Look Who's Talking

Social Media, the First Amendment, and the Public Records Act

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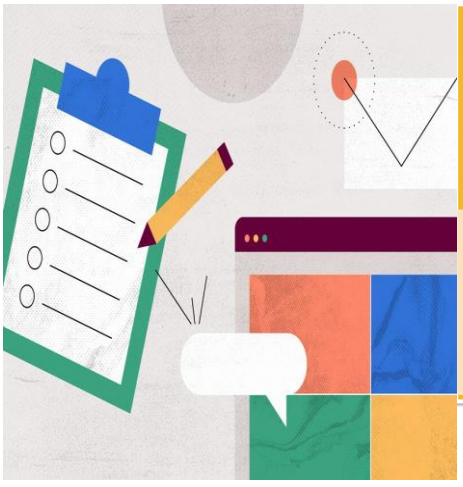
Presentation Structure



Today we will focus on the impact the right to free speech and the nuances of social media have on the Public Records Act (PRA), PRA requests, PRA compliance, and overall best practices. We will cover:

Free speech overview: What are the rules for public officials and employees?	Social media: How to tell the difference between personal and official speech.	Is the test the same for free speech and PRA purposes? (Hint—no)	Social media and the PRA: What you should know.

Usual disclaimer applies—This will be a robust conversation, but it is **not** legal advice.

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Free Speech Overview

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Public Employee Free Speech Rights

There is a large body of case law that defines when the speech of a public employee or official is protected. Here are some of the factors:

- Is it a "high level" employee?
- Is the speech on a matter of public concern, as opposed to a personal grievance?
- Is the speech made as a private citizen, and not as an official?
- If speech is of public concern and not part of official duties, a court will balance the employee's interest in speaking against the government's interest in a functioning workplace.
- Courts will consider the time, place and manner of speech and whether it impairs the work environment.

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Protected or Not: A First Amendment Pop Quiz

Facts: A schoolteacher writes a letter to the editor criticizing the school district's handling of a bond issue and accused the district of preventing teachers from opposing the bond issue. The bond issue then fails at the ballot box. The district fires the teacher, claiming that portions of the letter were false, and the teacher wrongly impugned the motives of the district. Protected or not?

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First Amendment Pop Quiz

Protected! Why?

Dismissal of a public employee for criticism of his superiors was improper where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or harmony among coworkers would arise.

Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions of which the community should be aware.

Pickering v. Board of Education, 391 U.S. 563 (1968).

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First Amendment Pop Quiz

Facts: An assistant district attorney was dissatisfied with her transfer to a different section by her supervisor. The attorney circulated a questionnaire to her peers soliciting views on matters relating to employee morale. She was fired for insubordination. Protected or not?

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First Amendment Pop Quiz

Not protected! Why?

When employee expression does not relate to any matter of political, social or other community concern, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the mane of the First Amendment.

Connick v. Myers, 461 U.S. 138 (1983).

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First Amendment Pop Quiz

Facts: A deputy prosecutor reviewing a search warrant determined that there were inaccuracies in an affidavit used to get a search warrant. He wrote a memo to his supervisors detailing his concerns and recommended dismissal of the case. The case was prosecuted anyway, and the deputy sued, claiming that retaliatory employment actions had been taken against him. Protected or not?

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First Amendment Pop Quiz

Not protected! Why?

The First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. In other words, when expressing concern about the affidavit, the deputy was speaking in his capacity as an employee, not as a private citizen. There may be statutory protections for employees—such as whistleblower laws—but the First Amendment does not, in general, protect speech made in the course of one's public sector job.

Garcetti v. Ceballos, 547 U.S. 410 (2006).

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First Amendment Pop Quiz

Facts: A high school football coach was disciplined for taking a knee and saying a prayer at the 50-yard line immediately after games. The school district disciplined him because, in the district's view, he was still on duty and therefore "speaking" in an official capacity and violating the Establishment Clause. Protected or not?

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First Amendment Pop Quiz

Protected! Why?

The Court held the coach's prayers were private speech which were not within the scope of his ordinary duties. The coach was not seeking to convey a government message, and the Court believed that those present would understand that. During the post-game period, other employees were free to attend briefly to personal matters, suggesting that the prayers were not delivered as an address to the team, but as a private citizen.

Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

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What about State law?

RCW 41.06.250(2) provides additional statutory protection:

- Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign.
- Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices.

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Social Media—Personal Versus Official

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Social Media—Personal or Public?

Social media is a vexing topic for agencies.

- An agency can determine whether it will maintain "public" social media accounts, but it has less control over how officials and employees use their social media accounts.
- When a councilmember posts about city business or interacts with constituents on a personal or campaign social media account, is it a public record?

Lindke v. Freed, 144 S. Ct. 756 (2024)

Freed, the City Manager of Port Huron, Michigan used his personal Facebook page to post about personal issues and matters related to the City.

Freed replied to comments and answered constituent questions. He occasionally deleted comments he considered "derogatory" or "stupid."

He also blocked Lindke from commenting after Lindke claimed the City's COVID response was "abysmal."

Lindke sued, claiming the Facebook account was a public forum for First Amendment purposes.

Lindke v. Freed, Personal or Public

US Supreme Court: the test for whether a public official's use of social media is "state action" is whether an official:

- (1) possesses actual authority to speak on the agency's behalf; and
- (2) purported to use that authority when speaking on social media.

You must have both. It is not enough if the official **appears** to have authority.

The Court finds that Freed's account is "ambiguous."

One thing that will help with ambiguity?

Disclaimers!

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Lindke v. Freed,—Disclaimers

"Had Freed's account carried a label (e.g., "this is the personal page of James R. Freed") or a disclaimer (e.g., "the views expressed are strictly my own"), he would be entitled to a heavy (though not irrebuttable) presumption that all the posts on his page were personal. Markers like these give speech the benefit of clear context…we can safely presume that speech on a "personal" page is personal (absent significant evidence indicating that a post is official)."

