

## CITY OF SPOKANE VALLEY HEARING EXAMINER

IN RE:

### Appeal of Councilmember Albert Merkel,

File No.: APP-2024-0001

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, DECISION, AND RECOMMENDED  
CORRECTIVE ACTION.

## **I. PRELIMINARY STATEMENTS**

- 1.1. At the conclusion of the October 24, 2024 open record public hearing (hereinafter "Hearing") the investigator asked if the Hearing Examiner would allow the parties to submit proposed Findings of Fact, Conclusions of Law, Decision and Recommended Sanctions as part of their post filing submissions. Mr. Merkel did not state an objection. The Hearing Examiner indicated that the parties were free to submit proposed Findings of Fact, Conclusions of Law, Decision, and Sanction with their post-hearing filings. The Hearing Examiner indicated that the Hearing Examiner was not required to make any of the proposed findings or conclusions or decision or sanctions.
- 1.2. The Investigator did submit proposed Findings of Fact, Conclusions of Law, Decision, and "Corrective Action". Mr. Merkel did not submit any proposed Findings, Conclusions, Decision, or Corrective Action.
- 1.3. The Investigator submitted a Motion that the Hearing Examiner adopt all of the Findings and Conclusions set forth in the Investigator's post-hearing submission. Mr. Merkel objected to the Hearing Examiner adopting these proposed Findings of Fact,

Conclusions of Law, Decision, and Corrective Action. The Hearing Examiner indicated that he would address this Motion in his decision.

1.4. The Hearing Examiner denies the Investigator's Motion. However, as the parties will see from this decision, the Hearing Examiner has liberally adopted most of the proposed Findings' of Fact and Conclusions of Law that have been submitted by the Investigator. This was done after the Hearing Examiner's consideration of all of the evidence submitted by the parties in this matter, and the Hearing Examiner's decision to make a finding that a violation of the Spokane Valley Conduct Standards and Social Media Policy did occur.

## II. FINDINGS OF FACT

2.1. On or about June 11, 2024, Councilmember Jessica Yeager of the City of Spokane Valley City Council submitted a formal complaint (“complaint”) to the City Manager of the City of Spokane Valley, alleging Councilmember Albert Merkel violated the Council Conduct Standards as identified in Chapter 5 of the Governance Manual adopted by the City Council of the City of Spokane Valley. (Ex. I-1) Specifically, Councilmember Yeager complained that Councilmember Merkel violated the Council Social Media Policy (Appendix H to the Governance Manual). (Ex. I-1)

2.2. On or about August 1, 2024, Councilmember Yaeger submitted a supplemental formal complaint to the City Manager clarifying and supplementing her allegations, contending that Councilmember Merkel had engaged in conduct constituting violations of RCW 42.56 (the Washington Public Records Act) and RCW 40.14 in violation of the Council Conduct Standards. (Ex. I-1)

2.3. Pursuant to Chapter 5 of the Governance Manual, the City of Spokane Valley was required to retain an independent investigator and did retain Rebecca Dean, Independent Investigator, to investigate the alleged violations of the Council Conduct Standards and the Social Media Policy and to issue a report finding whether or not the conduct alleged occurred and whether such conduct violated Council Conduct Standards.

1       2.4. Rebecca Dean is an attorney licensed to practice in the states of Washington, Oregon,  
2       and California. Investigator Dean achieved high academic honors in her  
3       undergraduate and law school training and has years of relevant experience in civil  
4       disputes in litigation and in providing advice and recommendations to clients. Ms.  
5       Dean has, since 2006, exclusively engaged in an investigation practice and has been  
6       retained by a variety of governmental agencies and private businesses to conduct  
7       investigations involving workplace conduct, ethical standards, policies, and rules and  
8       regulations disputes to include, where appropriate, witness interviews, document  
9       reviews, policy reviews and analysis, legal research, reviews of local and national  
10       standards or guidelines governing, *inter alia*, governmental agencies, and private  
11       businesses. Ms. Dean's experience includes making factual and legal determinations  
12       regarding the subject matter of the investigation to include whether policies,  
13       procedures, conduct guidelines, ethical prohibitions, laws or regulations have been  
14       violated and arriving at factual findings and legal conclusions as to the effects of  
15       determined conduct pursuant to the scope of the investigations that she has been  
16       charged to undertake.

17       2.5. Rebecca Dean is a resident of King County, Washington and has no social  
18       relationships with any City of Spokane Valley employee or any member of the City of  
19       Spokane Valley City Council.

20       2.6. In the conduct of her investigation, Rebecca Dean was provided and reviewed over  
21       350 screenshots taken of Councilmember Merkel's Nextdoor social media account, the  
22       contents of which were the basis of Councilmember Yaeger's complaint. (Merkel Pre-  
23       Hearing Brief, Attachment 1, RCA to City of Spokane Valley 9/24/2024, p. 1)

24       2.7. As part of her investigation, Rebecca Dean reviewed the City of Spokane Valley  
25       Governance Manual, the Association of Washington Cities' "Guidelines for Elected  
     and Appointed Officials Using Social Media," the Municipal Research and Services  
     Center Guidance for Local Governments On Elected Official Social Media Accounts  
     and Public Records Act Compliance, and the Washington State Archivist's Records  
     Management Guidelines for Local Government Agencies. Ms. Dean conducted  
     independent legal research into RCW 40.14, Preservation and Destruction of Public  
     Records; RCW 42.56, the Public Records Act, and relevant case authorities construing

1 the statutes. The legal research conducted by Ms. Dean included review and analysis  
2 of the following applicable statutes and judicial authorities:

3 2.7.1. Chapters RCW 40.14 et seq. and RCW 42.56, et seq.;

4 2.7.2. *West v City of Puyallup*, 2 Wn.App.2nd 586, 410 P.3d 1197 (2018);

5 2.7.3. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015);

6 2.7.4. *Neighborhood Alliance of Spokane County v. County of Spokane*,  
172 Wn.2d 7021, 261 P.3d 119 (2011); and

7 2.7.5. *West v. Clark County*, No. 52843-6-II, Wa. Ct. App., January 20,  
2021 (Unpublished).

