CASE NUMBER
2520071032
SN:31.0 PC:12

FILED
7/11/2025
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 RESPONSE TO MOTION FOR PROTECTIVE ORDER TO TEMPORARILY STAY DISCOVERY AND MOTION FOR ATTORNEY'S FEES

I. INTRODUCTION

Plaintiff City of Spokane Valley ("the City") hereby responds to the Motion for Protective Order to Temporarily Stay Discovery and Motion for Attorney's Fees filed by Defendant Albert W. Merkel ("Defendant"). This motion is nothing more than Defendant's latest attempt to shield himself from his discovery obligations under the guise of First Amendment "privacy" concerns. However, the City has not issued any discovery requests for "private communications." The City has only asked Defendant to produce his communications with **third parties concerning City business**. Those records are inherently "public records," and they are highly relevant because they are the subject of multiple public records requests the City has received. Thus, Defendant's privacy objections have no merit. Despite this, the City is still agreeable to a protective order that requires Defendant to produce requested records to the City, but prohibits public disclosure pending the outcome of this case. Prior to filing this motion, Defendant has never expressed the same willingness. Accordingly, the City respectfully requests that this Court deny Defendant's Motion.

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II. RELEVANT BACKGROUND

The facts of this case have been outlined in the Complaint, as well as Plaintiff's Opposition to Motion to Dismiss and Award of Attorneys' Fees and Costs, and are incorporated herein by this reference. The City offers the following brief recitation of pertinent facts.

A. Relevant Allegations of the Complaint.

The City filed this action to ensure its compliance, as well as Defendant's present and future compliance, with Washington's Public Records Act ("PRA") and the City's Governance Manual. The City alleges in its Complaint, among other things, that Defendant has refused (and continues to refuse) to provide records to the City that are responsive to multiple PRA requests. *Complaint*, ¶¶ 3.9-3.21; 3.34-3.48. The following are just some examples of the information sought by these formal PRA requests:

- "I request access to everything [Defendant] posts as a council member including all the comments between him and other on nextdoor regarding city business."
- "Request and/all communications to/from Councilmember Albert (Al) Merkel to/from [16 named individuals] and anything that pertaining to the Underground Rainbow… Please include any/all social media posts/conversations and recaps of telephone call conversations."
- "I would like every email send [sic] to Al Merkel between the dates of February 20th thru April 1 regarding Resolution 25-003: Declaring the City is not a sanctuary city."
- "Please provide 'any communications, records, or documents' in reference to Spokane Valley Al Merkel's investigation(s)."

Declaration of Patricia Rhoades ("Rhoades Decl."), ¶ 3, Ex. A.

Under the PRA, the City is required to produce responses to these requests. *Complaint*, ¶¶ 3.35-3.48. Despite the City's repeated demands, as well as an independent investigation and hearing examiner's decision supporting the City's demands, Defendant has refused (and continues to refuse) to comply with the PRA and the City's Governance Manual. *Id.* at ¶¶ 3.9-3.48. In doing so, he has taken the erroneous and illogical position that his communications with **third parties concerning City business** are somehow exempt from public disclosure. *Id.*

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B. The City's Discovery Requests Seek Documents and Communications That Are Necessary to Response to the PRA Requests that the City has Received.

The only way for the City (and ultimately, the Court) to determine whether the records that are being withheld by Defendant are subject to public disclosure is for the City to review those records as part of discovery. Accordingly, on March 21, 2025, the City served its First Set of Interrogatories and Requests for Production of Documents ("the First Discovery Set"). *Declaration of Reid G. Johnson ("Johnson Decl.")*, ¶ 3, Ex. A. Among other things, the City requested Defendant's production of his communications with third parties **concerning City business**—which simply reflect the PRA requests. *Id.* Moreover, the City narrowly tailored its discovery requests to clarify that it is only seeking communications concerning City business:

- RFP Nos. 6, 9, 12, 15, 18, 21, 23, 25, 27 and 29: Social media posts, emails, texts messages, and other documents "**concerning the Mayor, City Manager, other Councilmembers, and/or the City Attorney for the City of Spokane Valley** from January 2024 to the present."
- RFP Nos. 7, 10, 13, 16, 19, 22, 24, 26, 28 and 30: Social media posts, emails, texts messages, and other documents "**concerning the City of Spokane Valley's actions, initiatives, proposals, resolutions, spending, and/or councilmember meetings** from January 2024 to the present."
- RFP Nos. 8, 11, 14, 17, and 20: Social media posts "**concerning or containing citizen polls and/or surveys conducted by you** from January 2024 to the present"

Id.

Following an agreed upon extension of the production deadline, Defendant served his initial responses to the First Discovery Set on June 9, 2025. *Id.* at ¶ 4, Ex. B. That "production" was immensely deficient and did not provide substantive responses to at least 33 discovery requests, including the requests listed above asking for Defendant's social media posts, emails, text messages, and other documents concerning various categories of City business. *Id.* Instead, Defendant raised a blanket objection to these requests, claiming they violate his "right to privacy," impose an undue burden and expense, and seek irrelevant evidence. *Id.* Based on these objections, **Defendant did not produce a single responsive record**. *Id.* It is also worth noting that Defendant did not raise any objections based on a supposed "right of association" at this time. *Id.*

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C. Up Until Now, Defendant has Never Proposed a Protective Order Requiring Defendant to Produce Requested Documents to the City as Part of Discovery.

Although the parties have maintained an open line of communication, Defendant has never clearly expressed any willingness to produce responsive records to the City as part of discovery. To be clear, prior to this motion, counsel for Defendant has never proposed a protective order that would allow the City to receive and review the records that it has requested from Defendant.

Counsel for Defendant first inquired about a protective order on June 9, 2025. *Id.* at ¶ 5, Ex. C. At that time, counsel for Defendant sent an email to counsel for the City stating, in part:

> I would like to know if you would be willing to stipulate to a Protective Order **which would not require Mr. Merkel to answer or respond until after the July 18 hearing** [.]
>
> ...
>
> I also propose a Protective Order which will prevent disclosure of Mr. Merkel's private electronic communications from becoming public records until after the court can review the communications *in camera* to determine if they are "public records[.]"

Id.

Counsel for the City interpreted this proposal as a request to (1) shield Defendant from having to respond to the City's discovery requests and (2) prevent the City from disclosing any responses to the public. *Id.* The City rejected this proposal simply because it needs to obtain the requested records from Defendant in order to determine whether those records should have been (and need to be) produced in response to PRA requests. *Id.* at ¶ 6. What is more, the parties are in no position to obligate the Court to conduct an *in camera* review of hundreds to potentially over one thousand pages of documents. *Id.*

On June 30, 2025, counsel for the parties held a CR 26 conference. *Id.* at ¶ 7. Aside from a few minor concessions, counsel for Defendant stood on his Defendant's objections to virtually every single one of the City's discovery requests. *Id.* In doing so, counsel for Defendant made it clear that Defendant had no intention of responding to at least 33 discovery requests, including the requests asking for Defendant's communications **concerning City business**. *Id.*

Immediately after the CR 26 conference, counsel for Defendant sent an email to counsel

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for the City confirming the position that Defendant "objects to the disclosure of his private electronic communications." *Id.* at ¶ 8, Ex. D. At the same time, Counsel for Defendant proposed the same sweeping terms of a protective order that would effectively shield Defendant from any production to the City as part of discovery:

> I will file a CR 26(c) Motion For Protective Order for [sic] **protect Mr. Merkel from disclosing to the City of SV** his private personal communications and his political communications, or in the alternative, a protective order prevent [sic] the City from disclosing in response to a public records request any such materials until such time the Court may conduct an *in camera* inspection to determine what, if any of it, meets the definition of "public records"…

Id.

Once again, the City rejected this proposal because such a protective order would prevent the City from reviewing the records that it has requested and advancing this case. *Id.* at ¶ 9.

