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Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON IN AND FOR SPOKANE COUNTY

CITY OF SPOKANE VALLEY, a municipal corporation,

Plaintiff,

v.

ALBERT W. MERKEL, an individual,

Defendant.

NO. 25-2-00710-32

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AND AWARD OF ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

Plaintiff City of Spokane Valley (the "City") filed this action to force compliance with the Washington Public Records Act ("PRA") and the City's Governance Manual because its Councilmember, Albert W. Merkel ("Defendant" or "Merkel"), refuses to comply with his clear statutory obligations. The City has received multiple public records requests seeking communications from Defendant's social media accounts that openly discuss City business. The requests are still pending and the City has an ongoing statutory duty to preserve and produce all such communications. The City has asked Defendant to produce the responsive records and comply with the City's Social Media Policy multiple times and gone out of its way to work with him to facilitate his compliance. Yet, Defendant refuses to comply with these basic requests.

Eventually, the City received a complaint that Defendant's social media activity violated the PRA and the City's Social Media Policy. The City investigated the allegations, and an

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independent investigator determined that Defendant did in fact violate both the PRA and the Social Media Policy. Unhappy with the result, Defendant refused to comply and appealed the results of the investigation. The findings were then fully upheld by an administrative law judge, who recommended corrective action. Not to be deterred, Defendant still refuses to produce public records known to exist and refuses to comply with the Social Media Policy, leaving the City with no other option but to file suit to force Defendant to comply with his statutory duties.

Despite his long history of recalcitrance, Defendant spuriously asserts that there is no active dispute between the parties and that the City has no standing to force its representative's compliance with the PRA and the Social Media Policy. Defendant's claims are belied by binding precedent that affords the City standing to seek declaratory relief, not to mention the long history of pending public records requests, complaints, threats, investigations, public hearings, and repeatedly ignored demands for compliance that clearly establish an active dispute. The City's claims are valid and it has standing to seek a declaratory judgment and writ of mandamus to force Defendant's compliance. Moreover, Defendant carries an extraordinary burden to prevail on its CR 12(b)(6) motion and has failed to present any viable legal authority to support his Motion. Washington courts routinely reject CR 12(b)(6) motions, particularly such as here, where Defendant presents no supporting legal authority and fails to assume all plead facts as true. Accordingly, the City respectfully requests that this Court deny Defendant's Motion.

II. BACKGROUND

The City asserted the following factual allegations, which must be accepted as true for purposes of this CR 12(b)(6) motion:

A. The City Governance Manual

Per the authority granted by RCW 35A.13.230 and RCW 35A.11.020, the City, through the City Council, has long maintained a Governance Manual that contains rules governing, among other things, the conduct of City Councilmembers in performing the functions of their office. Compl., ¶ 3.1. The Governance Manual provides the following pertinent provisions:

As Councilmembers of the City of Spokane Valley, we agree that the Governance

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> Manual outlines the rules by which we agree to adhere in order to successfully and efficiently conduct city business. (p. 3)
>
> The City acknowledges the importance of complying with the Open Public Meetings Act and the Public Records Act: "The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." RCW 42.30.010 and 42.56.030.

Id., ¶ 3.2-3.3; Decl. of Reid G. Johnson in Supp. of Opp. To M. to Dismiss ("Johnson Decl."), ***Exhibit C****, pp. 3-4.* Chapter 3 of the City Governance Manual also addresses citizen contacts and interactions outside of a council meeting, including contact on social media. Specifically, Chapter 3, Subsection A.4 provides: "Councilmembers **shall comply with the City Councilmember Social Media Policy** which is attached hereto as Appendix H and wholly incorporated herein." (emphasis added). *Johnson Decl.,* ***Exhibit C****, p. 44.*

The Governance Manual requires that **all** Councilmembers abide by the Council Conduct Standards and contains enforcement provisions in the event a Councilmember violates them, including the Social Media Policy. *Id., pp. 55.* If a Councilmember does not cease the conduct that is deemed to violate the Council Conduct Standards, "then the Council may direct city administration to pursue legal action to prevent ongoing violations. . . ." *Id., p. 61.*

Finally, the Social Media Policy, which has been in place throughout Defendant's entire tenure, requires Councilmembers to establish and use an official City Councilmember account in order to discuss City business or the performance of their office on social media. *Compl., ¶ 3.7; Johnson Decl.,* ***Exhibit C****, Appendix H.* It also contains specific details about how to set up an official City Councilmember account. *Id.* The Social Media Policy does permit Councilmembers to maintain a personal social media account, but it places certain limitations on such use to ensure compliance with the Public Records Act. Specifically, **Councilmembers who maintain a personal or campaign social media account shall:**

> 3. **Not write posts on personal or campaign accounts that relate to the conduct of city government or the performance of your office**. Merely

