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

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Public Records & Public Forums: What Happens when Established Case Law Encounters
Rapidly Emerging Social Media Platforms and New Forms of Electronic Communications?

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I. Introduction

The ubiquitous use of social media, email, text messaging and other communication technology and practices is transforming government. Whether it's the board member who communicates with agency staff by text messaging to get real time guidance during meetings, the elected official using Twitter to address her constituents, or the municipality that maintains a Facebook or Nextdoor page to make public announcements and facilitate enhanced engagement between the city and its residents, the use of technology is making public entities more efficient, effective, dynamic, and connected to the communities and constituents they serve. Although some of these technologies and platforms are newer than others, there is invariably a delay in the increasing prevalence of such technologies and practices and the application of established laws and procedures to regulate them. That does not mean, however, that courts have been reluctant to apply old laws to the use of new technologies by public entities when the opportunity presents itself. To the contrary, established and familiar laws and regulations are being utilized by courts in California and throughout the country to ensure that, as used by governments, social media and other communication technology are subject to the same regulations as their traditional counterparts. This paper explores two important instances where this is happening – forum classification of social media under the First Amendment of the U.S. Constitution, and the application of California's Public Records Act to content residing on social media and the personal accounts and devices of public entity employees.

II. First Amendment Concerns For Governmental Social Media Platforms

The Free Speech Clause of the First Amendment of the United States Constitution provides "Congress shall make no law...abridging the freedom of speech, or of the press...." Under the Fourteenth Amendment, municipal regulations and policies are within the scope of this limitation on governmental authority.¹ The rise of social media platforms presents a new and evolving arena for public discourse and First Amendment scrutiny. While it remains to be seen exactly how First Amendment jurisprudence will be applied to these digital platforms, forum classification will be at the forefront of the debate.

A. Categories Of Forum Classification

The forum classification doctrine is a system of categorizing places, and then determining the rules according to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differs based upon the type of forum being

¹ *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

regulated.² There are two main categories for forum classification, the public forum and the nonpublic forum. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions. In contrast to the public forum, a nonpublic forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. These two main categories of government property have been expanded to cover circumstances that do not fall neatly into either primary category – namely, the designated public forum and the limited public forum. Both of these forum classifications apply to nonpublic fora that the government opens to expressive activity, but the terms under which the fora may constitutionally operate differ significantly.

Specifically, a designated public forum is created when the government intentionally opens (or “designates”) non-traditional areas for First Amendment activity pursuant to policy or practice.³ Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university had an express policy of opening the facilities to registered student groups; school board meetings where the state statute provided for open meetings; a municipal auditorium and a city-leased theater where the city dedicated the property to expressive activity; and the interior of a city hall where the city opened the building to display art and did not consistently enforce any restrictions.⁴ Regulations for a designated public forum are subject to the same level of review as a public forum.

A limited public forum is created when the government opens a non-public forum to First Amendment activity but limits such access to certain groups or topics.⁵ Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limited it to certain uses; public school property where policy limits use to only certain groups; and the state’s specialty license plate program.⁶ A property classified as a limited public forum is subject to the same more lenient rules as a nonpublic forum.⁷ The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so

² *International Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); see also *PMG Int’l Div., L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001).

³ See *Cornelius*, 473 U.S. at 800, 803; *Perry*, 460 U.S. at 45-46.

