

CITY OF SPOKANE VALLEY
RESOLUTION NO. 24-015

**A RESOLUTION DISCIPLINING COUNCILMEMBER ALBERT MERKEL FOR VIOLATING
COUNCIL CONDUCT STANDARDS**

WHEREAS, Albert Merkel is a member of the Spokane Valley City Council; and

WHEREAS, Councilmember Merkel has received training on the Washington Public Records Act on three separate occasions since being elected as a councilmember; and

WHEREAS, all records created by a City official relating to City business are potentially public records as defined by the Washington Public Records Act, RCW 42.56 *et seq.*, regardless of whether the record was created on a City or personal device, or disseminated on a personal or official City social media account; and

WHEREAS, the Washington Public Records Act requires the City, City staff, and City officials to preserve all public records and produce them when responsive to a public records request; and

WHEREAS, the Washington Public Records Act authorizes individuals to file lawsuits against local governments to seek damages for a local government official's failure to preserve and/or produce responsive public records in response to a public records request, including fines up to \$100 per day for each page of any public record that is not produced (RCW 42.56.550), in addition to the requestor's legal costs;

WHEREAS, courts in Washington have issued judgments against public agencies imposing monetary penalties in amounts equal to multiple hundreds of thousands of dollars for failing to timely produce requested public records; and

WHEREAS, pursuant to the authority granted to City Council by the Washington Legislature under RCW 35A.11.020, the City Council adopted a Governance Manual establishing, among other things, standards of conduct for individual councilmembers; and

WHEREAS, Chapter 5 of the Governance Manual (hereinafter "Governance Manual Ch. 5") contains and identifies Council Conduct Standards, which standards require councilmembers to, among other things, comply with (1) the councilmember social media policy, which is identified as Appendix H of the Governance Manual (hereinafter "Social Media Policy"); and (2) other applicable laws and/or regulations governing the conduct of the councilmembers in their capacity as elected public officials, including the Washington Public Records Act (RCW 42.56 *et seq.*) and Washington law requiring City officials to preserve public records (i.e. RCW 40.14 *et seq.*); and

WHEREAS, the Governance Manual encourages any councilmember to communicate with constituents via social media about City business in performing their councilmember role; and

WHEREAS, City Council adopted and enacted the Social Media Policy for the purpose of preventing violations of the Washington Public Records Act by providing councilmembers with a method to speak about City business on social media that automatically preserves any content posted on that councilmember's official social media accounts, and ensures such public records are accessible to City staff for purposes of responding to public records requests, and hence available to the public; and

WHEREAS, the Social Media Policy does not prevent any councilmember from speaking about City business on social media, but rather only ensures any such councilmember discussions on social media are preserved to ensure the City is able to fulfill its obligations to the public under the Washington Public Records Act; and

WHEREAS, the Social Media Policy expressly (a) authorizes councilmembers to post regarding City business on social media accounts established with that councilmember's official City email address and links said account to the City's social media archiving software, and (b) only prohibits a councilmember from posting about City business on social media accounts that are not linked to the City's archiving software; and

WHEREAS, Councilmember Merkel could have, and still can but has not, established any number of social media accounts with his City email address and linked any such social media account(s) to the City's social media archiving software; and

WHEREAS, since being sworn in as a City of Spokane Valley councilmember, Councilmember Merkel has repeatedly made posts to his personal Nextdoor social media accounts not connected to the City's archiving system, which posts are of City business;

WHEREAS, the City Manager advised Councilmember Merkel multiple times that his social media posts regarding City business are likely public records that must be preserved and produced when requested in order to protect the City from liability under the Washington Public Records Act; and

WHEREAS, Governance Manual Ch. 5 establishes a procedure for City Council to redress Council Conduct Standard violations when a councilmember submits a written complaint to the City Manager alleging another councilmember has violated one or more provisions of the Council Conduct Standards; and

WHEREAS, on June 11 and August 1, 2024, Councilmember Jessica Yeager submitted written complaints to the City Manager alleging that Councilmember Merkel violated the Council Conduct Standards identified in Governance Manual Ch. 5 §A by (a) regularly posting City business on his personal Nextdoor social media accounts in violation of the Social Media Policy; and (b) not producing or preserving records that pertain to City business and were requested via a Washington Public Records Act records request; and

WHEREAS, as required by Governance Manual Ch. 5, the City promptly retained an independent third-party investigator, attorney Rebecca Dean, to investigate the alleged Council Conduct Standard violations; and

WHEREAS, Ms. Dean conducted a thorough independent and unbiased investigation that is memorialized in the investigation report and findings ("Investigation Findings") that she issued on September 3, 2024, a copy of which is attached hereto as **Attachment A**; and

WHEREAS, Councilmember Merkel timely submitted his request for a hearing before the City Hearing Examiner to contest the Investigation Findings as allowed in Governance Manual Ch. 5; and

WHEREAS, on October 24, 2024, the City Hearing Examiner Andrew Kottkamp held and presided over the hearing (Hearing Examiner Case No. APP-2024-0001), during which (1) Ms. Dean, with the assistance of co-independent investigator and attorney James King (with the Evans Cravens & Lackie, P.S. law firm), presented evidence supporting her investigation, findings, and conclusions, and

was cross-examined by Councilmember Merkel, and (2) Councilmember Merkel presented evidence (including witness testimony) and argument in an effort to contradict the Investigation Findings; and