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> posting Council agendas or information regarding city events or providing general information regarding the City's activities is not conducting city business and will not convert your personal post or the posts of others into public records. Personal communications that are not related to the conduct of government or the performance of your office are not public records. **However, if you use your personal account to transact city business, any posts or comments generated in doing so may be public records**. (pp. 81-83) (emphasis added)

Thus, the Social Media Policy allows Councilmembers to make social media posts and comments regarding City business while using official accounts. However, the Social Media Policy precludes Councilmembers from posting about City business on (1) their personal social media accounts, and (2) other persons' social media accounts using the Councilmember's personal account. The purpose of this policy is to ensure that public records are preserved and able to be produced as required by the Public Records Act ("PRA"). *Compl., ¶ 3.8.*

B. The City Receives a Complaint Regarding Defendant's Social Media Activity

On January 2, 2024, Defendant took his oath of office to, among other things, uphold the laws and regulations of the State of Washington and City of Spokane Valley. *Compl., ¶ 3.9.* City administration informed Defendant of the Social Media Policy and the requirement that he establish official Councilmember social media accounts using his official City-issued email address for those social media platforms. *Id., ¶ 3.10.* City administration also provided Defendant with training regarding the PRA and specifically informed him that any social media content he creates regarding City business or the performance of his office would likely be public records subject to the PRA. *Id., ¶ 3.11.* City administration also advised Defendant on multiple occasions of: (1) the importance of preserving such content, and (2) the high risk of steep monetary penalties being assessed against the City if he failed to preserve all public records and produce those that are responsive to public records requests. *Id.*

Despite these warnings, Defendant stated, "I'll take that risk," and refused to establish an official Councilmember social media account. *Id., ¶ 3.12.* Instead, Defendant used various social media accounts, including an application called Nextdoor, to regularly post about City business and the performance of the City's representatives, communicate with the public regarding issues

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and business coming in front of City Council for official action, solicit feedback to guide his decisions as a Councilmember, and otherwise perform his Councilmember functions. *Id.*

In early 2024, the City received multiple public records requests for content on Defendant's personal social media accounts regarding City business. *Id.* ¶ *3.13.* Defendant refused to provide the requested records. *Id.*, ¶ *3.14.* City administration repeatedly requested Defendant produce the responsive records and reminded him of the legal risks that he was exposing the City. *Id.*, ¶ *3.15.* Instead of producing the records, Defendant insisted on submitting legally deficient *Nissen* declarations stating he did not have any "public records." Defendant continued this pattern despite repeatedly being informed that such declarations do not satisfy his obligations under the PRA and expose the City to liability. *Id.*, ¶ *3.16.*

On June 11, 2024, Councilmember Jessica Yaeger submitted a written complaint to the City pursuant to the City Governance Manual, alleging Defendant violated the City Council's Conduct Standards by failing to comply with the Social Media Policy with regard to his personal social media accounts. *Id.*, ¶ *3.17.* Specifically, the complaint alleged Defendant was using his personal Nextdoor account to conduct and/or transact City business by, *inter alia*, conducting citizen polls about City actions and proposals, providing opinions on various City initiatives, surveying citizens on issues related to the City Council's agenda, and engaging in discourse with citizens about City business, which he then presented at City Council meetings. *Id.*, ¶ *3.18.* Councilmember Yaeger later clarified that Defendant's conduct also violated the PRA with regard to his personal Nextdoor account (the "Yaeger Complaint"). *Id.*, ¶ *3.20.*

C. The City Investigates the Yaeger Complaint

Pursuant to Chapter 5 of the City Governance Manual, the City retained an independent investigator, Ms. Rebecca Dean,[1] to investigate the alleged violations of the Social Media Policy and to issue a written report determining whether Defendant had violated the Governance

[1] Ms. Dean is a licensed attorney specializing in independent investigations and has been retained by both private businesses and government agencies throughout the State to investigate workplace conduct, ethical standards, and regulations disputes. *Id.*, ¶ 3.23.

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Manual. *Id.*, ¶ 3.22-3.24. Ms. Dean submitted her Investigative Report on or about September 3, 2024. *Johnson Decl.*, ***Exhibit A.***

Among other things, the Investigative Report concluded that:

1. Defendant's social media activity violates the Councilmember Social Media Policy;
2. Defendant's social media posts and comments regarding City business on his personal Nextdoor account more likely than not constitute public records;
3. Defendant violated the PRA by refusing to search, segregate, and produce social medial posts and comments in response to multiple public records requests; and
4. Defendant violated the PRA by submitting deficient *Nissen* declarations in response to multiple public records requests received by the City.

Id. Based on these findings and conclusions, the City made another demand that Defendant comply with the Social Media Policy and produce all posts and communications from his personal social media accounts that discuss City business. *Compl.*, ¶ *3.27.* Defendant again refused to comply with the City's demands and continued the dispute. *Id.*, ¶ *3.28.*

D. Hearing Examiner Confirms the Investigator's Findings

Defendant appealed the Investigative Report and requested a hearing to determine whether any violation occurred. *Id.*, ¶ *3.29.* On October 24, 2024, Hearing Examiner Andrew L. Kottkamp conducted a public hearing and Defendant challenged the Investigative Report. *Id.*, ¶ *3.30.* Ultimately, Hearing Examiner Kottkamp entered his Decision on December 13, 2024 (the "Hearing Examiner's Decision"). *Johnson Decl.*, ***Exhibit B***.