⁴ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint School District v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

⁵ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

⁶ *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007); *Good News Club v. Milford Center School*, 553 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

⁷ *Id.*; *Perry*, 460 U.S. at 46; *United States v. Kokinda*, 497 U.S. 720, 725-27 (1990); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

long as the forum remains open it must comply with the requisite standards for its forum classification.⁸

Finally, in certain limited circumstances, government-owned and controlled property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse and engages in its own speech and is entitled to “speak for itself” and “select the views it wants to express.”⁹

B. Standard Of Review Based On Forum Classification

The classification of the forum at issue can be pivotal as to whether government policies or regulations pass constitutional muster. This is because in a public forum, or a designated public forum, restrictions are subject to an exacting review standard where content-based restrictions are subject to strict scrutiny and only pass muster if they are the least restrictive means for achieving a compelling government interest.¹⁰ Content-neutral restrictions in a public forum (or designated public forum) are subject to the time, place and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.¹¹ In a public (or designated public) forum, First Amendment activities generally may not be prohibited; rather, “speakers can be excluded ... only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”¹² By contrast, in a nonpublic forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass muster.¹³ Only viewpoint neutrality and not content-neutrality is required for regulations of a nonpublic or limited public forum.¹⁴

Given the different standards of review, it is critical to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In order to determine the proper classification of the forum, courts typically examine the terms on which the forum operates.¹⁵ Courts critically examine the actions and policies of cities to determine whether a designated public forum or a limited public forum has been created.¹⁶ The more consistently enforced and selective

⁸ *Perry*, 460 U.S. at 46.

⁹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

¹⁰ *Perry Education Assn. v. Perry Local Educator’s Assn.*, 460 U.S. 37, 46 (1983); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

¹¹ *Id.*

¹² *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Hopper*, 241 F.3d at 1074, 1075.

¹⁶ *Hopper*, 241 F.3d at 1076.

restrictions are, the more likely the forum will be deemed a limited public forum.¹⁷ By contrast, where restrictions are not enforced, or if exceptions are haphazardly permitted, the more likely the forum will be deemed a designated public forum.¹⁸

Courts have carved out specific forum classifications and standards for certain venues such as council meetings, which when open to the general public are treated as a limited public forum.¹⁹ Moreover, the Supreme Court has recognized the difficulty of applying forum classification to newly developing fora.²⁰ In regards to cyberspace, courts, including the Supreme Court, have explained that the Internet in general, and social networking sites like Twitter in particular, are akin to “the modern public square.”²¹ The Supreme Court has recognized the powerful communication potential provided by the Internet noting it allows anyone “to become a town crier with a voice that resonates farther than it could from any soapbox.”²² The Court has also commented that social media in particular provides “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard” and that Twitter enables people to “petition their elected representatives and otherwise engage with them in a direct manner.”²³ In short, the courts recognize the importance of social media as a vital, newly developing forum and it appears they will be protective of First Amendment rights in this forum and wary of governmental restrictions.

C. Forum Analysis Of Social Media Platforms

Overlaying the forum classification doctrine on top of the social media platforms used by public entities, such as Facebook or Twitter, highlights the importance for cities to proactively set forth the policies and standards for public engagement on these platforms. The critical inquiry will be whether municipalities have opened these fora for expressive activity and on what terms. It is possible for public entities to operate social media platforms such as Facebook in a manner where the public entity provides information but does not open the forum for any public discussion or comments. For instance, on Facebook, page owners can choose to restrict users from leaving their own updates. Under such a scenario, there is a strong argument that the government has not opened the forum for any type of public discourse and is engaging purely in its own speech where the Free Speech Clause of the First Amendment does not apply. Thus, operating a Facebook page on these terms presents a low risk of a First Amendment challenge.

¹⁷ *Id.* at 1076-78; *Cornelius*, 473 U.S. at 804-05; *See also Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302-04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

¹⁸ *Id.*; *Hills*, 329 F.3d at 1049.

¹⁹ *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (2013).

²⁰ *See Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 739-743 and 763-766 (1996)

²¹ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017); *hiQLabs Inc v. LinkedLin Corp.*, 273 F.Supp.3d 1099 (N.D. Cal. 2017); *Twitter, Inc. v. Sessions*, 263 F.Supp.3d 803, (N.D. Cal. 2017)

²² *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

²³ *Packingham*, 137 S.Ct. at 1735 & 1737.

Instead, the forum remains limited to government speech for items such as public service announcements or updates about city activities.