8 2.8. Following the completion of her investigation, research, and analysis, Ms. Dean  
9 prepared an investigative report dated September 3, 2024, regarding the Yeager  
10 complaints. The report, including Exhibits I-2 through I-15, were admitted into  
11 evidence at the hearing as Exhibit I-A and Exhibits I-2 through I-15.

12 2.9. An open record public hearing after due legal notice was held on October 24, 2024.

13 2.10. Appearing for the investigator were Rebecca Dean and Jim King.

14 2.11. Appearing for Councilman Albert Merkel was Albert Merkel.

15 2.12. The following exhibits were admitted into the record:

16 2.12.6. Investigator:

17 2.12.6.1. Exhibit I-A Investigation Report of Independent Investigator;

18 2.12.6.2. Exhibit I-1 Complaints of Jessica Yaeger of June 11 2024 and August 1,  
2024;

19 2.12.6.3. Exhibit I-2 Merkel Nextdoor Post, dated February 29, 2024;

20 2.12.6.4. Exhibit I-3 Merkel Nextdoor Posts, dated April 16, 2024 and April 23,  
2024;

21 2.12.6.5. Exhibit I-4 Merkel Nextdoor Posts, dated April, and May, 2024;

22 2.12.6.6. Exhibit I-5 Merkel Nextdoor Posts, dated March, April, and May, 2024;

23 2.12.6.7. Exhibit I-6 Merkel Nextdoor Posts, dated May, June, and July, 2024;

24 2.12.6.8. Exhibit I-7 Merkel Nextdoor Posts, dated March, 2024;

25 2.12.6.9. Exhibit I-8 Merkel Nextdoor Posts, dated June, 2024;

2.12.6.10. Exhibit I-9 Merkel Nextdoor Posts, dated June 29, 2024;

2.12.6.11. Exhibit I-10 Merkel Nextdoor Posts, dated June 14, 2024;

1 2.12.6.12. Exhibit I-11 Merkel Nextoor Posts, dated March and June, 2024;  
2 2.12.6.13. Exhibit I-12 Merkel Nextdoor Posts, dated May 5, 2024;  
3 2.12.6.14. Exhibit I-13 Merkel Nextoor Posts, dated April, 2024;  
4 2.12.6.15. Exhibit I-14 Merkel Nissen Declaration, dated April 2, 2024;  
5 2.12.6.16. Exhibit I-15 Jessica Yaeger Nextdoor Posts, dated May 10, 2024;  
6 2.12.6.17. Exhibit I-16 City of Spokane Valley Governance Manual Chapter  
5;  
7 2.12.6.18. Exhibit I-17 City of Spokane Valley Governance Manual  
Appendix H;  
8 2.12.6.19. Exhibit I-18 City of Spokane Valley Appendix B, Rules of  
9 Procedure for Proceedings Before the Hearing Examiner of the City  
10 of Spokane Valley Washington, Chapters I & IV;  
11 2.12.6.20. Exhibit I-19 Curriculum Vitae of Independent Investigator;  
12 2.12.6.21. Exhibit I-20 *Nissen v. Pierce County*, 183 Wash. 2d 863 (2015);  
13 2.12.6.22. Exhibit I-21 *West v. Vermillion*, 196 Wn. App 627 (2016);  
14 2.12.6.23. Exhibit I-22 *West v. City of Puyallup*, 2 Wn. App 2d 586 (2018);  
15 2.12.6.24. Exhibit I-23 *West v. Clark County*, Court of Appeals No. 52843-  
6-II (unpublished);  
16 2.12.6.25. Exhibit I-24 Investigator Hearing Memorandum;  
17 2.12.6.26. Exhibit I-25 Investigator Exhibit Lists;  
18 2.12.6.27. Exhibit I-26 Investigator Witness List;  
19 2.12.6.28. Exhibit I-27 Errata to Hearing Memorandum (Exhibit I-24);  
20 2.12.6.29. Exhibit I-28 Investigator Motion in Limine;  
21 2.12.6.30. Exhibit I-29 Final Argument of Investigator;  
22 2.12.6.31. Exhibit I-30 Investigator's Proposed Findings of Fact and  
23 Conclusions of Law;  
24 2.12.6.32. Exhibit I-31 Investigator November 8, 2024 Letter to the Hearing  
25 Examiner;  
2.12.6.33. Exhibit I-32 Investigator Motion for Acceptance of Findings of  
Fact and Conclusions of Law;

2.12.6.34. Exhibit I-33      Declaration of James Keene in support of  
Independent Investigator's Motion for Acceptance of  
Findings of Fact and Conclusions of Law;

### 2.12.6.35. Exhibit I-34      Independent Investigator's Rebuttal Argument.

#### 2.12.7. Exhibits from Appellant:

#### 2.12.7.1. Exhibit A-1-15 set forth in appellants exhibit list (Exhibit A 19)

### 2.12.7.2. Exhibit A-16 Appellant Brief;

### 2.12.7.3. Exhibit A-17 Letter to John Hohman dated September 27, 2024;

2.12.7.4. Exhibit A-18 September 24, 2024 City of Spokane Valley

## Requests for City Council Action (with Exhibits);

### 2.12.7.5. Exhibit A-19 Appellant Exhibit and Witness Lists'

2.12.7.6. Exhibit A-20      MRSC "Election Season Tips and Reminders" dated August 16, 2024;

2.13. The Hearing Examiner also admitted into the record the Hearing Examiner's Order on Pre-Hearing Conference dated October 18, 2024.