The Hearing Examiner's Decision concluded, among other things, that:

1. Defendant's use of his personal Nextdoor account to conduct City business violated the City Council's Conduct Standards and Councilmember Social Media Policy;
2. Defendant's failure and/or refusal to search, segregate, and produce social medial posts and comments to his personal Nextdoor account in response to multiple public records requests received by the City violated the City Council's Conduct Standards and Councilmember Social Media Policy; and

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3. Defendant's failure and/or refusal to submit proper *Nissen* declarations violated the City Council's Conduct Standards.

Id. The Hearing Examiner's Decision also recommended corrective action. *Id.*

E. The City Demands that Defendant Comply With the Social Media Policy, Produce All Public Records, and Produce Updated *Nissen* Declarations

Based on the Investigative Report and the Hearing Examiner's Decision, the City demanded that Defendant produce the content posted to his personal Nextdoor account to enable the City to complete its responses to multiple pending public records requests and remain in compliance with the PRA. *Compl.*, ¶ *3.35.* In response, Defendant agreed "under protest" to sign up to Nextdoor using his city email account and back up the account with the City's Page Freezer program, which is meant to archive social media activity and allow the City to compile public records. *Id.*, ¶ *3.36.* However, he only produced a backup file from his personal Nextdoor account because his account was suspended. *Id.* The City was willing to accept the backup file until Defendant could obtain complete records. *Id., 3.37.*

Defendant's full access to Nextdoor was soon restored, allowing him to locate and produce complete records. *Id.*, ¶ 3.38. **Defendant then deactivated his Nextdoor account that was linked to his City email address and the Page Freezer program**, and he again maintained only his unlinked personal Nextdoor account and other unlinked social media accounts. *Id.*

The City then reviewed the Nextdoor backup file and determined it was insufficient for the City to comply with the PRA because it did not contain documents in original native format, did not accurately depict the nature and scope of the communications, and did not contain his posts on other individual's accounts. *Id.*, ¶ *3.39.* Given that Defendant's Nextdoor account had been restored, the City demanded that Defendant provide records that fully and accurately depict all communications that discuss city business or were made in performance of his duties as an elected official. *Id.*, ¶ *3.40.* The City also requested that Defendant complete amended *Nissen* declarations, as both the Investigator and the Hearing Examiner concluded the declarations were not compliant with the PRA. *Id.*, ¶ *3.41.*

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The City also investigated Defendant's ongoing social media communications and determined that he continued to discuss City business and the performance of his office, all in violation of the Social Media Policy. *Id.*, ¶ *3.42.* These posts show that Defendant frequently conducts citizen polls about City actions and/or proposals, provides opinions of various City initiatives, surveys citizens on issues on the Council's agenda, reprimands the official actions of City officials and staff, discusses his own performance of his official duties, among other City business. *Id.* The City demanded that Defendant immediately cease and desist from making such communications on his personal social media accounts. *Id.* Defendant refused.

Defendant has failed (and continues to fail) to comply with the City's demands, all of which were made to ensure the City's compliance with the PRA. *Id.*, ¶ *3.44.* Defendant continues to deny that his social media posts and comments constitute public records, and he has failed (and continues to fail) to produce screen shots, sufficient account access, or other documents that fully and accurately depict all communications that discuss City business or the performance of Defendant's office. *Id.* Defendant has failed (and continues to fail) to provide all necessary amended *Nissen* declarations that comply with the PRA. *Id.*, ¶ *3.45.* Defendant has also failed to produce non-social media records regarding City or Council business, such as emails from personal accounts, text messages, and other notes/memoranda. *Id.*, ¶ *3.46.*

Defendant continues to be in violation of the Social Media Policy because he continues to make social media posts on his unlinked account related to the conduct of City business and the performance of his office. *Id.*, ¶ *3.47.* The City has taken all actions within its authority to obtain compliance from Defendant to ensure that the City complies with its obligations under the PRA. *Id.*, ¶ *3.48.* However, Defendant refuses to comply, forcing the City to seek court intervention.