Social media platforms, however, are engineered to allow for the flow of public comments and discussion, so it is common for them to be used to engage in civil discourse. Cities, however, need to evaluate whether these platforms are the appropriate forum to discuss issues with constituents. Municipalities may try to place restrictions on a social media platform, such that it will be viewed as a limited public forum. This poses the dual challenge of crafting reasonable and viewpoint neutral restrictions such as limiting discourse to city-related events, as well as the challenge of enforcing the limitations in an evenhanded fashion. On the other hand, with no limitations and no stated policy in place, the social media platforms are likely to be viewed as public forums open for the free exchange of ideas where the government will retain little ability to restrict, block or delete offensive comments.

In addition, it is ubiquitous for elected officials to use Twitter accounts to communicate with their constituents, likely opening this medium to First Amendment scrutiny as well. If these accounts are used by elected officials to make or comment on official policies, such accounts will likely come within the scope of the forum classification analysis, and public officials run the risk of engaging in prohibited viewpoint-based discrimination if they block certain users. This very issue is currently pending in a Manhattan federal court before Judge Buchwald in a recently filed case brought by a group of Twitter users against President Trump for blocking them on his official social media account, which the plaintiffs allege is a violation of their First Amendment rights.²⁴ Trump's lawyers have argued that his social media account is a private venue, while lawyers for the blocked Twitter users have compared the forum to a public town hall type of meeting. It remains to be seen how the court will rule in the case, but given the general recognition of social media as "the modern public square" it seems likely that at a minimum the government restriction at play (namely the blocking of certain Twitter users) will be carefully scrutinized.

The forum classification jurisprudence is in the process of evolving to address the particular issues at play for social media platforms. For now, the most cautious approach is for cities to disallow users from leaving comments and messages on official social media platforms, such as city Facebook pages, so as to prevent the medium from becoming a forum for public discussion. Council meetings or town halls are the traditional means for discussing contentious or sensitive issues with citizens and cities should carefully consider if they want social media platforms to also take on that role. If elected officials are going to use their social media platforms, such as Twitter, to comment on official business, they too need to be aware that they may have a limited ability to restrict or block comments on their accounts. This can raise complicated issues of whether, and to what extent, public officials can block aggressive internet trolling on their social media accounts.²⁵ The courts have typically been very permissive in

²⁴ *Knight First Amendment Institute at Columbia University, et al. v. Trump, et al.*, No. 17-cv-5205 (NRB) (S.D.N.Y. 2017).

²⁵ Wikipedia defines an internet troll as "a person who sows discord on the Internet by starting quarrels or upsetting people by posting inflammatory, extraneous, or off-topic messages in an online community . . .

allowing provocative or inflammatory speech in public fora such as parks and in some limited public fora such as city council meetings.²⁶ By analogy, it is quite likely the courts will also find such speech cannot be prohibited across the board on City or elected City officials social media sites where public business is being discussed. But while the courts expect public officials to have thick skins, they are likely to be more receptive to narrowly tailored restrictions for trolling directed at “fighting words” or actual and real threats of bodily harm.²⁷ Such limitations in turn trigger thorny issues of how to determine what qualifies as “fighting words” or real threats of bodily harm and how to evenhandedly enforce any limitations.

III. Electronic Messages Fall Within The Scope Of The California Public Records Act.

In addition to the First Amendment concerns noted above, social media platforms and the messages generated there, also fall within the purview of the California Public Records Act (“PRA”). The long-arm of the PRA reaches not just to the social media platforms maintained by public entities, but also to emails and text messages sent through the personal accounts and devices of public officials and employees pursuant to the California Supreme Court’s recent decision in *City of San Jose v. Superior Court*.²⁸

A. Overview Of The PRA

The PRA grants access to public records held by state and local agencies.²⁹ Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies.³⁰ The PRA declares that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”³¹ In 2004, voters made this principle part of the California Constitution.³²

with the intent of provoking readers into an emotional response or of otherwise disrupting normal, on-topic discussion, often for the troll’s amusement.”