On July 1, 2025, Defendant produced his First Supplemental Answers, Responses, and Objections to the First Discovery Set. *Id.* at ¶ 10, Ex. E. As part of that "supplemental production," Defendant continued to refuse to provide any records in response to the City's requests for communications with third parties concerning City business. *Id.* On July 2, 2025, counsel for Defendant sent another email to counsel for the City clarifying that "**Mr. Merkel will not provide the City with data for any of his private electronic communications**." *Id.* at ¶ 11, Ex. F.

On July 7, 2025, Defendant filed this motion seeking a protection order. Based on the City's review of Defendant's filings—namely, the proposed Protective Order—it is not clear whether Defendant is willing to produce records to the City as part of discovery. *Id.* at ¶ 12. Accordingly, on July 10, 2025, counsel for the City sent an email to counsel for Defendant seeking clarification and offering a solution to this discovery dispute. *Id.* Specifically, counsel for the City stated:

> **I believe there is some confusion between the relief you are seeking and what has been discussed between us**. Based on your email below and on our discussion at the CR 26 conference, **I was under the impression that Mr. Merkel is refusing to produce his emails, text messages, and notes regarding city business in discovery in any fashion**. **This was what we discussed at our conference**, and what you've stated below. However, your proposed order seems more limited in that you only seek protection from releasing these documents to members of the public in response to public records requests, and possibly some protections for

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handling these documents throughout the case. Please correct me if I am wrong.

> If Mr. Merkel produces these records in discovery (i.e. ROG Nos. 19 -21, 24 and RFP Nos. 21-28), the City will not disclose the records outside the scope of this litigation until there is a court order or agreement between the parties permitting such disclosure. **The City is also willing to enter into a standard protective order governing the use of any confidential information that is exchanged between the parties**.

Id. at ¶ 13, Ex. G.

In response to these good faith attempts to seek clarification and a potential solution, counsel for Defendant provided the following one-line response: "**Reid, file your response**." *Id.* Now, the parties must move forward on a motion that could and should have been easily resolved.

III. ARGUMENT

A. Under the Relevant Civil Rules, the City is Entitled to the Discovery of Defendant's Communications with Third Parties Concerning City Business.

Washington's Civil Rules permit broad discovery. Buschman v. New Holland Div. of Sperry Rand Corp., 83 Wn.2d 429, 434 (1974); CR 33, 34. "CR 26(b)(1) allows a broad scope of discovery, the only restrictions being that the matter must be relevant and not privileged." Rhinehart v. Seattle Times Co., 98 Wn. 2d 226, 232, 654 P.2d 673 (1982), aff'd, 104 S. Ct. 2199 (1984). "Private affairs" objections are not a "privilege" within the meaning of CR 26(b)(1). See T.S. v. Boy Scouts of Am., 157 Wn. 2d 416, 431, 138 P.3d 1053 (2006).

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. While it is within the court's discretion to narrow discovery, "it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit." Neighborhood All. of Spokane Cnty. v. Spokane Cnty., 172 Wn.2d 702, 717, 261 P.3d 119 (2011).

Here, Defendant's communications **with third parties concerning City business** are plainly relevant, and they are not subject to any privilege within the meaning of CR 26(b)(1). Indeed, they are the core of this entire lawsuit. The City filed this lawsuit to ensure its compliance

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with the PRA and its Governance Manual after receiving multiple PRA requests for Defendant's communication (those PRA requests are still outstanding). To that end, the City has specifically tailored its discovery requests to mirror the information sought in those formal PRA requests. Clearly, that information goes to the heart of this case. Indeed, those records will have a tendency to make a final determination of whether Defendant is wrongfully withholding records that are subject to disclosure under the PRA.

The bottom line: the City needs the requested information from Defendant to determine its own compliance, as well as Defendant's present and future compliance, with the PRA and its Governance Manual. For these reasons, Defendant's communications with third parties concerning City business are plainly relevant and subject to discovery in this case.