F. The City Files Suit, Alleging Claims for Declaratory Judgment, Writ of Mandamus, and Injunctive Relief

On February 11, 2025, the City filed its Complaint against Albert W. Merkel, alleging three (3) causes of action. In its First Cause of Action, the City seeks a declaratory judgment pursuant to the Uniform Declaratory Judgment Act, RCW 7.24 et seq. *Compl.*, ¶¶ *4.1-4.5.*

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Specifically, the City seeks a judgment declaring that Defendants social media communications constitute public records, that his text messages on his personal cell phone regarding City business constitute public records, that his emails on personal accounts regarding City business or the performance of his office constitute public records, and that the PRA requires Defendant to provide the City with those records that are responsive to public records requests. *Id.*

In its Second Cause of Action, the City seeks a writ of mandamus ordering Defendant to comply with the City's Governance Manual, namely, the Social Media Policy. *Id.*, ¶¶ *5.1-5.6.*

In its Third Cause of Action, the City seeks an injunction requiring Defendant to produce all social media communications and other records regarding City business or the performance of his office, and to the extent the records are not available, to produce truthful and legally sufficient declarations that contain reasonably detailed, nonconclusory facts that attest to the extent of Defendant's search for all past and future public records requests. *Id.*, ¶¶ *6.1-6.3.*

III. ARGUMENT

A. CR 12(B)(6) STANDARDS

Dismissal under CR 12(b)(6) is strictly limited and warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove "any set of facts which would justify recovery." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims. Id. A motion to dismiss is granted "'sparingly and with care'" and, as a practical matter, "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Id. (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

B. DEFENDANT'S STANDING ARGUMENT FAILS BECAUSE THE CITY HAS NOT ASSERTED A CLAIM UNDER THE PUBLIC RECORDS ACT

A fundamental deficiency with Defendant's Motion is his revisionist allegation that the City is bringing a claim under the PRA. This is simply not true. Defendant claims, **without any legal authority**, that "[t]he gravamen of this lawsuit is whether the City has standing to enforce

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the PRA against its Councilmember Merkel." *M. to Dismiss, p. 6.* However, **the City has not asserted any claim under the PRA against Councilmember Merkel**. Thus, Defendant's spurious allegation misrepresents the allegations of the Complaint.

The City asserted three separate and distinct causes of action: (1) Declaratory Judgment Action; (2) Writ of Mandamus; and (3) Injunctive Relief. Yet, Defendant attempts to re-write the Complaint to claim that the City is bringing a wholly distinct claim under the PRA. What is worse, he offers no legal authority for manipulating the asserted claims to his liking. The City asserted a claim for Declaratory Judgment to ensure it complies with its obligations under the PRA, and asserted a claim for Writ of Mandamus to force Defendant's compliance with the Governance Manual. These claims have separate legal bases and will analyze separate rights and duties. Defendant fails to explain why a plaintiff needs standing to assert a cause of action not asserted in the complaint and provides no authority for such a proposition. See State Constr., Inc. v. city of Sammamish, 11 Wn. App. 2d 892, 906, 457 P.3d 1194 (2020) ("Where a party fails to cite to relevant authority, we generally presume that the party found none."). Therefore, Defendant's standing argument under the PRA must be denied outright.

C. MANDAMUS IS REQUIRED TO ENSURE COMPLIANCE WITH THE CITY GOVERNANCE MANUAL

Similarly, Defendant moves to dismiss the City's claim for writ of mandamus, but completely fails to address the merits of the actual allegations. To be clear, the City seeks a writ of mandamus to force Defendant to comply with the City's Governance Manual, namely, the Social Media Policy.[2] *Compl., ¶¶ 5.1-5.6.* Yet, Defendant does not address his compliance with the Governance Manual at all and instead (again) tries to re-write the Complaint by contending that the City seeks the writ to force Defendant to provide adequate *Nissen* declarations. However, the City's claim for writ of mandamus is focused solely on Defendant's failure to comply with the Social Media Policy – a duty that requires no discretion, contains detailed parameters that

[2] City lawfully enacted the Governance Manual pursuant to RCW 35A.13.230 and RCW 35A.11.020. *Compl., ¶ 3.1*

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outline Defendant's responsibilities, and was the subject of both the Investigative Report and the Hearing Examiner's Decision. Defendant's Motion must be denied because he has not addressed the actual merits of the claim in any fashion.

D. A JUSTICIABLE CONTROVERSY BETWEEN THE CITY AND MERKEL HAS BEEN ONGOING FOR A FULL YEAR

Defendant contends there is no justiciable controversy because the City does not name any third parties who have successfully sued the City for violations of the PRA stemming from his actions. This argument must be rejected as it flies in the face of binding authority analyzing the Uniform Declaratory Judgment Act ("UDJA") and the central purpose of the UDJA.

1. The Justiciable Controversy Requirement

The UDJA grants trial courts the general power to "declare rights, status and other legal relations" if "a judgment or decree will terminate the controversy or remove an uncertainty." RCW 7.24.010, .050. The UDJA is a remedial statute and courts are required to liberally construe and administer it. RCW 7.24.120; Bloome v. Haverly, 154 Wn. App. 129, 140-41, 225 P.3d 330 (2010). RCW 7.24.020 confers standing to seek a declaratory judgment on any person "whose rights, status or other legal relations are affected by a statute." Its purpose is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Bloome, 154 Wn. App. at 140, 225 P.3d 330.