²⁶ See *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006); see also *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (2013).

²⁷ “‘Fighting words’ are those that by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

²⁸ *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.

²⁹ Gov’t. Code § 6250 et seq.; *Los Angeles Cty. Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290.

³⁰ *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.

³¹ Gov’t. Code § 6250.

³² *City of San Jose*, 2 Cal.5th at 615.

The fundamental rule announced by the PRA is that “every person has a right to inspect any public record” unless an express statutory exception to such access applies.³³ The PRA defines “public record” as “any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”³⁴ A “writing” is also defined under the PRA as “any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”³⁵ Courts have recognized that what will constitute a record relating to the “public’s business” will not always be clear. Gripes about coworkers, for example, will not typically be “public records.” Generally, a record relates to the conduct of the “public’s business” – and therefore constitutes a “public record” – where it is kept by an officer because it is necessary or convenient to the discharge of [her/his] official duty.”³⁶

Enacted in 1968, the PRA clearly predated the prevalence of electronic communications such as email, text messaging, as well as social media platforms such as Twitter, Facebook and Nextdoor. Unlike the traditional paper records the PRA was designed to address, electronic communications can be generated, copied, and transferred with far greater ease and efficiency. Whereas before the age of electronic communications, a public employee or officer might have to ask her or his assistant to type a letter to communicate about government business – which letter would then more likely be saved in an official file – with email and other such electronic communication methods, a public employee can easily prepare correspondence herself/himself and facilitate the transfer of the correspondence to others with the click of a button, possibly circumventing more traditional administrative processes and record keeping.³⁷ Indeed, with electronic communications, public entity employees have myriad means of disseminating, storing, and duplicating information pertaining to government business without having to rely on or utilize the facilities or resources of the public entity itself. For example, although public entities provide their employees with official email accounts and computing resources to facilitate the use of electronic communication for government work, such employees can effectively just as easily use their own personal email accounts and computing facilities – smart phones, laptops, etc. – for conducting their work.

Despite the potential for government business to be conducted through personal electronic means of communication, storage, and processing, the issue of whether content on personal electronic communication accounts and personal computing devices is subject to the PRA had not been addressed by the California Supreme Court. That changed last year with the case of *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017).

³³ Gov’t. Code § 6253.

³⁴ Gov’t. Code § 6252(e).

³⁵ Gov’t. Code § 6252(g).

³⁶ *City of San Jose*, 2 Cal.5th at 618.

³⁷ *Id.* at 625.

B. The *City of San Jose* Case Extended The Reach Of The PRA.

In the *City of San Jose* case, an individual, Ted Smith, submitted a request to the City of San Jose, seeking public records related to downtown San Jose redevelopment. He specifically requested “[a]ny and all voicemails, emails or text messages sent or received on private electronic devices” used by the mayor and members of the City Council or their staff. The City produced information responsive to Smith’s requests, but refused to produce any information contained on any private devices. The City took the position that these items were not public records within the meaning of the PRA.³⁸

Smith brought an action for declaratory relief seeking an order that he was entitled to disclosure of the responsive information on the private devices. The Superior Court granted Smith’s requested relief, but the City prevailed on its ensuing petition for a writ of mandate to the Court of Appeal. The California Supreme then took up the matter on appeal, overturning the judgment of the Court of Appeal.

Explaining that under the California Constitution, the PRA must be broadly construed to further the people’s right of access,³⁹ the high Court interpreted several key provisions of the PRA to find that “writings concerning the conduct of public business [are not] beyond CPRA’s reach merely because they were sent or received using a nongovernmental account.”⁴⁰ Several of the key PRA provisions the Court interpreted to support its holding are discussed below.