WHEREAS, on December 13, 2024, the City Hearing Examiner issued his decision in Hearing Examiner Case No. APP-2024-0001 (hereinafter “Hearing Examiner Ruling”), a copy of which is attached hereto as **Attachment B**; and

WHEREAS, the Hearing Examiner Ruling concluded that Councilmember Merkel posted about City business on his personal Nextdoor social media account, including Councilmember Merkel’s posts (a) offering to assist Nextdoor users conduct business with the City, such as opposing a conditional use permit application; (b) conducting polls of potential voters and constituents on City governance issues and proposals which Councilmember Merkel planned to present for City Council consideration; (c) pertaining to the governance of the City; (d) summarizing and providing his commentary as a councilmember about Council deliberations, including deliberations occurring in executive session; (e) commenting on investigations into formal complaints about Councilmember Merkel’s behavior as a councilmember as well as investigations of his formal allegations against other councilmembers; (f) containing statements replete with details, assertions, and allegations about his position as a City councilmember on the merits of policy issues considered by the City Council for approval or rejection; (g) making promises to followers to address questions about specific City issues; (h) surveying Nextdoor users about the Sprague Avenue development project and reporting the survey results at a City Council meeting in his official capacity and an apparent effort to shape or steer policy to Councilmember Merkel’s desired position; (i) describing his budget proposal and soliciting Nextdoor user comments about his proposal with the intent to inform his presentations to City Council in his official capacity as a councilmember; and (j) soliciting comments about his proposal for persons experiencing homelessness; and

WHEREAS, the Hearing Examiner Ruling found that some Nextdoor posts by Councilmember Merkel regarding City business were subsequently edited as were others’ posts responding to Councilmember Merkel’s City business-related posts; and

WHEREAS, the Hearing Examiner Ruling further concluded that the aforementioned posts were made in violation of the Social Media Policy and Governance Manual Ch. 5 §A(3) because they pertained to City business and were made on Councilmember Merkel’s personal Nextdoor accounts rather than on a Nextdoor account connected to Councilmember Merkel’s City email address and the City’s social media archiving software; and

WHEREAS, the Hearing Examiner Ruling found that Councilmember Merkel violated Governance Manual Ch. 5, §A(9) by altering and then signing declarations regarding his searches for requested public records on his personal devices and personal social media in such a way as to cause them to fail the good faith requirement identified by the Washington Supreme Court in *Nissen v. Pierce County*, 183 Wn.2d 863 (2015); and

WHEREAS, when Councilmember Merkel submitted the first altered declaration violating the *Nissen v. Pierce County* requirement, the City Manager informed Councilmember Merkel of the same and requested Councilmember Merkel to correct and re-sign the declaration (see **Attachment C** hereto); and

WHEREAS, Councilmember Merkel rejected the City Manager’s request to bring his declaration within the requirements of Washington law and thereby impaired the City’s ability to demonstrate that Councilmember Merkel conducted a thorough and good faith search for public records on his personal social media accounts; and

WHEREAS, Governance Manual Ch. 5 authorizes City Council to take specific corrective action for Council Conduct Standard violations with a majority-plus-one vote of City Council made during an open public meeting of City Council; and

WHEREAS, Councilmember Merkel's actions have exposed the City to substantial risk of being held liable for monetary damages under the Washington Public Records Act, and Councilmember Merkel has continued to post about City business on his personal social media and has not taken any effort to link his social media accounts to the City's social media archiving software despite having been informed multiple times by City staff that his conduct puts the City at risk; and

WHEREAS, the Hearing Examiner Ruling rejected and dismissed all of Councilmember Merkel's defenses on the basis that they are meritless; and

WHEREAS, Councilmember Merkel requested the City Council to review the hearing examiner ruling in an open session of Council, and the City Council granted his request and reviewed the hearing examiner's ruling in the open session of the December 19, 2024, City Council special meeting as required by Governance Manual Ch. 5;

WHEREAS, following the aforementioned review, Deputy Mayor Tim Hattenberg motioned to discipline Councilmember Merkel by (a) publicly censuring him, and (b) removing him from his committee assignments through the end of his current term as a councilmember, and City Council voted to take the corrective action identified further herein by a vote of 10 to 0, a vote for which Councilmember Merkel was required to recuse himself due to his inherent conflict of interest;

NOW, THEREFORE, IT IS HEREBY RESOLVED BY THE CITY COUNCIL OF THE CITY OF SPOKANE VALLEY, that:

Section 1. The Spokane Valley City Council incorporates the above recitals as if fully set forth herein.