2.14. Testifying for the Investigator was the investigator herself, Rebecca Dean. Ms. Dean's testimony is consistent with her report and the Findings of Fact and Conclusions of Law set forth in this decision.

2.15. Investigator attorney, Jim King, also provided legal argument on behalf of the investigator.

2.16. Testifying on behalf of the Appellant were Albert Merkel and Dan Allison.

2.17. The Hearing Examiner finds that the investigation conducted herein by Ms. Dean was performed thoroughly, competently, and in a fair and impartial manner by a highly qualified professional with significant investigative experience in discovering and analyzing facts, reviewing and interpreting documents, and researching and applying guidelines and recommendations, as well as in the interpretation and application of applicable rules, regulations, statutes, and judicial opinions.

2.18. The Hearing Examiner further finds that given the quality, depth, and breadth of the experience and professionalism of the Investigator, the thoroughness and comprehensiveness of the Investigator's work and report in this matter, that the

Investigator's report and the Investigator's analysis, opinions, and testimony are entitled to great weight by the Hearing Examiner in the adjudication of this matter.

2.19. The impartiality, accuracy, and fairness of the Independent Investigator in her report have not been challenged by competent impeachment, a showing of bias or prejudice, or a showing by way of competent expert testimony that the Investigator's factual conclusions, analyses, and opinions are inadequate, inaccurate, or insufficiently supported.

2.20. The Hearing Examiner also heard testimony from Councilmember Merkel and from Dan Allison, a witness called by Mr. Merkel. The Hearing Examiner finds that Mr. Merkel provided no competent expert legal analysis to support his conclusion that none of his questioned social media posts on Nextdoor were “the conduct of City business,” “in furtherance of the City Business,” “public records,” as that term is defined in RCW 42.56.010(3) and Washington case law, or a violation of the City of Spokane Valley Social Media Policy. However, the Hearing Examiner also finds that Mr. Merkel sincerely believes that his posts on Nextdoor were not a violation of the City of Spokane Valley Social Media Policy.

2.21. The Examiner was not convinced by Mr. Merkel's testimony, legal analysis or supporting rationale. Mr. Merkel claimed *Lindke v. Freed*, 601 U.S. 187, 144 S. Ct. 756, 218 L.Ed.2d 121 (2024) was dispositive of the charges that he had violated the Social Media Policy and/or the Governance Manual. But *Lindke* has nothing to do with Washington state law governing public records definitions, retention, or retrieval. Instead, *Lindke* concerned a City Manager's potential personal liability under 42 USC §1983 for violating third parties' First Amendment rights under the U.S. Constitution. The City Manager (Freed) had deleted, and then ultimately blocked, a follower (Lindke) from commenting on the City Manager's personal Facebook page, which was otherwise open to the public. The follower sued under §1983, alleging that the City Manager violated his First Amendment rights. The Supreme Court held that the public official who prevents someone from commenting on the official's social media page only engages in "state action" under the color of law for purposes of 42 USC §1983 if they (1) possessed actual authority to speak on the public entity's behalf and (2) purported to exercise that authority in the relevant social media posts. Merkel cited

*Lindke* for the proposition that the use of a disclaimer means that his posts could not constitute conducting City business because he employed a disclaimer. The dicta in *Lindke* to the effect that a social media user's disclaimer creates a rebuttable presumption that posts were personal for First Amendment purposes is not applicable to whether a councilmember's posts violate the City's Governance Manual or constitute a public record under the Washington Public Records Act.

2.22. Witness Dan Allison offered no testimony specifically related to the posts that were the subject of the Investigator's evaluation or as to the requirements of the City of Spokane Valley Social Media Policy, the Washington Public Records Act, or the Governance Manual.

2.23. The Hearing Examiner finds that some of Councilmember Merkel's personal Nextdoor posts (including some of those admitted into evidence and/or were the subject of review by the Investigator), which were the subject of the (a) investigation, (b) Investigator's report, and (c) the testimony at hearing, are posts that may relate to the conduct of city government and/or city business and/or the performance of Mr. Merkel's office, and/or in furtherance of the City's business.

2.24. The Hearing Examiner finds that Councilmember Merkel used his Nextdoor account to conduct business relating to the City—even if he was not speaking for the entire City Council (which he was not). For example, Councilmember Merkel offered to assist his Nextdoor followers with city business, including opposition to a proposed application for a Conditional Use Permit. Councilmember Merkel used his Nextdoor account to conduct polling of potential voters and constituents on City governance issues and proposals that Mr. Merkel planned to present for City Council consideration. Moreover, Mr. Merkel discussed the results from his Nextdoor account of his polling in public meetings to include a Nextdoor survey conducted by Councilmember Merkel on Nextdoor about support or opposition to a street improvement project on Sprague Avenue.

2.25. The Hearing Examiner further finds that the Nextdoor posts by Councilmember Merkel have been edited in accord with the Investigator's unrefuted testimony and as demonstrated in Exhibits I-2 through I-5. Similarly, posts of followers on

1 Councilmember Merkel's Nextdoor account, including posts that relate to the conduct  
2 of City government or City business, have been edited.

3 2.26. Councilmember Merkel has regularly posted on his Nextdoor account about topics  
4 pertaining to the governance and policies of the City of Spokane Valley and has  
5 consistently communicated on his Nextdoor account with followers concerning a wide  
6 variety of City governance matters and/or City business.

7 2.27. Councilmember Merkel has posted on his Nextdoor account summaries of and  
8 commentary about City Council debates, including posts concerning council  
9 deliberations in executive session. (Exhibits 2, 3).