Generally, a declaratory judgment action requires that there be a judiciable controversy between the parties. State v. American Tobacco Co., 28 Wn. App. 2d 452, 470, 537 P.3d 303 (2023). A justiciable controversy requires:

> (1) an actual, present and existing dispute, or the mature seeds of one, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

League of Educ. Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (quoting To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). However, Washington courts carve out an exception to this general requirement where there exists an issue of "major

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public importance." Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 917, 949 P.2d 1291 (1997). Here, Defendant Merkel appears to challenge the first and third elements of the justiciable controversy test before addressing the major public importance exception.

2. A Justiciable Controversy Exists to Determine Whether Councilmember Merkel Has Fulfilled His Duty to Search for and Produce Public Records

Throughout Defendant's Motion, not once does he address his own ongoing duty to comply with the PRA, or his continued refusal to follow the City's basic requests that he produce public records so the City can comply with the PRA. Instead, despite complaints and threats already being levied against the City, and findings that Defendant has violated the PRA, Defendant argues the Court must wait to address his ongoing noncompliance until the City gets sued, spends thousands on attorney fees, and is forced to pay daily penalties for Defendant's refusal to follow his own legal obligations. Such a claim is without legal support, encourages municipalities to violate the PRA, and contradicts clear statutory mandates of the PRA.

a. The City and Defendant Merkel Each Have a Duty Under the PRA to Search For and Produce Records

The PRA requires the City to make all "public records" available for public inspection and copying, unless the records fall within specific, enumerated exemptions. RCW 42.56.070(1). The City, as an agency identified by the PRA, must act exclusively through its employees and agents, and when an employee or representative acts within the scope of his or her employment or engagement, the representative's actions are tantamount to the actions of the agency itself. Nissen v. Pierce County, 183 Wn.2d 863, 876, 357 P.3d 45 (2015). Accordingly, the basic common law concept of principal-agency law is built into the PRA and makes clear that an agency's public records include the work product of its employees and representatives that were created within the scope of their agency. Nissen, 183 Wn.2d at 876-78. Consequently, all records that a representative prepares, owns, uses, or retains within the scope of their agency are public records if they meet all the requirements of RCW 42.56.010(3). Id. at 878.

Moreover, City representatives have an affirmative duty to search their files, devices, and accounts, and to obtain, segregate, and **produce** any records, including records located on social

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media accounts, that constitute "public records." Nissen, 183 Wn.2d at 886, 357 P.3d 45. If the elected official claims that the information in personal accounts are not public records, then the official must submit a declaration with **sufficient facts** to show the information is not a public record. Id. The declaration must be made in **good faith** and contain reasonably detailed, nonconclusory facts that attest to the nature and extent of the official's search. Id.

Moreover, the law is clear that a public official's posts on a personal social media platform can constitute public records subject to disclosure under the PRA if the posts "relate to the conduct of government" and are "prepared within a public official's . . . official capacity." West v. City of Puyallup, 2 Wn. App. 2d 586, 594, 410 P.3d 1197 (2018).

If the agency violates the PRA, courts have authority to award penalties against the agency of up to one hundred dollars per day of noncompliance for each page of public records not produced, and award the complaining party all costs, including reasonable attorney fees. RCW 42.56.550(4). This daily penalty is intended to enforce the strong public policies underlying the PRA. Soter v. Cowles Pub. Co., 162 Wn.2d 716, 751, 174 P.3d 60 (2007).

Here, Defendant fails to acknowledge that both he and the City have an ongoing duty to comply with the PRA by searching for **and producing** records that are within the scope of public records requests that are currently open and active. Defendant owes a duty under the PRA—and as a representative of the City—to comply with the PRA and the City's numerous demands to produce responsive records. Not once does Defendant address his own ongoing duty, or his own refusal to follow the City's basic requests. Instead, despite complaints and threats already being levied against the City, Defendant claims the dispute over his ongoing noncompliance is not ripe until the City gets sued and has a judgment entered against it. Such a claim is without **any** legal support and contradicts clear mandates and policy of the PRA.

b. The Actual, Present, and Existing Dispute Between the City and Defendant Merkel Has Been Ongoing for Months

The dispute at issue in this case is between the City and Defendant over Defendant's failure comply with his clear duty to produce public records. Yet, Defendant ignores the

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longstanding dispute between the parties and claims the dispute *should be* between the City and the public records requestor. When one analyzes the actual dispute that has been pled by the City, it is clear there is nothing speculative about it, as it has been raging for over a year.

The actual dispute initiated in early 2024 when the City received multiple public records requests for content on Defendant's personal social media accounts, and Defendant refused to provide responsive records despite multiple requests from the City. *Compl.,* ¶ *3.13-15.* Instead, Defendant submitted legally deficient *Nissen* declarations stating he did not have "public records" in his possession, and the City informed him that such declarations do not satisfy his legal obligations under the PRA. *Id.* The dispute did not end there.

