose Case – how Court addressed privacy

- Court recognized privacy concerns of subjecting personal accounts to CPRA
- Case-by-case basis, not categorical
- No particular search method is required or adequate
- **Court's Guidance**
 - Inform employees of CPRA request
 - Allow them to search their own records for responsive content
 - Approved Washington Supreme Court's approach – employees must submit affidavit



Implications of *San Jose*

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- Increased risk of CPRA liability
 - Which carries attorneys' fees



- CPRA applies to social media platforms



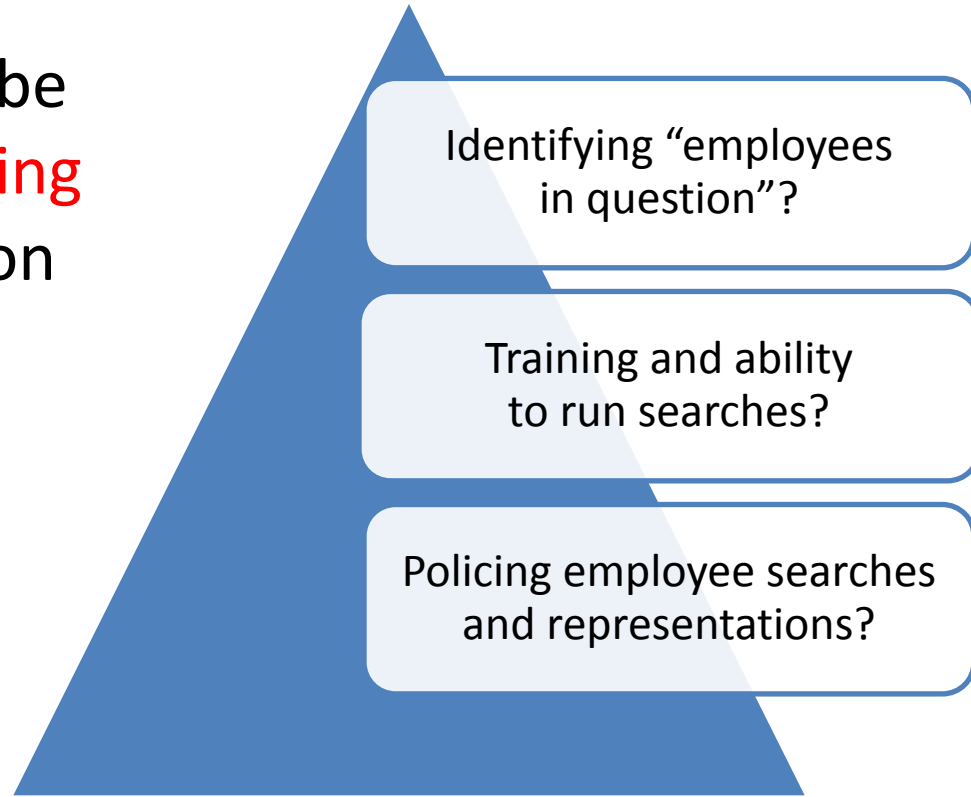


Open Questions After *San Jose*



Open Questions After *San Jose*

Court did not prescribe
**specifics for performing
defensible searches** on
personal devices and
accounts.





Open Questions After *San Jose* (cont.)

How are State Records Retention Requirements Affected?

State law governs: Generally, must retain for 2 years

Options: Prohibit use of personal accounts
or train employees to comply with retention rules

Question: Treat transitory social media differently?



Practice Tips

- ✓ **Ensure employees/officials understand** that use of personal accounts and devices does not shield CPRA
- ✓ **Consider requiring use of government accounts** and devices for all official business
- ✓ **Develop procedures** for conducting defensible searches:
 - Notify employees of a request
 - Determine if they use personal accounts and to what extent
 - Train on searching and keeping record of compliance



Presenters



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