10 2.28. Councilmember Merkel has regularly posted on his Nextdoor accounts complaints  
11 and criticisms of other Councilmembers and as to the Mayor of the City of Spokane  
12 Valley, as well as Councilmembers Higgins and Yaeger, claiming that they were  
13 engaged in efforts to silence Merkel, and that the same councilmembers had failed to  
14 engage, in their official capacities, with City residents. Mr. Merkel, at the same time,  
15 commented on his own level of engagement with the constituents and followers  
16 (Exhibit I-4).

17 2.29. Councilmember Merkel has commented and posted on Nextdoor about investigations  
18 into Merkel's behavior and Merkel's formal complaints against Councilmember  
19 Higgins regarding Higgins' alleged behavior during council debate. (Exhibit I-4, page  
20 6 and Exhibit I-5).

21 2.30. Councilmember Merkel has posted on his Nextdoor account with statements of  
22 opinions replete with details, assertions, and allegations about his position as a City  
23 Councilmember and the positions of other City Councilmembers on the merits of  
24 policy issues considered by the City Council for approval or rejection. (Exhibit I-2;  
25 Exhibit I-3 at pp. 2 -5; Exhibit I-4 at pp. 2-9 & 13-16; Exhibit I-5 at pp. 7-14).

22 2.31. Councilmember Merkel used his personal social media platform on Nextdoor to make  
23 promises to followers to address questions about specific City issues to include  
24 requests to the follower on his social media account to send an email to  
25 Councilmember Merkel's City email address (Exhibit I-6).

22 2.32. Councilmember Merkel used his Nextdoor social media account to survey his  
23 followers about the Sprague Avenue development project and reported on the results

1 of this survey at a Council meeting in his official capacity in an apparent effort to  
2 shape or steer policy to a position that Merkel approved (Exhibit I-7).

3 2.33. Councilmember Merkel has posted on social media soliciting comments about his  
4 budget proposal, and he solicited follower comments about his proposal for addressing  
5 issues associated with persons experiencing homelessness in the City of Spokane  
6 Valley. (Exhibit I-9). Councilmember Merkel solicited follower comments concerning  
7 his proposed budget with the intent that the comments would inform his presentations  
within his official capacity as a city Councilmember to the city council.

8 2.34. Councilmember Merkel has claimed that the Washington Public Records Act does  
9 not apply to his personal account as long as there is a disclaimer which states that he  
10 is not acting for or on behalf of the City of Spokane Valley or the City of Spokane  
11 Valley City Council. Merkel claims since he does not have legal power to speak for  
12 the Council as a whole, none of his postings can be deemed to be public records, or in  
13 furtherance of the City's business, or the conduct of the City's business. Mr. Merkel's  
assertion is incorrect and inconsistent with Washington law.

14 2.35. Councilmember Merkel does not claim that the Nextdoor posts were not made in his  
15 capacity as a member of the City Council. Instead, he argues that he is not bound by  
16 the requirements of the Governance Manual's Social Media Policy or the Public  
17 Records Act because he was not directed to make the posts and does not have authority  
18 to bind the City or Council by his posts.

19 2.36. The subject Nextdoor posts admitted into evidence and as reviewed by the  
20 Investigator and the Hearing Examiner appear to be posted by Mr. Merkel in his  
21 capacity as a member of the City Council and are Mr. Merkel's view of the proper  
22 manner to further City business and are posted in order to advance that viewpoint.

23 2.37. Merkel does not claim that the Nextdoor posts have nothing to do with City business,  
24 City policy, decisions of the City Council with which he disagrees, investigations by  
25 the City of his behavior which he decries, or because of political differences with other  
members of the City Council with whom he officially disagrees.

2.38. Mr. Merkel's Nextdoor social media posts appear to be (a) made in furtherance of  
Mr. Merkel's viewpoint of what City's business and governance should be and (b)

1 posted as a mechanism to cause his positions to be adopted in furtherance of the City's  
2 business and its government, and (c) posted in his Councilmember capacity.

3 2.39. On April 2, 2024, the City provided a declaration (Investigator Exhibit I-14) to  
4 Councilmember Merkel. He was requested, through the language in the declaration, to  
5 confirm that he had no responsive posts or messages on his Nextdoor account  
6 regarding City and/or council business for the period of January 1, 2024 through  
7 March 21, 2024, or provide any responsive records if he did. Councilmember, Merkel,  
8 despite the *Nissen* requirements that an affidavit or declaration must be made in good  
9 faith and must contain reasonably detailed nonconclusory facts attesting to the nature  
10 and extent of his search, redacted the proffered declaration, and rather than confirm  
11 that he had no social media posts regarding City and/or Council business, simply  
12 changed the language on the declaration to state that none of his posts were public  
13 records and signed the declaration with that change. Councilmember Merkel's refusal  
14 to state under penalty of perjury that none of his Nextdoor posts dealt with City and/or  
15 Council business is a strong indication that he understood he had posted regarding City  
16 and/or Council business.

17 2.40. Following the completion of her investigation, the Investigator properly provided a  
18 written report to the City Manager that meets the requirements of the Governance  
19 Manual. The investigator likewise complied with the requirement to deliver without  
20 undue delay a copy of the Investigator's report to the Councilmember that was the  
21 subject of the investigation.

22 2.41. It is not necessary for the Hearing Examiner to enter a Finding of Fact or a Conclusion  
23 of Law that Mr. Merkel violated the Public Records Act. It is only necessary for the  
24 Hearing Examiner to determine whether Mr. Merkel violated the Social Media Policy.

25 2.42. The Hearing Examiner finds that Mr. Merkel violated the Council Conduct Standard  
having to do with social media utilization. The Hearing Examiner finds based upon  
the above Findings of Fact as well as the Conclusions of Law that Mr. Merkel had in  
fact violated the social media policy.