Section 2. The Spokane Valley City Council hereby determines that the Hearing Examiner's Recommendations for Corrective Action are too conservative to motivate Councilmember Merkel to comply with the Social Media Policy and Washington laws requiring Councilmember Merkel, as a City official, to retain, preserve and produce public records. This determination is based on the following:

- a. Councilmember Merkel received training regarding his and the City's duties under the Washington Public Records Act on three separate occasions since being elected as a councilmember (i.e. from WCIA, AWC, and the City Attorney);
- b. Councilmember Merkel was advised by the City Manager on several occasions that his social media posts regarding City business are likely public records that must be produced upon request in order to protect the City from liability under the Washington Public Records Act (see emails included in **Attachment C** hereto);
- c. Due to the above, the City Manager requested Councilmember Merkel several times to (i) provide the City with all content on his Nextdoor social media account regarding City business so City staff can respond to public records requests seeking said records; and (ii) connect his social media accounts on which he posts about City business (including Nextdoor) to the City's social media archiving software, and only post about City business on such accounts (see emails included in **Attachment C** hereto);

- d. The City Manager advised Councilmember Merkel that the changes he made to his declaration caused the declaration to fail the requirements of the Washington Public Records Act and asked him to reconsider said alterations (see emails included in **Attachment C** hereto); and
- e. Councilmember Merkel refused the City Manager's requests, and submitted a complaint against the City Manager to the City's Human Resources Director claiming that the City Manager's efforts to convince Councilmember Merkel to comply with Washington law was "hostile" – in the City Council's opinion, Councilmember Merkel submitted the Human Resources complaint in an attempt to intimidate and dissuade the City Manager from continuing his efforts to convince Councilmember Merkel to comply with Washington law (see emails included in **Attachment C** hereto);
- f. Councilmember Merkel falsely believes, as stated in his oral presentation to the Hearing Examiner, that enforcing the Governance Manual Ch. 5 is an ultra vires act (see page 10 of **Attachment D** hereto).

Section 3. The Spokane Valley City Council hereby *publicly censures* Councilmember Merkel for:

- a. Repeatedly making posts regarding City of Spokane Valley and City Council business on his personal Nextdoor social media accounts rather than establishing and posting the City business-related content on a Nextdoor account linked to his City email address and connected to the City's electronic document archiving system. This conduct is a clear violation of the social media policy identified in Appendix H of the Governance Manual, and both the City Manager and other councilmembers have repeatedly informed Councilmember Merkel that his conduct violates the same and exposes the City to substantial risk of liability under the Washington Public Records Act for failing to preserve and produce requested public records.
- b. Revising declarations regarding his searches for responsive public records on his personal electronic devices in such ways that cause the declarations to violate the legal requirements for good faith searches imposed on local government agencies by *Nissen v. Pierce County*, and continuing to do so despite having been notified by the City Manager that his revisions do not meet the legal requirements identified in *Nissen v. Pierce County*.

Section 4. To allow Councilmember Merkel to continue to participate in his official capacity on committees of other regional public entities would be to expose those agencies to the same risks that Councilmember Merkel has exposed the City. Therefore, the Spokane Valley City Council hereby *removes* Councilmember Merkel from the Spokane County Regional Opioid Abatement Council, a non-City committee to which the City Mayor has authority to appoint members.

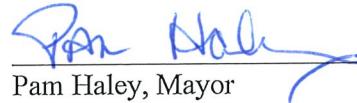
Section 5. Given Councilmember Merkel's (a) persistent refusal to comply with the Governance Manual social media policy even after he was informed several times that his conduct exposes the City to substantial risk of liability and monetary damages under the Washington Public Records Act, and (b) utter lack of concern for both the financial consequences to the City (and by extension the City's resident taxpayers) and potential to erode public trust in the transparency and conduct of City government, the Spokane Valley City Council determines that the appropriate duration of the removal is from the effective date of this Resolution 24-015 through the end of Councilmember Merkel's current term in office.

Section 6. Severability. If any section, sentence, clause or phrase of this Resolution should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Resolution.

Section 7. Effective Date. This resolution shall be effective immediately upon passage and signatures hereto.

Pass by the City Council this 19th day of December, 2024.

CITY OF SPOKANE VALLEY


Pam Haley, Mayor

ATTEST:


Marci Patterson, City Clerk

Approved as to form:


Office of the City Attorney

Attachment A

R E B E C C A D E A N P L L C
2212 QUEEN ANNE AVE. NORTH • # 158 • SEATTLE, WA • 98109
PHONE: (206) 465-3594 • EMAIL: rebeccadean@comcast.net

DATE: SEPTEMBER 3, 2024
TO: KELLY KONKRIGHT
FROM: REBECCA DEAN
RE: INVESTIGATION REPORT/COUNCILMEMBER JESSICA YAEGER COMPLAINT

I. INTRODUCTION

This report summarizes my investigation into, and conclusions regarding, City of Spokane Valley (“the City”) Councilmember Jessica Yaeger’s June 11, 2024, complaint (as clarified on August 1, 2024) that Councilmember Albert Merkel has failed to comply with the City’s Governance Manual Section H, the Councilmember Social Media Policy (“the Policy”). Yaeger also asserts that Merkel has failed to comply with Ch. 40.14 RCW and Ch. 42.56 RCW. (Exh. 1.)

Specifically, Yaeger asserts that Merkel conducts City business on his personal Nextdoor account, which cannot be tracked on Page Freezer, the application the City uses to archive Councilmember social media posts and comments for public records retention.