First, the Court addressed an ambiguous provision concerning the definition of “local agency” that the City argued supported its position that records sent through personal accounts did not constitute records “prepared by” a local agency.⁴¹ Although the PRA defines “public records” to include those “prepared by” any state or local agency, the City argued that this provision did not reach records transmitted through a public entity employee’s *personal* account because the PRA’s definition of “local agency” does not expressly include “individual government officials or staff members.”⁴² The Court rejected this “narrow” interpretation of the PRA to find that a “writing prepared by a public employee conducting agency business has been ‘prepared by’ the agency within the meaning of section [6252(e)], even if the writing is prepared using the employee’s personal account.”⁴³ The Court explained that “[i]t is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things.”⁴⁴

³⁸ *City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75, 80.

³⁹ *City of San Jose*, 2 Cal.5th at 617.

⁴⁰ *Id.* at 616.

⁴¹ *Id.* at 619.

⁴² *Id.*

⁴³ *Id.* at 621.

⁴⁴ *Id.* at 620-621 (citations excluded).

The City also argued that the PRA’s provision requiring the disclosure of records “owned by, used, or retained” by a public entity does not apply to records residing on the personal device or account of a governmental employee or officer, because such material, the City argued, is beyond the governmental entity’s reach.⁴⁵ The Court rejected this argument as well, mainly on the precept that “an agency’s public records ‘do not lose their agency character just because the official who possesses them takes them out the door.’”⁴⁶ The Court concluded that a “writing retained by a public employee conducting agency business has been ‘retained by’ the agency within the meaning of section [6252(e)], even if the writing is retained in the employee’s personal account.”⁴⁷

As a policy matter, the Court observed that allowing public entities to avoid disclosure under the PRA simply because their employees can “click” into a personal account to send or receive the records would undermine the “whole purpose” of the PRA because it would allow – and even encourage – public entities to hide their most sensitive and potentially damning discussions from public access.⁴⁸

Despite its holding, the Court recognized that subjecting records on personal accounts and devices to the PRA implicates privacy concerns for public entity employees, but found that such privacy concerns should be resolved on a case-by-case basis rather than categorically as the City proposed.⁴⁹ The Court then provided guidance for searching for public records that reside on personal accounts and personal devices in a manner that would fulfill the objectives of the PRA while not trampling on the privacy rights of public employees. Specifically, the Court explained, that although the PRA does not prescribe specific methods of searching for documents, and that public entities may develop their own internal policies for conducting searches, “once an agency receives a CPRA request, it must ‘communicate the scope of the information requested to the custodians of its records,’ although it need not use the precise language of the request.”⁵⁰ The Court explained that once the request has been communicated to the “employees in question,” the “agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.”⁵¹

The Court went on to describe a procedure adopted by the Washington Supreme Court for its public records law that allows a public agency to demonstrate that it has performed an adequate search under Washington’s PRA. Under that procedure, employees who “withhold” personal records from their employer “must submit an affidavit with facts sufficient to show the

⁴⁵ *Id.* at 622.

⁴⁶ *Id.* at 623.

⁴⁷ *Id.* at 623.

⁴⁸ *Id.* at 625.

⁴⁹ *Id.* at 626.

⁵⁰ *Id.* at 628.

⁵¹ *Id.*

information is not a ‘public record’ under [Washington’s PRA].”⁵² The California Supreme Court stated that it agreed that this procedure “when followed in good faith, strikes an appropriate balance” for complying with the PRA while protecting employees’ privacy concerns.⁵³ The Court concluded, however, by stating that “[w]e do not hold that any particular search method is required or necessarily adequate.”⁵⁴

C. Complying With The PRA Following the *San Jose* Case – Implications, Unanswered Questions, And Practical Tips.

1. *Implications of San Jose*

The Supreme Court’s decision in *San Jose* is well-reasoned and clearly settled the specific issue before it – whether content that otherwise constitutes “public records” remains subject to the PRA when it has been transmitted through personal accounts or resides on personal devices. The Court also provided useful guidance concerning how to approach searching for public records on personal accounts and devices in ways that preserve the privacy rights of government employees. As with most decisions, however, the holding has certain implications beyond that rule expressly announced, and also leaves some relevant questions unanswered – in this case, concerning compliance with the PRA when it comes to personal accounts and devices. Some of these implications and open questions are discussed below.