2.43. It is significant to the Hearing Examiner that it is not Mr. Merkel's public or private  
conversations that are subject to the Public Records Act. It is only public records that  
are subject to the Public Records Act. Mr. Merkel remains free to talk to anybody

1 about anything at any time, including discussions of City business and affairs. The  
2 issue is whether Mr. Merkel is free to publish posts in furtherance of City businesses  
3 and affairs on social media that are not on a platform that allows for the documents  
4 created to be stored and retrievable in the event of a public records request. That is the  
critical requirement in order to comply with the Social Media Policy

5 2.44. No Constitutional protected right of free speech is implicated by the City of Spokane  
6 Valley Social Media Policy for council members.

7 2.45. In violation of the Social Media Policy, Council Member Merkel refused to utilize  
8 the policy mandated platform that allows capture, storage, and retrieval of his posts on  
9 City business and affairs. This requirement is for a real financial risk to the City if the  
City is unable to comply with a public request for records.

10 2.46. Mr. Merkel also refused to provide in good faith and in the detail required, a detailed  
11 factual description of his posts when requested by the city in dealing with the request  
12 for records under the Public Records Act.

13 2.47. The City of Spokane Valley has lawfully enacted a Conduct Standard, the Social  
14 Media Policy, that allows the City access to social media posts published by council  
15 members so that those records may be produced in connection with public record  
16 request made to the city. This policy enables the City to fulfill its legal obligations  
under the Act and to mitigate risk of liability under the Act.

17 2.48. The Hearing Examiner finds that, based in the Investigator's report and the Hearing  
18 Examiner's review of all file materials, that Mr. Merkel violated the City of Spokane  
19 Valley Council Conduct Standards and Social Media Policy.

20 2.49. Any Conclusion of Law that is more correctly a Finding of Fact is hereby  
incorporated as such by this reference.

21 **III. CONCLUSIONS OF LAW**

22 Based on the foregoing Findings of Fact, the Hearing Examiner makes the following  
23 Conclusions of Law:

24 3.1. Mr. Merkel has violated The Governance Manual's (a) Appendix H, Section 3, p. 83,  
25 and (s) Chapter 5, §A(3) by posting on his personal Nextdoor account posts "that relate

1 to the conduct of City business or the performance of" Councilmember Merkel's  
2 office.

3 3.2. Pursuant to the Findings of Facts, Councilmember Merkel has violated Chapter 5, §A  
4 (3), (9) of the Governance Manual. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d  
5 45 (2015) imposes upon City-elected officials a duty to search, obtain, segregate, and  
6 produce posts made by such elected officials, which duty requires them to search  
7 allegedly personal social media accounts for documents that may constitute public  
8 records. If the official conducting the search contends that the documents contained  
9 on the personal device (or by extension, a social media account) are not public records,  
10 then the elected official has a legal duty to submit a declaration establishing a factual  
11 foundation to support the claim that the documents on the platform are not public  
12 records.

13 3.3. The conduct of Councilmember Merkel in failing to meet the good faith requirements  
14 of *Nissen* and in further failing to provide a factual foundation that there were no posts  
15 on his Nextdoor account that dealt with City or council business, violates both the  
16 letter and spirit of *Nissen* and constitutes a violation of the Governance Manual,  
17 Chapter 5(A)(9) in violation of Chapter 5, Section C (Governance Manual, p. 55).

18 3.4. Based on the Investigator's Report and testimony and the contents of the posts  
19 proffered and/or reviewed prior to April 2, 2024, Councilmember Merkel's signing of  
20 the declaration as drafted would have been an act of bad faith as well since he clearly  
21 posted on Nextdoor regarding City business prior to that time between January and  
22 March of 2024.

23 3.5. Councilmember Merkel has failed to establish that his defense of ultra vires is valid  
24 and that affirmative defense is dismissed.

25 3.6. Councilmember Merkel's defense attacking the processes by which the Investigator  
was selected and conducted her investigation is dismissed as meritless.

3.7. Councilmember Merkel's defense that the investigator was partial or biased is  
meritless and is dismissed.

3.8. Councilmember Merkel has failed to meet his burden of proof on his affirmative  
defense that his Nextdoor posts are available to the public and the City of Spokane

1 Valley and that defense is dismissed. Even if there were evidence that the posts were  
2 available to the City and all of the public, he still violated the Social Media Policy.

3 3.9. Councilmember Merkel's defense that he has not been provided due process fails. The  
4 essence of due process is notice of a hearing and the opportunity to be heard in  
5 connection with the subject matter of the hearing. Here, both notice and an opportunity  
6 to be heard have been provided to Councilmember Merkel who has willingly and fully  
7 participated in the due process, including instigating this appeal.

8 3.10. Councilmember Merkel's alleged defense that he made requests of the City for  
9 records, some of which were not provided, or that he did not have the right to subpoena  
10 witnesses for purposes of the hearing is beyond the scope of the authority provided to  
11 the Hearing Examiner under the City of Spokane Valley Municipal Code, Appendix  
12 B, Chapters I (Rules of General Applicability) and IV (Hearings on Council Conduct  
13 Standards Violation) under which the hearing must be conducted.

14 3.11. Councilmember Merkel failed to make any offer of proof at the hearing identifying  
15 what records he requested but supposedly did not receive or, most importantly, what  
16 said records would show in connection to the complaints of Councilmember Yeager  
17 and the Findings and Conclusions of the Investigator. Councilmember Merkel has  
18 further failed to show, through an offer of proof, what testimony would have been  
19 provided by witnesses compelled to testify under the power of subpoena that would  
20 have been probative of his defenses to the Investigator's findings, including Appendix  
21 H, the Councilmember Social Media Policy.