I conclude that some of Merkel’s posts on his personal Nextdoor account are more likely than not public records; therefore, documents that are potentially public records are not correctly retained. I also conclude that (1) by refusing to search, segregate, and produce such posts at the City’s request; and by (2) submitting an affidavit that does not comply with his obligations under the Public Records Act, Merkel probably violated the Public Records Act and acted inconsistently with his duty as a Councilmember. I also conclude that Merkel’s personal Nextdoor posts that “relate to the conduct of city government” or “the performance of his office” violate the Policy.

II. DOCUMENTS

I reviewed screenshots from Merkel’s Nextdoor account that Yaeger provided for review (“the screenshots”). The screenshot file name indicates that the documents were captured between March 1, 2024, and July 18, 2024.¹ I also briefly reviewed a June 12, 2024, Spokane Spokesman Review article reporting on Yaeger’s complaint. In addition to the Governance Manual and my legal research, I reviewed the Association of Washington Cities “Guidelines for elected and appointed officials using social media” (December 19, 2017); the online Municipal Research and Services Center (“MRSC”) guidance for local governments on elected officials’ social media accounts and Public Records Act compliance; and, to a limited

¹ With some exceptions, the screenshots appear to have been captured within a few hours to a few days of the date field in the filename, although the precise date and time does not appear in the documents. I cannot, however, assess whether the screenshots have captured all Merkel’s postings, follower comments, or Merkel’s responses to follower comments during this time span. Moreover, many of the posts have been edited.

degree, the Washington State Archivist's Records Management Guidelines for Local Government Agencies of Washington State.

A. BACKGROUND

It appears based upon the screenshots that Merkel has regularly posted on Nextdoor about topics pertaining to the City and communicated with followers about City matters. The content of the screenshots is repetitive, and the topics fall into several categories: (1) Merkel's posted summaries of, and commentary about, City Council debates (including one public report about deliberations in executive session)² (e.g., Exh. 2,³ Exh. 3); (2) Merkel's complaints about other Councilmembers, most often Mayor Pam Haley, Councilmember Rod Higgins, or Yaeger, their alleged "silencing" of Merkel in Council meetings, and other Councilmembers' alleged failure to engage with City residents (as compared with Merkel's assertions about his own level of engagement) (e.g., Exh. 4 *passim*); (3) Merkel's complaints about, and commentary on, City investigations into Merkel's behavior and Merkel's formal complaint about Higgins's calling a point of order during a Council debate (e.g., Exh. 4 p.6, Exh. 5); (4) Merkel's opinions about, positions on, and the merit of issues before the Council⁴ (e.g., Exh. 2; Exh. 3 p.2-5; Exh. 4 p.2-9, 13-16; Exh. 5 p.7-14); (5) Merkel's promise to address some followers' questions about a specific City issue, sometimes accompanied by a request that the follower send an email to his City email address (e.g., Exh. 6); and (6) Merkel's decision to run for Washington State Senate and serve simultaneously on the Council and in the Senate, and related campaign matters (e.g., Exh. 3 p.5-7).

Merkel additionally: (1) surveyed Nextdoor followers about the Sprague Avenue development project; It is apparent from his posts that Merkel reported on his Sprague Avenue survey at a Council meeting or meetings (Exh. 7); (2) according to his posts, solicited follower comments about Merkel's budget proposal (Exh. 8); and (3) solicited follower comments about Merkel's proposal for addressing issues associated with persons experiencing homelessness (Exh. 9). It also appears that Merkel solicited follower comments about his budget proposal and plan for addressing issues associated with the homeless with the intent that the comments would inform his presentations to the Council.

Moreover, Merkel encourages his Nextdoor followers to attend Council meetings. He also encouraged, and, apparently, led, a public recitation of the Pledge of Allegiance five minutes before a Council Meeting as a protest of a Council decision not to recite the Pledge of Allegiance before study sessions. (See, e.g., Exh. 4 p.3.)

² I note, however, that in more recent screenshots, one of Merkel's followers has been posting Council meeting summaries, apparently in lieu of Merkel's summaries.

³ Exhibit 2 is apparently a screenshot of Merkel's February 29, 2024 Nextdoor posting captured by Haley.

⁴ Common subjects of Merkel's postings and Merkel's responses to comments include, but are not limited to, (1) the Sprague Avenue construction project; (2) City police staffing and funding; (3) City policies and responses to persons experiencing homelessness; (4) the SCRAP program; (5) property development in the City and the Washington Growth Management Act; (6) the City's Governance Manual; and (7) City spending priorities, including Merkel's complaints about City staff salaries and assertions that the City intended to close its public pools.

B. ANALYSIS

1. Legal Context and Applicable Standards

Yaeger contends that Merkel has violated the Governance Manual Chapter 5, Council Conduct Standard and Enforcement. Chapter 5, §§ A, B, and C, read together, require Councilmembers to abide by the Council Conduct Standards, including the City's Councilmember Social Media Policy, which is attached as Appendix H to the Governance Manual, and "other applicable laws and/or regulations governing the conduct of Councilmembers in their capacity as elected officials."