(a) Increased Risk of PRA Liability

One thing seems clear – the *San Jose* decision will result in an increased risk of liability for public entities in PRA lawsuits. This is because due to the rule announced, the systems public entities use to ensure compliance with the PRA now apply to a larger scope of records and record-keeping processes and practices. Whereas prior to *San Jose*, public entities did not even have to think about whether “public records” might reside on personal accounts and devices for purposes of complying with the PRA, now they do, or face the prospect of an adverse ruling in a PRA lawsuit, including the imposition of attorneys’ fees.⁵⁵ Indeed, although the Supreme Court provided guidance on how public entities can balance their obligations to search for public records while avoiding an undue intrusion in to the privacy rights of their employees, the Court did not announce any specific searching prescriptions or bright-line rules. Nothing stated in the *San Jose* decision allows public entities to be certain their procedures and practices for searching personal accounts and devices will comply with the PRA.⁵⁶

Indeed, a government agency might *attempt* to institute appropriate procedures and practices, but could still find itself running afoul of the PRA for failing to disclose public records residing on personal accounts and devices. For example, unlike in the case where public records

⁵² *Id.*

⁵³ *Id.* at 628.

⁵⁴ *Id.*

⁵⁵ Gov’t. Code § 6259(d).

⁵⁶ *City of San Jose*, 2 Cal.5th at 629.

reside on agency-controlled accounts and devices – where the agency can run searches for responsive content across multiple employees or all employees – when dealing with personal accounts and devices, an agency must rely exclusively on its employees to conduct adequate searches. The agency must also ensure that its procedures for *notifying* appropriate employees and for *training* them to search for public records are themselves adequate and defensible. This is less of a concern with searching agency controlled servers and accounts, where the agency can simply search all content for responsive documents, either in the first instance or to ensure that employees have adequately identified responsive documents.

(b) PRA Applies To Social Media – Such as Facebook, Twitter, and Nextdoor

Another implication of *San Jose* is that content transmitted through, or contained on, social media – such as Facebook, Facebook Messenger, Twitter, and Nextdoor – is also subject to the PRA. Although the requester in San Jose did not ask the City to disclose public records contained on social media,⁵⁷ and the Supreme Court’s holding in *San Jose* referred only to “personal accounts,” without specifying if social media fell within the ruling’s purview, the rationales behind the rule announced, as well as other language in the decision, make clear that the PRA applies with equal force to social media. For example, if a communication by a public entity employee is transmitted through her/his Facebook Messenger to another party, that content is still a “writing” “prepared by” the agency’s employee, and therefore subject to the PRA in the event the communication concerns the “public’s business.”⁵⁸ Likewise, the mere fact that an otherwise “public record” is transmitted through social media should not mean it loses its “agency character” any more so than a public record that an employee takes with them “out the door.”⁵⁹ The fact that the Court’s holding applies to social media as well as more traditional electronic communications that were the subject of the specific request at issue in the case – email and text messaging – is evident from the Court’s generic references throughout the decision to terms such as “electronic communications,” “personal accounts,” and “other electronic platforms.”⁶⁰ Although the holding never expressly referred to social media, public entities should treat social media as subject to the PRA.

2. Open Questions After San Jose

The Court’s decision in *San Jose* also leaves some unanswered questions, particularly as to what agencies must specifically do to ensure their search for public records on personal accounts and devices (including social media) will comply with the PRA, and how public

⁵⁷ *City of San Jose*, 225 Cal.App.4th at 80.