The Yaeger Complaint was initiated in June, 2024, alleging that Defendant's conduct on social media violated the PRA. *Id.,* ¶ *3.20.* The City retained an independent investigator who concluded that Defendant's social media activity violated the Social Media Policy, his posts and comments constituted public records, and Defendant violated the PRA by refusing to search, segregate, and produce social medial posts and comments and submitting deficient *Nissen* declarations in response to multiple public records requests. *Id.,* ¶ *3.23-3.25.* Defendant still refused to comply with the City's demands. *Id.*, ¶ 3.28.

Instead, **Defendant challenged the findings Investigative Report** through a public hearing, prolonging the active dispute. *Id.*, ¶ 3.29. After a full hearing, the Hearing Examiner's Decision affirmed the findings in the Investigative Report. *Johnson Decl.,* ***Exhibit B***. Based on the Investigative Report and the Hearing Examiner's Decision, the City demanded that Defendant produce all posts and comments discussing City business on his social media accounts to enable the City to respond to the pending public records requests. *Compl.,* ¶ *3.35.* Despite these demands, Defendant still failed to produce all responsive public records and refused to comply with the Social Media Policy. *Id.,* ¶¶ *3.40-3.44.*

Based on the full year of complaints, demands, investigations, a contentious administrative hearing, and Defendant's continued refusal to comply with the PRA, it is clear the parties to this case have an actual, present, and existing dispute against one another. Defendant

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continues to deny that his social media posts and comments constitute public records, and continues to refuse to produce responsive public records. Further, the City claims that Defendant's *Nissen* declarations are deficient, which Defendant denies. Both the City and Defendant Merkel maintain ongoing legal obligations under the PRA and they dispute the scope of said obligations and whether they have been satisfied. This dispute is active and the City seeks to settle and afford relief from uncertainty and insecurity with respect to its rights and obligations under the PRA, satisfying the first prong of the justiciable controversy analysis.

Defendant argues the present dispute is merely "speculative," relying on two cases that are easily distinguishable because they do not involve parties with ongoing statutory duties.

For example, in Lewis v. State, the County sought a judgment declaring the State responsible for any civil liability imposed in future lawsuits stemming from official acts of County staff. 178 Wn. App. 431, 433 (2013). There was no active claim and no ongoing duty to do anything. Instead, the County was concerned because it was found liable in past cases and sought to confirm the State's responsibility in any future disputes. Id. Because there were no present demands, the dispute was found to be hypothetical. Id. at 437.

Similarly, in Diversified Industries Development Corp. v. Ripley, 82 Wn.2d 811, 812, 514 P.3d 137 (1973), a lessor brought a declaratory judgment action against a residential lessee, asking the court to declare who would be financially responsible for an incident involving a minor social guest who had not brought any claim for damages, but had a twenty-year statute of limitations. There was no ongoing duty to act by either party and no active claim or demand against either party, and the court therefore held that the case was not ripe. Id. at 815.

Here, there is an ongoing duty to act based on pending public records requests, there has already been a complaint and demand for compliance, the Investigative Report determined that Defendant is non-compliant, the Hearing Examiner's Decision confirmed the findings from the Investigative Report, and yet Defendant still refuses to comply with his obligations under the PRA. In the meantime, the City's exposure to liability under the PRA continues to increase each day that goes by without Defendant providing the requested records. Thus, the dispute is not

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speculative – it is active and both parties have ongoing duties to act. Defendant's claim that there is no active dispute is wholly without merit.

c. The City Has Standing to Pursue a Declaratory Judgment

Defendant also claims that the City does not have standing because it has not suffered a direct injury and is merely asserting the rights of others under the PRA. This argument is contradicted by binding precedent and the basic facts of this case.

"Under the UDJA standing requirement, a party must (1) be within the zone of interests protected **or regulated** by a statute, and (2) have suffered an injury in fact." Benton County v. Zink, 191 Wn. App. 269, 278, 361 P.3d 801 (2015) (emphasis added). The standing doctrine essentially requires that the claimant has a personal stake in the outcome of the case. Id. Because the UDJA is meant to be liberally construed and administered, "**standing is not intended to be a particularly high bar**." Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc., 193 Wn.2d 704, 712, 445 P.3d 533 (2019) (emphasis added).

To satisfy the "zone of interest" prong, a plaintiff must identify the interest it is seeking to protect and demonstrate that the interest is "arguably" within the zone of interests protected or regulated by a particular statute. Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802 (2004). "If the party's interests are affected or impacted by a statute, the party is within the zone of interests." Zink, 191 Wn. App. at 279, 361 P.3d 801.

Previous binding decisions have already determined that state agencies' interests in ensuring full public access to records are within the zone of interests protected by the PRA. Id. The PRA presents a mandate for the broad disclosure of public records, and agencies are highly regulated by the PRA. Puyallup, 2 Wn. App. 2d at 592, 410 P.3d 1197. As summarily determined by Division III in Zink, "[t]he PRA thus recognizes that agencies should have limited protections when carrying out their duties, **and are therefore within the zone of interests protected by the PRA**." 191 Wn. App. at 279 (emphasis added). Thus, this prong is easily met.