As noted in the introduction, Yaeger alleges that Merkel has violated the City's Social Media Policy, and, as included in "other applicable laws and/or regulations," Ch. 40.14 RCW and Ch. 42.56 RCW.

As a preliminary matter, I note that Merkel has mistakenly asserted on Nextdoor that (1) the City has no authority to investigate alleged violations of the Public Records Act; and (2) Yaeger has no standing to make an email complaint under the Public Records Act (Exh. 10). My inference is that Merkel has confused (1) the City's power to enforce its Councilmember conduct standards (including violations of applicable statutes and regulations) and Yaeger's complaint, which is brought pursuant to the Governance Manual enforcement procedures; with (2) the statutory right of a person denied an opportunity to inspect or copy a public record to seek judicial review of the agency's action, RCW 42.56.550.

By way of context, the Public Records Act 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 Washington Supreme Court has held that a public official's posts on a personal social media platform can 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*, 410 P.3d 1197 (2018) (City Council member's personal Facebook account posts were "merely informational" and were not public records because the Council member did not prepare them within the scope of her official capacity.)

City employees and elected officials have a duty to search their files, devices or accounts, and to obtain, segregate, and produce posts on personal devices and, by extension, social media accounts that constitute "public records." If the elected official claims that the information in personal accounts are not public records, then the official must submit a declaration or affidavit "stating facts sufficient to support that claim." *Puyallup; Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (plaintiff alleged sufficient facts to show that County prosecutor's text messages on his personal phone were sent and received in the prosecutor's official capacity; therefore, prosecutor must obtain, segregate, and produce the records to the County). The affidavit or 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. *Nissen*, citing *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 7021, 261 P.3d 119 (2011).

Merkel has categorically, and incorrectly, claimed that the Public Records Act is not applicable to personal accounts, but only to official accounts for legislative bodies that are used to post items for the Council as a whole, or to documents that are customarily stored by government, such as emails. Merkel adds that, because he does not have legal power to speak for the Council as a whole, his postings cannot be public records. (*Id.* p. 6-9.) Merkel's assertions are inconsistent with the Court's decisions in *Puyallup* and *Nissen*.

Violations of the Public Records Act may subject local municipalities to liability. To guide municipalities like the City in fulfilling their legal obligations, organizations such as the MRSC and the Association of Washington Cities have published recommendations for cities and public officials to help them navigate the ambiguities and complexities of the Public Records Act applicability to officials' personal social media accounts. *See, e.g.*, "Social Media Policy Questions for Local Governments to Answer" (April 12, 2023); "Elected Officials Guide – What's Personal and What's Public?" (Jan. 9, 2020) (mrsc.org)

According to such guidelines, adopting a policy governing officials' compliance is a critical step. Merkel claims that the City's sole purpose in adopting the Policy was to silence him (*e.g.*, Exh. 3 p.2; Exh. 11). In my assessment, however, the City's adoption of the Policy is a prudent step applicable to all Councilmembers designed to promote the City's adherence to Washington law.

Moreover, the Policy closely adheres to recommendations by authoritative entities, such as MRSC. In that regard, for example, the Policy (1) attempts to provide clear guidance for the use of City accounts and for keeping clear distinctions between City and personal accounts; (2) addresses open public meeting implications, such as the risk of serial communications between Councilmembers presented by posting on or liking other Councilmember accounts; and (3) addresses Public Records Act implications of personal social media accounts by prohibiting Councilmembers from writing posts on personal or campaign accounts that "relate to the conduct of city government or the performance of [the Councilmember's] office"; and "discussing personal accounts in public meetings or documents."

Additionally, the Policy directly addresses the risk to the City created by failure to retain posts that may be found to be public records. *See* RCW 40.14.060(1)(c) ("Official public records shall not be destroyed . . . unless the originals . . . have been copied or reproduced" using an approved, accurate, and durable process.) Because some social media platforms, such as Nextdoor, may edit comments and postings that do not meet platform guidelines, this is a substantial risk. In that regard, the Policy asks Councilmembers to create and maintain a Councilmember-specific social media account on an approved platform that can be associated with the City's archiving platform to ensure that all content is archived for public records retention.

2. Merkel's Social Media Posts & the Public Records Act

I conclude that some of Merkel's posts on his personal Nextdoor account are more likely than not public records. I also conclude that (1) by refusing to search, segregate, and produce such posts at the City's request; and (2) by submitting an affidavit that does not

comply with his obligations under the Public Records Act, Merkel probably violated the Public Records Act and acted inconsistently with his duty as a Councilmember.

a) Merkel's Posts

As the Court explained in *Puyallup*, a public record is a (1) writing, regardless of physical form or characteristics; (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function; and (3) that is prepared, owned, used, or retained by the governmental agency.