⁵⁸ *City of San Jose*, 2 Cal.5th at 621 (“A writing prepared by a public employee conducting agency business has been “prepared by” the agency within the meaning of section 6252, subdivision (e), even if the writing is prepared using the employee's personal account.”).

⁵⁹ *Id.* at 623 (“an agency's public records ‘do not lose their agency character just because the official who possesses them takes them out the door.’”).

⁶⁰ *See, e.g., id.* at 618 (“Today, these tangible, if laborious, writing methods have been enhanced by electronic communication. Email, text messaging, and other electronic platforms, permit writings to be prepared, exchanged, and stored more quickly and easily.”).

entities' records retentions obligations are affected (if at all) by the extension of the PRA to private accounts.

(a) What Do Agencies Need to Do To Perform Defensible Searches For Public Records on Personal Accounts?

Although the Court in *San Jose* addressed how agencies might go about complying with the requirement to search for public records on personal accounts, it laid down no definite prescriptions or rules.

For example, the Court explained that once a public entity has notified the “employees in question” of a public records request, the agency may then “reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.”⁶¹ But who the “employees in question” are, begs the question.

In *San Jose*, the “employees in question” were specifically identified in the request itself, which called for communications from the mayor and specific council members. But many PRA requests do *not* identify any particular employees or class of personnel or officials, leaving it up to the target agency to make this determination based on its own analysis of the request. Where the PRA request does not identify specific custodians, as is most often the case, what steps does the agency have to take to identify the specific employees who might have responsive information on their personal accounts? Where an agency is dealing with electronic files and accounts it can access directly – *i.e.*, those hosted on its own servers – identifying the “employees in question” at the outset is less of a concern because the content on the agency’s servers can be searched using keywords to identify responsive documents. But where the agency must rely on individual employees to do the searching – as will be the case with personal accounts and devices – each individual likely to have responsive information will have to be identified at the outset. What must agencies, therefore, do to identify those employees who have opted to use personal accounts to transmit and store public records relevant to the request?

On a similar note, what must an agency do to discharge its obligation to ensure employees who *are* identified, and who must search their own personal accounts and files for “public records,” are “properly trained” to do so?⁶² Not all employees possess the same technical acumen or skills. Employees A and B may both prefer to use their Gmail accounts for conducting agency business, but Employee A may have no clue how to search his inbox while Employee B has a degree in computer science and can be relied upon to conduct such a search with ease. Some employees might not have the basic technical ability to effectively search their personal accounts and devices for “public records” even when instructed to do so and even if they attempt to do so in good faith. What must agencies do to ensure this is not an appreciable risk?

⁶¹ *Id.* at 628.

⁶² *Id.* (referring to the procedure to comply with FOIA whereby employees must be “properly trained” to do searches for public records).

Another question is, to what extent can public entities rely on their employees' representation concerning searching for public records on their personal accounts and devices? The Court in *San Jose* explained that agencies may "reasonably" rely on their employees to search for responsive documents on their personal accounts, and described a procedure under which agencies could establish that an adequate search has been performed provided their employees swear under penalty of perjury that they have not withheld public records.⁶³ At the same time, the Court held that such a procedure could only be compliant when conducted in "good faith," and the Court noted that no particular search method or approach it discussed was "necessarily adequate" for compliance with the PRA.⁶⁴ Given this backdrop, what should a public entity do if one or more of its employees or officials represent they have no public records on their personal accounts, but other agency personnel believe that they do? What level of "policing" of an agency's procedure for identifying public records on a personal account (if any) is required for compliance with the PRA? In the case of records that are directly accessible to an agency, such as on its servers, this is less of an issue because the agency can always conduct its own searches. Decisions following *San Jose* may clarify these issues depending on whether they become practical concerns to public entities and requesters litigating PRA disputes.

(b) How Are Existing Records Retention Requirements Affected By
The Extension of the PRA to Records On Private Accounts and
Devices?