B. Defendant's First Amendment Privacy Objections are Baseless Because the City Has Only Requested the Production of Defendant's "Public" Communications.

Defendant's "right to privacy" and "privacy in association"[1] objections are inapplicable to the City's discovery requests. Defendant's communications **with third parties** concerning **City business** are inherently public in substance and in form. Thus, there are no legitimate First Amendment implications. Nevertheless, to the extent the Snedigar three-part test applies (it does not), the City can easily satisfy its burden and establish a compelling interest in production.

As a practical matter, by limiting the scope of discovery to Defendant's communications concerning City business (*i.e.*, "concerning the Mayor, City Manager, other Councilmembers, and/or the City Attorney," "concerning the City of Spokane Valley's actions, initiatives, proposals, resolutions, spending, and/or councilmember meetings," and "concerning or containing citizen polls and/or surveys conducted by you"), the City has ensured that it is only seeking "public records"—and not "private communications." See Nissen v. Pierce Cnty., 183 Wn.2d 863, 874,

[1] Significantly, Defendant did not raise any "privacy in association" objections until serving his supplemental responses on July 1, 2025—after 30 days and the initial June 9, 2025 production deadline. In Washington, **objections that are not timely asserted are waived**: "[a] waiver of the right to object or of a protective order may result from a failure timely to respond or object [to discovery requests]." Rhinehart v. Seattle Times Co., 51 Wn. App. 561, 568, 754 P.2d 1243 (1988). The Court should disregard the "privacy in association" objections because they were not asserted in a timely manner and were therefore waived.

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357 P.3d 45 (2015) ("Under the PRA, a 'public record' is any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."). Consequently, there can be no privacy concerns when the records at issue are "public records." Moreover, **Defendant cannot possibly have any legitimate privacy concerns because these communications involve third parties**.

Moreover, Defendant's First Amendment privacy objections are a complete misapplication of the right of association and the Eugster v. City of Spokane, 121 Wn. App. 799, 91 P.3d 117 (2004). As a threshold matter, the right of association typically applies to "**groups organized for a political or social purpose**." Id. at 808 (emphasis added). Defendant has not identified any political or social groups that would be harmed by these discovery requests, aside from his "friends" and "political supporters." He has also not provided any authority demonstrating that these protections individuals—let alone an elected public official.

The notion that the right of associations only applies to "groups" is consistent with the Eugster court's determination that only the following types of discovery requests implicate the First Amendment: "membership lists," "donation records," "minutes of meetings," "financial records," "documents and correspondence regarding political activities," "identities of their members and the details of all of their activities," and "contributions to political candidates and political action committees." Id. at 808-09. Critically, the City has not requested anything remotely close to these types of records. It bears repeating that the City is only seeking Defendant's communications with **third parties concerning City business**.

Ultimately, the facts of this case are eerily similar to those in Wilkinson v. FBI, 111 F.R.D. 432 (C.D. Cal 1986), a case analyzed by the Washington Supreme Court in the landmark decision, Snedigar v. Hoddersen, 114 W.2d 153, 786 P.2d 781 (1990). In Wilkinson, a civil rights activist attempted to assert the right of association as a blanket objection to the discovery of 240 boxes of documents, tapes, and film. 111 F.R.D. at 436. The Central District of California swiftly rejected the activist's objections holding that he had not made the requisite showing that "the information

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sought would impair **the group's** associational activities." Id. at 437.

Here, Defendant is taking the same flawed approach as the activist in Wilkinson. Indeed, Defendant has asserted a blanket "right of association" objection to substantially all of the City's requests for communications concerning City business. However, he has not made the requisite showing that his communications (*e.g.,* those "concerning the Mayor, City Manager, other Councilmembers, and/or the City Attorney") could cause harm to his rights. Instead, Defendant simply advances his self-serving interpretations of various unrelated and uncorroborated incidents that he views as "harassment." Defendant has failed to substantiate the vast majority of the supposed harm he claims could result from simply producing the requested documents to the City.