Puyallup requires a close factual analysis to assess if the posts on personal social media accounts are “public records.” Applying the first two factors to Merkel’s posts:

- Merkel’s posts are “writings” within the meaning of the Public Records Act, which includes any means of recording any form of communication, including electronic means, and postings on social media accounts.
- Merkel’s posts contain information “relating to the conduct of government” or the “performance of any governmental function.” Merkel’s posts are rife with direct references to City actions, processes, and functions. These include, but are not limited to: proposals made to, and under consideration by the City Council; City Council deliberations and debates; the conduct of City Council meetings; the outcome of City Council meetings; the conduct and outcome of City investigations into Merkel’s behavior; Merkel’s formal complaint about Higgins’s calls for points of order during Council meetings; the City budget; City staff salaries; the City’s Governance Manual; and the process and conduct of City committee meetings.

Puyallup dictates that the City can be deemed to have “prepared” Merkel’s social media posts if Merkel was acting within his official capacity as a City Council member. This assessment turns on whether (1) Merkel’s position required the posts; the answer is “no”; (2) the City directed the posts; the answer is also “no”; or (3) the posts “furthered” the City’s interests; here, the answer is complicated.

The case law does not provide a clear or easily applied answer. In *Puyallup*, the Court concluded that certain posts did not constitute conducting public business because the City Council member (1) posted about issues that did not require a City Council decision; and (2) consisted of general information about Council agendas, City activities, and City business, but did not contain specific details about the Councilperson’s work as a City Councilmember, or regarding Council discussions, decisions, or other actions.

Likewise, in *West v. Clark County* (No. 52843-6-II, Wa.Ct.App. Jan. 20, 2021) (unpublished), the Washington Court of Appeals held that a Councilmember’s statements (that the court analogized to a “megaphone”) on social media of personal opinions on various issues regarding Clark County’s governance, and solicitations of discussion and commentary from followers, did not constitute conducting public business because the posts did not contain specific details of the Clark County Council’s discussions, decisions, or other actions.

The inference that I draw from these cases, therefore, is that a Councilmember may be acting within the scope of their official capacity and their posts therefore deemed to be public records if their social media posts *do* contain specific details of the Councilmember's work, or provide information about Council discussions, decisions, and actions. This is a logical inference because communicating with constituents about City business and specific Council action is an essential Councilmember function, as is gathering feedback and ideas from residents and businesses, and sharing such information with staff, Councilmembers, or at Council meetings. *See Governance Manual* pp. 5-6.

Merkel's social media posts are exponentially more expansive and inclusive than the *Puyallup* Councilmember's Facebook posts. In contrast, many of Merkel's posts, like those of the *Clark County* Councilmember, can be characterized as a "megaphone" broadcasting Merkel's opinions about City issues. I note, moreover, that many of Merkel's posts combine opinions with specific details of, and information about, City Council discussions, debates, decisions, and actions, and it is not possible to disentangle them.

Nevertheless, applying the case law to the posts I reviewed, I conclude that the following categories of Merkel's posts are more likely than not public records:

- Merkel's posted summaries of, and commentary about, City Council debates (including one public report about deliberations in executive session) (*e.g.*, Exhs. 2, 3, 4).
- Merkel's complaints about other Councilmembers, most often Haley, Higgins, or Yaeger; their alleged "silencing" of Merkel in Council meetings; and other Councilmembers' alleged failure to engage with City residents (as compared with Merkel's assertions about his own level of engagement) (*e.g.*, Exh. 4 *passim*).
- Merkel's complaints about, and commentary on, City investigations into Merkel's behavior and Merkel's formal complaint about Higgins's calling a point of order during a Council debate (*e.g.*, Exh. 4 p.6, Exh. 5).
- Merkel's posts about the City budget and proposals he has, or intends to, present to Council, such as his proposal to address homelessness and police funding (*e.g.*, Exhs. 8, 9).
- Merkel's promises to address followers' questions about a specific City issue (*e.g.*, Exh. 6).
- Merkel's surveys of followers where Merkel either has, or apparently intends to, carry the survey results and associated comments into Council meetings and debates (*e.g.*, Exh. 7).

The following categories are, more likely than not, not public records:

- Merkel's opinions about, and positions on, issues before the Council and the City, where not combined with specific details of, and information about, City Council discussions, debates, decisions, and actions (*e.g.*, Exh. 12).

- Merkel's decision to run for Washington State Senate and intent to serve simultaneously on the Council and in the Senate, and any other campaign matters (*e.g.*, Exh. 3 p.5-7).
- Merkel's posts encouraging follower attendance at Council meetings or citizen participation in the political process, (*e.g.*, Exh. 13) including Merkel's opinions about recitation of the Pledge of Allegiance or prayer in Council meetings.

b) *Merkel's Compliance with Nissen*

As I understand it, Merkel has refused City's request(s) for access to his Nextdoor account to search for and retrieve posts that may be responsive to public records requests. Additionally, Merkel has submitted (and posted) at least one affidavit that purports to satisfy his obligation under *Nissen*. The City's standard language on the posted affidavit states: "I have personally reviewed all content on all of my personal Nextdoor social media accounts to determine if I had any responsive posts and/or messages between me and others regarding city and/or council business⁵ from January 1, 2024, through March 21, 2024." Merkel crossed out the words, "regarding city and/or council business" and interlinedated the words "that are Public Records" and dated and initialed the interlineation. (Exh. 14.)