The PRA does not govern what records public entities must *retain* – only what records they must *disclose*.⁶⁵ Record retention is addressed by other various state laws depending on the nature of the records. Generally, however, cities must retain records for at least two years.⁶⁶ Regardless of the *specific* records retention rules that might apply, presumably they apply to public records that reside on personal accounts and devices, which raises the difficult practical problem for cities of how to ensure that employees and officials know about and conform their behavior to applicable records retention laws concerning records residing on personal accounts and devices.

As discussed below in the practical tips section, there are two primary ways cities can go about securing compliance. First, they can prohibit employees and officials from using personal accounts for official business. Assuming such policies are adhered to, they circumvent the practical challenges of ensuring compliance with retention and disclosure laws for public records on personal accounts. The second general approach is to ensure employees and officials understand the applicable retention rules that apply. For example, a city could permit the use of personal accounts for conducting official business but require that all records be forwarded to an official account, or require that employees and officials abide by any applicable records retention

⁶³ *Id.* at 627.

⁶⁴ *Id.* at 629.

⁶⁵ *Los Angeles Police Dep't v. Superior Court* (1977) 65 Cal.App.3d 661, 668 (PRA "itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure.")

⁶⁶ Gov. Code § 34090(d).

laws – such as requiring employees to maintain records for at least two years, or longer as the case may be, and possibly to purge such records when no longer required to be retained.

One type of record that is likely to be maintained on personal accounts – transitory social media such as Snapchat – presents a particularly novel problem for cities trying to comply with their retention and disclosure obligations in the aftermath of *San Jose*. Although transitory social media almost certainly falls within the ambit of the PRA, there is also an inherent conflict with retaining such communications that are, by nature, *intended* to be temporary.

As discussed elsewhere, one means of dealing with such transitory records is to simply develop policies prohibiting public business from being conducted on privately maintained social media, and requiring that any communications that do arise on private accounts about public business be forwarded to official public accounts. Another potential solution is for cities to simply exclude such transitory and temporary records from the city’s definition of public records for purposes of state public records retention laws. This is possible because what constitutes a public record for purposes of state records retention laws is not defined under state law, giving officials a modicum of discretion in this domain. Cities may be able to justify not treating transitory social media as a public record subject to retention due to the temporary nature of such media. This is something to be explored as the law in this area continues to develop.

3. *Practice Tips For Decreasing The Risk of Failing To Comply With the PRA Concerning Public Records On Personal Accounts and Devices*

Public entities attempting to ensure their practices concerning personal accounts and devices comply with the PRA should consider the following practice tips, particularly while the law in this arena – and the extent of the *San Jose* holding – are further established:

First, government agencies should ensure all employees and officials understand that use of personal electronic communication accounts and devices, as well as social media platforms and systems, will not shield any content from being subject to the PRA. Similarly, they should understand and comply with any records retention requirements in the event they chose to use their personal accounts and devices for public business.

Second, agencies should consider policies requiring all public or official business to be conducted using official government accounts and devices, and should consider instituting policies for monitoring such compliance – for example with periodic training, reminders, and employee statements of compliance.

Third, public entities should consider developing specific procedures for ensuring that appropriate employees are notified of a PRA request that might implicate their records, and develop a procedure for determining whether it is a reasonable possibility that such employees might have transmitted or saved public records through and to their personal accounts and devices, respectively. For example, an employee could be required to complete a questionnaire indicating whether they ever use a personal account or device for conducting any communication or work connected to their official responsibilities. Depending on their answers, the questionnaire would guide them through further topics and inquiries with the goal of facilitating a more robust and defensible search for public records on personal accounts and devices.

IV. Conclusion

Public entities need to ensure that as they and their employees increasingly leverage social media and other communication technologies, they stay appropriately on top of the ways in which established laws are being extended to address these changes in government practices.