To satisfy the "injury in fact" prong, a plaintiff must "demonstrate that he or she is (**or will be**) specifically and perceptibly harmed" by the complained of action. Patterson v. Segale,

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171 Wn. App. 251, 253–54, 289 P.3d 657 (2012) (emphasis added). Significantly, "the injury in fact test is not meant to be a demanding requirement." City of Burlington v. Wash. Liquor Control Bd., 187 Wn. App. 853, 869, 351 P.3d 875 (2015). Washington courts have held, "if a litigant can show that a **potential injury is real**, that injury is sufficient for standing." Id.

Washington courts have held that additional financial and administrative burdens imposed on an agency constitute sufficient injury. Zink, 191 Wn. App. at 279. "Seeking a declaratory judgment under the PRA, "spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding." Id. (holding a justiciable controversy exists where a state agency sought declaratory relief to determine its obligations under the PRA presented); see also Soter, 162 Wn.2d at 732, 174 P.3d 60 (holding that the PRA allows an agency to seek a judicial ruling regarding its compliance with the PRA); Harbor Plumbing v. Washington State L&I, 4 Wn. App. 2d 1065 (2018) (recognizing that standing was established in Zink and "the dispute was clearly ripe because the records request had been filed.").

Here, the City has already suffered substantial financial and administrative burdens in attempting to comply with its obligations under the PRA, and faces potential monetary penalties if Defendant's noncompliance continues. Due to multiple complaints, the City was forced to initiate an independent investigation, which determined Defendant was out of compliance with his statutory obligations. The City has also been forced to make repeated demands for compliance and hire outside counsel to assist in enforcing the Hearing Examiner's Decision, causing it material financial and administrative burden. Because Defendant still refuses to abide by the simple request, the City seeks a declaratory judgment to obtain certainty and avoid cost of delay and per diem penalties for wrongfully withholding of documents known to exist and already determined to be public records by an independent investigator and a judge. Thus, the City has been injured and has standing to bring a claim for declaratory relief.

3. The Present Issue is One of Major Public Importance

If the Court somehow determines there is no justiciable controversy, this dispute presents an issue of major public importance regarding the City's compliance with the PRA.

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A party may still have standing under the UDJA so long as the plaintiff presents an issue of substantial or major public importance. Wash. State Hous. Fin. Comm'n, 193 Wn.2d at 712. Whether an issue is one of "major public importance" depends on "the extent to which public interest would be enhanced by reviewing the case." Lewis Cnty. v. State, 178 Wn. App. 431, 440, 315 P.3d 550 (2013). Courts will apply the major public importance exception where the public's interest is overwhelming. Id.

Here, the City's compliance with the PRA – specifically, an elected official's compliance with the PRA – is undoubtedly a matter of overwhelming public interest. The language of the PRA itself, the legislative history of the PRA, and the court's own remarks about the PRA make this clear:

> The [PRA] is a strongly worded mandate for broad disclosure of public records. Indeed, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. We interpret the [PRA] liberally to promote full disclosure of government activity that the people might know how their representatives have executed the public trust placed in them and so hold them accountable. It is therefore imperative that government agencies timely comply with the mandates of the [PRA]. . . . Thus, judicial oversight is essential to ensure government agencies comply with the [PRA].

Spokane Rsch. & Def. Fund v. City of Spokane, 155 Wn. 2d 89, 100, 117 P.3d 1117 (2005) (internal citations omitted); see also, Progressive Animal Welfare Soc'y v. Univ. of Washington, 125 Wn.2d, 243, 251, 884 P.2d 592 (1994) (holding the Legislature originally adopted the PRA to preserve "**the most central tenets of representative government**, namely, **the sovereignty of the people** and **the accountability to the people of public officials**[.]").

According to the broad legislative and judicial mandate of promoting access to public records, this case raises issues of substantial public importance necessary to confer standing, namely, whether an agency can ensure its elected officials' comply with the strict requirements of the PRA. Thus, even if the Court does not find a justiciable controversy, which it should, the public importance exception should be invoked to confer standing.

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E. INJUNCTIVE RELIEF IS REQUIRED TO FORCE DEFENDANT'S COMPLIANCE WITH THE PRA

A party requesting injunctive relief has the burden of proving (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual or substantial injury. Kucera v. State, Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). The court may also consider the public interest in the outcome of the case. Mains Farm Homeowners Ass'n v. Worthington, 64 Wn. App. 171, 824 P.2d 495 (1992). Under RCW 7.24.080, a court possesses authority in a declaratory judgment action to issue further relief in addition to entering a judgment. That relief includes a permanent injunction. City of Union Gap v. Printing Press Props., L.L.C., 2 Wn. App. 2d 201, 233, 409 P.3d 239 (2018).