Merkel's refusal to segregate and provide social media posts constituting public records (or providing access to the City so the City can retrieve the posts) violates his obligation under the Public Records Act, and therefore violates the Governance Manual's Council Conduct Standards. Additionally, Merkel's affidavit does not comply with *Nissen's* requirement that Merkel provide a reasonably detailed, nonconclusory affidavit stating facts sufficient to support his claim that his Nextdoor posts are not public records. Instead, he offers a conclusory legal opinion rather than the required facts, which is inconsistent with his duty as a Councilmember.

3. *Merkel's Compliance with the City's Councilmember Social Media Policy*

I conclude that Merkel's personal Nextdoor posts violate the Policy. Specifically, many of Merkel's posts "relate to the conduct of city government" and "the performance of his office." Merkel has also used his personal Nextdoor account to conduct city business; for example, by offering to assist followers with City matters, such as contacting the prosecutor's office to follow up on a concern about a crime. Additionally, Merkel has discussed his personal accounts in public meetings; for example, Merkel's Nextdoor survey of followers about the Sprague Avenue project.⁶

⁵ The City's standard language adheres to the Court's analysis in *Puyallup*.

⁶ I note that it appears from Merkel's complaints to his followers (*e.g.*, Exh. 10 p.9) that Haley and Yaeger posted on Merkel's personal Nextdoor account (*e.g.*, Exh. 15) and engaged with discussion with him there. Merkel claims such posts violate the Policy. The Policy does ask Councilmembers not to discuss City business on *official accounts*. The Policy does not, however, similarly prohibit Councilmembers from posting on another Councilmember's personal social media accounts. Nevertheless, in my assessment, some of Yaeger and Haley's posts apparently concern the conduct of City business. At minimum, engaging with Merkel on these subjects on social media was unwise.

Additionally, because Nextdoor has edited many of Merkel's and his followers' Nextdoor posts, including posts that related to the conduct of City government, Merkel has put the City at risk of claims that it violated RCW 40.14.060(1)(c) by failing to retain documents that may well be public records.

Merkel has refused to take advantage of the Policy's provision for Official Councilmember-Specific Social Media Accounts. Nevertheless, contrary to Merkel's assertions, neither the Policy nor the City's general Social Media Policy, §4, *Administrative Policy & Procedure 300.020 Communications Policy* (which the Policy incorporates by reference) regulates the content of an Official Councilmember-Specific Social Media Account in any objectionable way. In my review of the screenshots of Merkel's personal account, the only (visible) content that potentially violates the City's general prohibitions of inappropriate content are (1) personal insults lobbed by Merkel and some of his followers, including both pro- and anti-Merkel comments; and (2) Merkel's posts about political campaigns. Because political campaigns properly belong on personal social media accounts, it is difficult to see how Merkel would be harmed by establishing an official account.

Additionally, establishing an official account would resolve the difficulties presented by Merkel's posts that pertain to the conduct of City business or the performance of his office, and are arguably public records, and deletions of some posts or comments that the City may be required to retain.

RD

Attachment B

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
Procedure for Proceedings Before the Hearing Examiner of the City
of Spokane Valley Washington, Chapters I & IV;

9 2.12.6.20. Exhibit I-19 Curriculum Vitae of Independent Investigator;

10 2.12.6.21. Exhibit I-20 *Nissen v. Pierce County*, 183 Wash. 2d 863 (2015);

11 2.12.6.22. Exhibit I-21 *West v. Vermillion*, 196 Wn. App 627 (2016);

12 2.12.6.23. Exhibit I-22 *West v. City of Puyallup*, 2 Wn. App 2d 586 (2018);

13 2.12.6.24. Exhibit I-23 *West v. Clark County*, Court of Appeals No. 52843-
6-II (unpublished);

14 2.12.6.25. Exhibit I-24 Investigator Hearing Memorandum;

15 2.12.6.26. Exhibit I-25 Investigator Exhibit Lists;

16 2.12.6.27. Exhibit I-26 Investigator Witness List;

17 2.12.6.28. Exhibit I-27 Errata to Hearing Memorandum (Exhibit I-24);

18 2.12.6.29. Exhibit I-28 Investigator Motion in Limine;

19 2.12.6.30. Exhibit I-29 Final Argument of Investigator;

20 2.12.6.31. Exhibit I-30 Investigator's Proposed Findings of Fact and
Conclusions of Law;

21 2.12.6.32. Exhibit I-31 Investigator November 8, 2024 Letter to the Hearing
Examiner;

22 2.12.6.33. Exhibit I-32 Investigator Motion for Acceptance of Findings of
Fact and Conclusions of Law;

23

24

25

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"

August 16, 2024:

2.12.7.7. Exhibit A-21

the Hearing Examiner, and to file his final summation.

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
to bind the City or Council by his posts.

18 2.36. The subject Nextdoor posts admitted into evidence and as reviewed by the
19 Investigator and the Hearing Examiner appear to be posted by Mr. Merkel in his
20 capacity as a member of the City Council and are Mr. Merkel's view of the proper
manner to further City business and are posted in order to advance that viewpoint.