22 3.12. At the hearing in this matter, the only exhibits offered in support of the claims against  
23 Councilmember Merkel were the report and exhibits of Investigator Dean, which  
24 Councilmember Merkel has had since the report was prepared and submitted to him  
25 on September 4, 2024, and to which Councilmember Merkel had no evidentiary  
objection. The only witness called for the Investigator's case-in-chief was Investigator  
Dean who was made available for both direct and cross examination during the hearing  
held on October 24, 2024.

26 3.13. *Lindke v. Freed*, 601 U.S. 187, 144 S. Ct. 756, 218 L.Ed.2d 121 (2024) is not  
27 controlling in this case. The *Lindke* case has nothing to do with state statutes regarding  
28 public records or with Social Media policies adopted by State or municipal

1 governments. Instead, the *Lindke* case involved a claim under 42 USC, Section 1983,  
2 asserting that a city manager was subject to personal liability because the city manager  
3 had violated the plaintiff's 1<sup>st</sup> Amendment free speech rights by blocking the plaintiff  
4 from commenting on the city manager's personal social media account.

5 3.14. Justice Barrett in writing for the *Lindke* court, proclaimed that the "official's social  
6 media activity" would meet the state action requirement for pursuit of a Section 1983  
7 claim only if the public official possessed actual authority to speak on the City's behalf  
8 and was engaged in exercising that authority when he spoke on social media.

9 3.15. *Lindke* does not address whether a City Council's authority to adopt and enforce a  
10 policy requiring its elected members to make sure any social media posts regarding  
11 City business are posted on social media accounts that are archivable for purposes of  
12 the Washington Public Records Act. *Lindke* is likewise irrelevant to the determination  
13 of whether a record constitutes a "public record" under the Washington Public Records  
14 Act.

15 3.16. Mr. Merkel also claimed that the City Council concluded that his posts were not  
16 "public records" or subject to the Social Media Policy when they allegedly denied his  
17 request for City-funded legal representation in connection with this hearing. The only  
18 evidence Mr. Merkel offered is the request for Council action of 7/24/24 attached to  
19 Mr. Merkel's Pre-Hearing Brief. The request, however, concerned application of the  
20 Spokane Valley Municipal Code Ch. 2.70, which prohibits the City from paying for  
21 legal representation when the claim involves an action by an elected official contrary  
22 to adopted City policy without regard to whether the action was within or outside the  
23 scope of their office. Here, Mr. Merkel violated the City's Councilmember Social  
24 Media policy by conducting City business on his personal Nextdoor account. The  
25 Hearing The Hearing Examiner concludes that Mr. Merkel is therefore not entitled to  
City-funded legal representation. Contrary to his claim, the City Council concluded  
only that the allegations are that he violated City policy, and he was therefore not  
entitled to City-funded legal counsel.

3.17. The City of Spokane Valley Governance Manual ("Manual") provides as follows:

1           3.17.1. "As councilmembers of the City of Spokane Valley, we agree that the  
2           Governance Manual (Manual) outlines the rules by which we agree to adhere in  
3           order to successfully and efficiently conduct city business." (Manual, p. 3)

4           3.18. The Manual further provides:

5           3.18.2. The City acknowledges the importance of complying with the ... Public Records  
6           Act: "The people of this state do not yield their sovereignty to the agencies which  
7           serve them. The people, in delegating authority, do not give their public servants  
8           the right to decide what is good for the people to know and what is not good for  
9           them to know. The people insist on remaining informed so that they may retain  
control over the instruments they have created." RCW42.30.010, 42.56.030  
(Manual, p. 4)

10          3.19. Chapter 3 of the Manual (pp. 43-44A) addresses citizen contact and interactions  
11          outside of a council meeting. It provides as follows:

12          3.19.1. Social Media

13          3.19.1.1. "Councilmembers shall comply with the City Councilmember Social  
14          Media Policy which is attached hereto as Exhibit H and wholly incorporated  
herein." (Manual, p. 44A)

15          3.20. The duties of individual Councilmembers are set forth in the Manual (pp. 5-6). The  
16          duties, responsibilities and limitations of each Councilmember include:

17          3.20.1. "... Contact residents and businesses to gather feedback and ideas. The resulting  
18          information may be shared with staff or other Councilmembers individually, or  
19          with fewer than two simultaneously (but not serially), or with all Councilmembers  
at a Council meeting.

20          3.20.2. Studies internal and external written and documented information related to the  
21          government and administration of the city. ...

22          3.20.3. When acting in the capacity of Councilmember outside of Council meetings,  
23          communicates that any personal opinion is the opinion of the individual  
24          Councilmember and not that of the collective Council. Councilmember's freedom  
of speech is protected by the U.S. and Washington State Constitutions.  
25          Councilmembers may ... discuss city business in non-public meetings. No

permission is needed, nor is notice required to be given for such gathering.” (Manual, pp. 5-6)

3.21. Chapter 5 of the Manual provides as follows:

3.21.4. "In order to foster an environment of ethical and professional conduct by all Councilmembers, the Council has adopted the following process to be implemented in the event a Councilmember is alleged to have violated a provision of: ...

3.21.5. "(3) the Social Media Policy attached as Appendix H to this Governance Manual; ...

3.21.6. "(9) other applicable laws and/or regulations governing the conduct of the Councilmembers in their capacity as elected public officials. (Manual page 55A.) The previously provided provisions are part of the Council Conduct Standards. (Manual, p. 55B)

3.22. The Manual provides that:

3.22.7. "All Councilmembers must abide by the above-identified Council Conduct Standards. Any Councilmember alleged to have violated Council Conduct Standards is subject to the below enforcement provisions."