Nevertheless, even if Defendant could show a probability that the requested information would harm his First Amendment rights (he cannot and has not), the City can easily satisfy its burden to establish that (1) the requested information is relevant and material and (2) the City has not been able to obtain the requested information by other means. As mentioned multiple times, Defendant's communications with third parties concerning City business are the subject of multiple PRA requests that the City has received. This case is entirely about those PRA requests and the City's ongoing efforts to comply with the PRA by responding to those requests. Therefore, the information sought by the City (*i.e.,* the information contained in PRA requests) is highly relevant and material in this case. Furthermore, the City has gone through painstaking efforts—including an independent investigation and hearing examiner's decision—to try to obtain this information, which is in Defendant's exclusive control. The only reason the City filed this lawsuit is because it has no other means of obtaining these records. Therefore, the City can easily satisfy its burden under the Snedigar three-part test.

In the end, Defendant's "right of association" objections have no legal merit whatsoever. The privacy protections afforded under the First Amendment simply do not apply to the information sought by the City, which can only be interpreted as "public records." Moreover, even if the First Amendment was implicated by the circumstances of this case, the City has a compelling governmental interest to ensure compliance with the PRA and its Governance Manual.

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C. The City is Agreeable to a Standard Protective Order that Requires Discovery Production and Prevents Public Disclosure Until this Lawsuit is Resolved.

Despite the shortcomings with Defendant's First Amendment objections, the City is agreeable to the entry of a standard protective order that (1) requires Defendant to produce the requested records to the City as part of discovery and (2) prohibits the City from disclosing those records to the public until such a disclosure is ordered by the Court or agreed upon by the parties.

It is still unclear to the City whether Defendant is willing to produce records to the City as part of discovery. Prior to reviewing Defendant's motion and proposed Protective Order, the City was under the impression that Defendant was refusing to produce any of his communications as part of discovery. Indeed, that was the position taken by Defendant in his initial and supplemental production, and it was the position articulated by counsel for Defendant before, during, and after the parties' CR 26 conference.[2] However, after reviewing the proposed Protective Order filed with this motion, counsel for the City sent an email to counsel for Defendant seeking clarification and a solution to this dispute. Rather than participate in a good faith discussion or offer any clarification, counsel for Defendant curtly directed: "**file your response**."

The City nevertheless remains agreeable to the entry of a standard protective order requiring Defendant to produce all requested records to the City as part of discovery and prohibiting the City from disclosing those records to the public until and in accordance with the Court's ultimate resolution of the City's claims. That is reasonable. The reality is that the parties may be in agreement as to these terms, however, Defendant apparently prefers to waste the Court's time and resources.

D. Defendant's Request for Attorney's Fees is Wholly Improper and Unjustified.

Defendant's request for attorney fees under CR 37 is an egregious request, particularly in light of the fact that counsel for Defendant has refused to provide any clarification regarding the relief sought by Defendant on this motion. Based on this alone, the City is entirely justified in

[2] To the extent counsel for Defendant is taking a new position on this motion, that position has never been discussed with the City and therefore Defendant has failed to satisfy the meet and confer requirements of CR 26.

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opposing the proposed Protective Order. Once more, prior to this motion, Defendant only conveyed the position that he was refusing to produce records to the City as part of discovery. It is unclear to the City whether Defendant's position has changed. To the extent Defendant's position has changed, Defendant never shared that information and clarification with the City. Consequently, the circumstances come nowhere near justifying an award of fees.

IV. CONCLUSION

Based on the foregoing, the City respectfully requests that the Court deny Defendant's Motion for Protective Order to Temporarily Stay Discovery. The City also requests that the Court deny Defendant's request for attorney's fees pursuant to CR 37.

DATED this 11th day of July, 2025.

LUKINS & ANNIS, P.S.

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July, 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
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Attorney for Defendant

- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
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KIRSTEN PRICE, Legal Assistant

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