Disclaimers can make a difference! They are not bullet-proof, but they are an easy tool to use in cases where officials/employees insist on using their personal accounts for agency-related posts.

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Disclaimers of Disclaimers

Question: Is it safe to assume that the PRA public records test (the *West* case) is equivalent to the public forum analysis in *Lindke*?

Answer: That is not a safe assumption. The *West* public records test appears to be broader than the *Lindke* public forum test. But disclaimers are useful in either context.

Caveat: Under either *West* or *Lindke*, if a person uses a personal social media account to take official agency action, it will be a public record/public forum.

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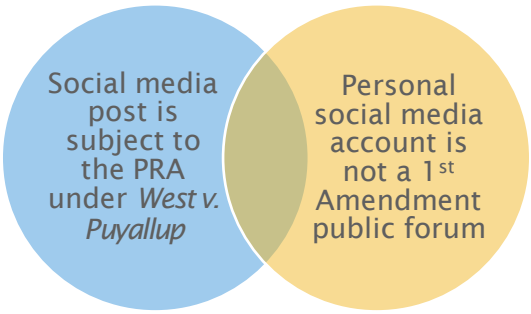
Free Speech and Public Records



Should the tests be the same?

This would make things simpler, but it is not a safe assumption.

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Social Media and the PRA

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Nissen v. Pierce County

Background: PRA request for an elected prosecutor's work-related text messages sent/received on his private phone

Ruling: A record on an agency employee/official's private device or account is a "public record" if it:

- (a) is a writing
- (b) relates to the conduct of government or the performance of any governmental or proprietary function; and
- (c) was prepared, owned, used, or retained by the employee/official **within the scope of their employment or their official capacity**

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When are social media records a writing?

The PRA defines "writing" broadly – includes every "handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation…"

Therefore, most (if not all) social media records qualify as "writings." This includes all texts, photos, posts, links, etc.

When does a social media record relate to the conduct of government or the performance of any government functions?

If it contains "any information that refers to or impacts the actions, processes, and functions of government."

The element is satisfied even if the information only indirectly relates to the conduct of government or to government functions.

When does an employee/official act within its "official capacity?"

- A record is created within the scope of employment when:
  - The job requires it;
  - The employer directs it; or
  - It furthers the employer's interest.

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Case Study: West v. Puyallup

- Prior to 2018, there was no clear judicial guidance on when personal social media posts become public records.
- *West v. Puyallup*, 2 Wn. App.2d 586, 410 P.3d 1197 (2018), involved city councilmember posts on a personal Facebook account which included:
  - General city news;
  - Links to official city Facebook posts;
  - Links to official Puyallup Police Dept. posts.
- There were comments on some posts, but the councilmember did not respond to any of them.

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Case Study: West v. Puyallup

Ruling: The Councilmember's posts were not public records because:

- (1) posting is not a councilmember job requirement;
- (2) the City did not direct the posts; and
- (3) it did not further the City's interests.

Court: posts "may have furthered the City's interest to some minimal extent," but "this tangential benefit" does not satisfy the scope of employment test.

Question: What if the councilmember had engaged in discussion or debate in the Facebook comments section?

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PRA & Search Requirements, Generally

- When responding to a PRR, the PRA requires an adequate search that is reasonably calculated to uncover all relevant records.
- A search does not need to be perfect, and failure to locate and produce a record is not necessarily a PRA violation.
- The search needs to be reasonably calculated to uncover all relevant documents.
- The existence of a record is never exempt from disclosure—it's a question of whether it needs to be produced.

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Conducting Searches for Social Media Records

When should I conduct a search of social media records?

- "Social Media Records" - YES
- "Posts" - YES
- "Tweets" - YES
- "Communications" - MAYBE

How do I conduct a search of social media records?

- Each social media platform is unique. Searches may not be easy.
- When in doubt, contact the social media platform and ask.

What are my search terms? It depends…

Case Study: Cantu v. Yakima School District No. 7

Cantu's daughter (initials AM) was the victim of harassment and bullying at school, and she requested "all incidences/incident reports where [AM] was a victim of bullying, threats, harassment, etc."

The reports were known as HIB reports (harassment, intimidation, and bullying).

Cantu later requested all associated emails.

The District performed the following email searches:

- [A] AND bullying OR HIB
- [A] AND harassment OR intimidation OR bullying
- [A] AND [M]

What is wrong with these searches?

Case Study: Cantu v. Yakima School District No. 7

There were a lot of problems with the District's response, including lack of training and resources, poor communication, and failure to follow-up.

Regarding the search, the District:

- Failed to use wildcards for alternate suffixes;
- Failed to search name variations and nicknames or student ID number;
- Failed to search "threat," which was part of the PRR;

Often, your PRO will have suggestions on search terms to use. If not, take 10 minutes to think about your search strategy and document it. Share it with your PRO if you have questions about search scope.

Best Practices for Public Records Officers

1. Read every PRA request carefully
   - "Does this request ask social media records?"
2. If a PRA request asks for social media records, notify everyone who might possess responsive records and advise them retain responsive records until further notice.
   - This includes social media records from official and personal accounts
   - PROs should be clear in their notification which social media records, located on personal accounts, qualify as "public records."
3. Obtain *Nissen* affidavits from everyone that performed a search of their personal social media accounts–regardless of whether they provide records.

Recommendations for Everyone

1. Avoid use of social media for official business.
2. But if you use social media for official business:

   Use separate accounts for your personal use.

   Be aware of your records retention obligations.
3. When in doubt, call your City Attorney. We're here to help.

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THANK YOU

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