3.23. The Manual establishes in chapter 5 a procedure for enforcement of the Council Conduct Standards. (Manual, p. 55D)

3.24. The Council Conduct Standards are binding on Councilmember Albert Merkel. The Enforcement Procedure set forth in the Manual was appropriately followed after complaints that Councilmember Merkel had violated the Social Media Policy of the City of Spokane Valley were lodged by Councilmember Yaeger on or about June 11, 2024 and August 1, 2024.

3.25. The City Manager, in accordance with the Manual, upon receipt of the written complaints involving Councilmember Merkel promptly retained an independent third-party attorney, Rebecca Dean, to conduct an independent review and investigate the complaints of Councilmember Yaeger pursuant to the Governance Manual.

3.26. The retained attorney (referred to throughout this decision as Investigator) properly determined that Councilmember Yaeger's complaints alleged an actionable claim

against Councilmember Merkel pursuant to the Governance Manual, Chapter 5, Section (D)(2)(a).

3.27. The Investigator thereafter conducted a full and fair investigation of the allegations identified in the Yaeger complaints pursuant to the Governance Manual. The Investigator investigated the allegations in the complaints with a view toward determining whether, on a more probable than not basis, Councilmember Merkel violated Council Conduct Standards (Governance Manual, Chapter 5, § A & B (3), (9)).

3.28. The investigation conducted by Investigator Rebecca Dean complies with the requirements set forth in the Governance Manual.

3.29. Following the completion of her investigation, the Investigator properly provided a written report to the City Manager that meets the requirements of the Governance Manual. The investigator likewise complied with the requirement to deliver without undue delay a copy of the Investigator's report to the Councilmember that was the subject of the investigation.

3.30. The Investigator found, on a more probable than not basis, that Councilmember Merkel violated the Council Conduct Standards and the Social Media Policy. Councilmember Merkel timely delivered a request for hearing to the City Manager pursuant to the Governance Manual.

3.31. The actions of the City of Spokane Valley and the City Council in adopting the Governance Manual and the Conduct Standards, contained therein, and in formulating and adopting a policy and procedure providing due process to a Councilmember accused of violating the Council Conduct Standards, including the Social Media Policy, by providing for a hearing with notice pursuant to Appendix B of the Spokane Valley Municipal Code are valid exercises of the power and authority granted to Councilmembers of the City of Spokane Valley, and were adopted by the City Council in order to successfully and efficiently conduct City business.

3.32. The Governance Manual, including Appendix H and Chapter 5, is a valid, reasonable, and justified policy adopted by the City Council of the City of Spokane Valley, and is within the scope of authority possessed by the Council. Per RCW 35A.11.020, the Council has the authority to adopt policies it sees fit to regulate its own affairs. See

1 also *Nissen*, 183 Wn.2d at 887 (“Agencies are in the best position to implement  
2 policies that fulfill their obligations under the PRA yet also preserve the privacy rights  
3 of their employees. E-mails can be routed through agency servers, documents can be  
4 cached to agency-controlled cloud services, and instant messaging apps can store  
conversations.”)

5 3.33. Appendix H to the Governance Manual contains the Councilmember Social Media  
6 Policy.

7 3.33.1. In material part, Appendix H states as follows:

8 3.33.2. “Councilmembers may choose to create and maintain a Councilmember-  
9 specific social media account ... to communicate with constituents as part of their  
10 Councilmember role. When doing so, Councilmembers agree to the following  
11 guidelines: The requirements include that any social media platform selected by  
12 a councilmember must be verified by the city's IT manager as compatible with the  
13 city's social media archiving platform to assure that all content including posts  
14 and comments is archived for public records retention.” (Appendix H, Section 1)

15 3.34. Appendix H further requires any Councilmember creating or maintaining an official  
16 Councilmember-specific social media account to use the Councilmember's City of  
17 Spokane Valley email alias. (Appendix H, Section 2)

18 3.35. Appendix H further provides that the Councilmember-specific account must be  
19 verified as compatible with the City's social media archiving platform, Page Freezer,  
20 to ensure that all content (including posts and comments) is archived for public records  
21 retention. Councilmembers can make posts on their official councilmember-specific  
22 accounts that are related to the conduct of City government or the performance of their  
23 councilmember duties.

24 3.36. The adoption of the Councilmember Social Media Policy is within the scope and  
25 authority of the City Council per RCW 35A.11.020 -- it is not an ultra vires act.

3.37. Councilmember social media accounts that are not established with a  
Councilmember's City email address are “personal or campaign” accounts.

3.38. Appendix H prevents councilmembers from writing posts on their personal or  
campaign social media accounts that relate to the conduct of city government or the  
performance of the councilmember's office. Such posts are required to only be on

1 official councilmember-specific accounts backed up with Page Freezer. This ensures  
2 each councilmember can discuss City business via social medial while ensuring  
3 compliance with the Washington Public Records Act.

4 3.39. Councilmember Merkel's use of the social media platform Nextdoor constitutes the  
5 maintenance of a personal or campaign social media account under Appendix H. To  
6 the extent that Councilmember Merkel has made posts on his personal/campaign  
7 Nextdoor social media account that relate to City government, they go beyond merely  
8 posting Council agendas or information regarding City events or provide general  
9 information regarding the City's activities. Instead, they discuss the conduct and  
10 affairs of City government and Councilmember Merkel's performance of his  
11 Councilmember duties. Moreover, by making such posts on his personal/campaign  
12 social media (which is not archived) rather than one on an official councilmember-  
13 specific account (which is archived), Councilmember Merkel has violated Appendix  
14 H, §3, p. 83, and Chapter 5, §A(3) of the Governance Manual.