Here, the City seeks an injunction to force Defendant to comply with his clear obligations under the PRA, so that the City can do the same. The City's request is not onerous: Defendant simply needs to perform an adequate search for records (many have already been identified), produce them, and supply an adequate *Nissen* declaration outlining the basis for withholding any documents deemed to be personal. These rights and obligations are clearly outlined in the PRA and have been explained to him numerous times. He simply refuses to act.

The City has a clear legal and equitable right to an injunction. As previously explained, Defendant has a legal obligation to search, segregate, and produce public records in his possession. See, *infra, pp. 12-13*; Nissen, 183 Wn.2d at 886. If Defendant claims the records requested are not public records and are personal, he must submit a good faith declaration with sufficient facts to show the information is not a public record. Id. If he fails to comply – which is evident given the Investigative Report and the Hearing Examiner's Decision – the City will be out of compliance with its obligations, liable, and subject to steep monetary penalties. Thus, the City has a protectable interest under the PRA and it has a right and obligation to request these records and force its representative to comply with his legal obligations if necessary.

The City also has a well-grounded fear of immediate invasion of that right. In fact, its

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right has already been invaded. It has already been determined that Defendant is creating and maintaining public records on his social media pages. The City alleges that he continues to withhold records, continues to create social media posts that constitute public records, and has submitted improper *Nissen* declarations. These allegations satisfy this element.

Defendant's actions likely will result in actual or substantial injury. As previously explained, Washington courts have held that financial and administrative burdens imposed on an agency constitute injury. Zink, 191 Wn. App. at 279. The City has already exhausted substantial resources in demanding Defendant's compliance, including initiating an independent investigation, hiring counsel to defend Defendant's appeal of Investigative Report, using City resources to make demands and investigate Defendant's deficient production, and ultimately hiring counsel to assert its rights and obligations. Moreover, the City is currently out of compliance with pending public records requests and if Defendant continues to evade his obligations, the City will be subject to daily monetary penalties. RCW 42.56.550(4).

Finally, Defendant shockingly claims that his personal privacy somehow outweighs the clear mandate for broad disclosure of public records under the PRA. Spokane Rsch. & Def. Fund, 155 Wn. 2d at 100, 117 P.3d 1117 (2005). Indeed, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. Id. Defendant's right to privacy is not implicated at all because the City is not requesting his "private electronic communications" – only public records. Defendant's contention yet again misses the mark. The only interest that is implicated here is the public interest because the City is seeking public records, not private communications. Thus, the City has adequately pled a claim for injunctive relief.

F. DEFENDANT'S REQUEST FOR ATTORNEY FEES IS WHOLLY IMPROPER

Defendant requests attorney fees under CR 11 and RCW 4.84.185, claiming the Complaint is frivolous. "A frivolous claim is one that cannot be supported by any rational argument on the law of facts." Rhinehart v. Seattle Times, Inc., 59 Wn. App. 332, 340, 798 P.2d 1155 (1990). This egregious accusation is entirely without merit.

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For one, two of Defendant's primary arguments are based on a complete misinterpretation of the Complaint. First, Defendant asserts the City has no standing to assert claims under the PRA, but the City did not assert a claim under the PRA. Second, Defendant fails to address the actual substance of the writ of mandamus claim in any manner. These reasons alone demonstrate that this request for fees is spurious.

Nonetheless, the City filed this lawsuit after a culmination of repeated attempts to force Defendant's compliance with the City's Social Media Policy and the PRA after an independent investigator and an administrative law judge both determined that Defendant violated the Social Media Policy and the PRA. These claims are valid and Defendant's egregious request for fees is consistent with his baseless refusal to produce public records.

Moreover, a party who perceives a possible violation of CR 11 must notify the offending party as soon as possible. Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). This notice must be done before filing, preparing, and serving a CR 11 motion. Id. Without such notice, CR 11 sanctions are unwarranted. Id. To no one's surprise, Defendant failed to satisfy this basic prerequisite. This alone renders Defendant's claim for sanctions spurious.

IV. CONCLUSION

In conclusion, despite Defendant's concerted and strategic efforts to muddy and obfuscate the City's Complaint, this is a simple case. The City has a clear statutory duty to preserve and disclose its records involving City business. The City promulgated an internal Governance Manual and Social Media Policy to insure compliance. Defendant repeatedly violated these legal mandates. The City made extensive efforts to obtain Defendant's compliance, which he repeatedly and callously rejected, forcing the City to bring this action to obtain compliance. Defendant presents no argument in his CR 12(b)(6) motion demonstrating why the pled allegations, all assumed true for purposes of this motion, are legally deficient and fail to support cognizable claims. Defendant's motion is woefully deficient on all accounts and should be readily denied.

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DATED this 25th day of April, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April, 2025, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all entities as follows:

Patrick J. Kirby Patrick J. Kirby Law Office, PLLC 4353 S. Greystone Lane Spokane, WA 99223 pkirby@pkirbylaw.com	☒ ☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Via E-Filing Via Email

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