15 3.40. Councilmember Merkel is permitted under the Social Media Policy to post on a City  
16 of Spokane Valley "official account" posts that may constitute the conduct or  
17 transaction of City business, governance, or in furtherance of City business because  
18 the "official account" has the ability to be stored, retrieved, and produced in the event  
19 those posts and comments constitute public records.

20 3.41. Exhibit I-14 is a declaration modified and then signed by Councilmember Merkel in  
21 response to a public records request. Councilmember Merkel, in submitting the  
22 declaration as modified, failed to comply with his obligations as delineated in *Nissen*  
23 *v. Pierce County, supra*. Councilmember Merkel modified the declaration to  
24 summarily conclude he did not possess public records, rather than providing facts  
25 establishing he did a thorough search and does not have the type of records that could  
be found to be public records. This constitutes a violation of Chapter 5, §A(9) of the  
Governance Manual.

26 3.42. Councilmember Merkel's refusal to segregate and provide social media posts which  
27 may constitute public records or the transaction or conduct of City business, or to  
28 provide access to the City so the City could retrieve the posts constituting public  
29

1 records also violates the Governance Manual's Council Conduct Standards (Chapter  
2 5, §§A(9), B and C).

3 3.43. Due to the apparent edits on Mr. Merkel's Nextdoor social media posts, which  
4 include edits of Councilmember Merkel's posts and his followers' posts and  
5 comments, including posts that relate to the conduct of City government or City  
6 Business, Councilmember Merkel could be placing the City at risk of claims under the  
PRA.

7 3.44. In violation of Appendix H and Chapter 5, §A(3) of the Governance Manual,  
8 Councilmember Merkel has refused to set up an official councilmember-specific social  
9 media account, which may include public records, and which limits access and lacks  
10 Page Freezer capability and would allow Councilmember Merkel to post on that social  
11 media account the same type of posts that he is now posting on Nextdoor that relate  
12 to, involve, and/or amount to the conduct of City business, the discussion of City  
13 business, the furtherance of the City's interest or business and which may be public  
14 records under Washington law. Due to his conduct, those posts cannot be maintained,  
15 segregated, and retrieved by the City of Spokane Valley in the event they are deemed  
16 to be public records responsive to PRA requests submitted to the City.

17 3.45. Mr. Merkel has also violated the Councilmember Social Media Policy (Appendix H  
18 to the Governance Manual) by posting on his personal/campaign Nextdoor social  
19 media account matters that amount to discussions or descriptions of city business or  
20 city governance. The Governance Manual Chapter 5, Council Conduct Standards and  
21 Enforcement Sections A-C, read together, require Councilmembers to abide by the  
22 Council Conduct Standards, including the City's Councilmember Social Media Policy  
23 attached as Appendix H and "other applicable laws and/or regulations governing the  
24 conduct of Councilmembers in their capacity as elected officials."

25 3.46. Councilmember Merkel has violated the City's Social Media Policy as set forth in  
the Findings of Fact and has violated "other applicable laws and/or regulations,"  
specifically RCW 40.14 et seq. and his obligations under *Nissen*, as claimed by  
Councilmember Yeager in her complaint and supplemental complaint.

3.47. The Public Records Act requires the City of Spokane Valley to make all “public records” available for public inspection and copying unless the records fall within specific enumerated exemptions. RCW 42.56.070(1).

3.48. The Washington Supreme Court has held that a public official's posts on a personal social media platform constitute "public records" subject to disclosure under the Public Records Act 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, 410 P.3d 1197 (2018).

3.49. The posts that were the subject of the investigation as delineated by Investigator Dean in her report and testimony were, as they relate to the affairs, business, debates, and actions of the City of Spokane Valley, all made by Mr. Merkel, a member of the City Council of the City of Spokane Valley. The posts were made by Mr. Merkel as a dissenting voice to the policy and governance decisions being made by other Councilmembers and/or by the City and in that sense were made to further Mr. Merkel's vision of the furtherance of City business. They were also made in furtherance of Councilmember Merkel's attempts to further the City's business by affecting policy change.

3.50. The Independent Investigator has met the more probable than not burden of proof imposed upon her under the Hearing Rules (Exhibit I-3 Investigator's Brief), Councilmember Merkel has violated the Social Media Policy of the City of Spokane Valley and Chapter 5 and Appendix H (Councilmember Social Media Policy) of the Governance Manual.

3.51. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

#### IV. DECISION

4.1. Based on the above Findings of Facts and Conclusions of Law, the Hearing Examiner finds and concludes that Councilmember Merkel violated the Spokane Valley Council Conduct Standards and Social Media Policy and is subject to corrective action.

## **V. RECOMMENDATIONS FOR CORRECTIVE ACTION**

The Hearing Examiner pursuant to Chapter 5 of the Governance Manual makes the following recommendations to the City Council of the City of Spokane Valley for corrective action as follows:

- 5.1. A verbal censure should be administered.
- 5.2. In the event Councilmember Merkel persists in continued violations of the Social Media Policy in the same and or similar way as he has done in the past as evidenced by this Hearing Examiner Decision, or violates the Social Media Policy by posting City business and/or transacting City business in his capacity as a member of the City Council of the City of Spokane Valley on his Nextdoor account, the following additional corrective action should be imposed.
  - 5.2.1. A public censure and/or removal of Councilmember Merkel from any committee assignments for a period of time to be determined by the City Council of the City of Spokane Valley would be appropriate if Councilmember Merkel continues to insist that he is entitled to post regarding City business and/or the transaction of City business on his personal/campaign social media account in his capacity as a member of the City Council of the City of Spokane Valley without any means by which the City can capture the same (i.e., Page Freezer).

Dated this 13 day of December, 2024,

ANDREW L. KOTTKAMP  
Hearings Examiner for Spokane Valley