21 2.37. Merkel does not claim that the Nextdoor posts have nothing to do with City business,
22 City policy, decisions of the City Council with which he disagrees, investigations by
23 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.

24 2.38. Mr. Merkel's Nextdoor social media posts appear to be (a) made in furtherance of
25 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
Valley Council Conduct Standards and Social Media Policy.

19 2.49. Any Conclusion of Law that is more correctly a Finding of Fact is hereby
20 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 1st 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
10 control over the instruments they have created." RCW42.30.010, 42.56.030
11 (Manual, p. 4)

12 3.19. Chapter 3 of the Manual (pp. 43-44A) addresses citizen contact and interactions
13 outside of a council meeting. It provides as follows:

14 3.19.1. Social Media

15 3.19.1.1. "Councilmembers shall comply with the City Councilmember Social
16 Media Policy which is attached hereto as Exhibit H and wholly incorporated
17 herein." (Manual, p. 44A)

18 3.20. The duties of individual Councilmembers are set forth in the Manual (pp. 5-6). The
19 duties, responsibilities and limitations of each Councilmember include:

20 3.20.1. "... Contact residents and businesses to gather feedback and ideas. The resulting
21 information may be shared with staff or other Councilmembers individually, or
22 with fewer than two simultaneously (but not serially), or with all Councilmembers
23 at a Council meeting.

24 3.20.2. Studies internal and external written and documented information related to the
25 government and administration of the city. ...

26 3.20.3. When acting in the capacity of Councilmember outside of Council meetings,
27 communicates that any personal opinion is the opinion of the individual
28 Councilmember and not that of the collective Council. Councilmember's freedom
29 of speech is protected by the U.S. and Washington State Constitutions.
30 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-
specific account (which is archived), Councilmember Merkel has violated Appendix
H, §3, p. 83, and Chapter 5, §A(3) of the Governance Manual.

13 3.40. Councilmember Merkel is permitted under the Social Media Policy to post on a City
14 of Spokane Valley "official account" posts that may constitute the conduct or
15 transaction of City business, governance, or in furtherance of City business because
16 the "official account" has the ability to be stored, retrieved, and produced in the event
those posts and comments constitute public records.

17 3.41. Exhibit I-14 is a declaration modified and then signed by Councilmember Merkel in
18 response to a public records request. Councilmember Merkel, in submitting the
19 declaration as modified, failed to comply with his obligations as delineated in *Nissen*
20 *v. Pierce County, supra*. Councilmember Merkel modified the declaration to
21 summarily conclude he did not possess public records, rather than providing facts
22 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
23 Governance Manual.

24 3.42. Councilmember Merkel's refusal to segregate and provide social media posts which
25 may constitute public records or the transaction or conduct of City business, or to
provide access to the City so the City could retrieve the posts constituting public

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.

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

4 3.48. The Washington Supreme Court has held that a public official’s posts on a personal
5 social media platform constitute “public records” subject to disclosure under the
6 Public Records Act if the posts “relate to the conduct of government” and are
7 “prepared within a public official’s... official capacity.” *West v. City of Puyallup*, 2
8 Wn.App.2d 586, 410 P.3d 1197 (2018).

9 3.49. The posts that were the subject of the investigation as delineated by Investigator Dean
10 in her report and testimony were, as they relate to the affairs, business, debates, and
11 actions of the City of Spokane Valley, all made by Mr. Merkel, a member of the City
12 Council of the City of Spokane Valley. The posts were made by Mr. Merkel as a
13 dissenting voice to the policy and governance decisions being made by other
14 Councilmembers and/or by the City and in that sense were made to further Mr.
15 Merkel’s vision of the furtherance of City business. They were also made in
16 furtherance of Councilmember Merkel’s attempts to further the City’s business by
17 affecting policy change.

18 3.50. The Independent Investigator has met the more probable than not burden of proof
19 imposed upon her under the Hearing Rules (Exhibit I-3 Investigator’s Brief),
20 Councilmember Merkel has violated the Social Media Policy of the City of Spokane
21 Valley and Chapter 5 and Appendix H (Councilmember Social Media Policy) of the
22 Governance Manual.

23 3.51. Any Finding of Fact that is more correctly a Conclusion of Law is hereby
24 incorporated as such by this reference.

25

IV. DECISION

23 4.1. Based on the above Findings of Facts and Conclusions of Law, the Hearing Examiner
24 finds and concludes that Councilmember Merkel violated the Spokane Valley Council
25 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

Attachment C

From: amerkel@spokanevalleywa.gov
Sent: Monday, March 18, 2024 4:50 PM
To: John Hohman
Subject: Re: Nextdoor account

Dear John,

After reading West vs Puyallup and the Supreme Court cases decided on 3.15, I think it's premature to move forward with an official Nextdoor account. So far neither the city nor the council has directed me to post anything or communicate anything via my social media, additionally there is nothing inherently within my elected job description that requires such postings. Further more, with the disclaimer I include in my posts and on my account it is clear that I am not communicating on behalf of the council or the city as a whole. Finally, it is clear that my posts do not further the city's interests in any meaningful way, as you and the staff have made it clear on multiple occasions that I do not speak for the city. If these things change we can proceed accordingly.

Thanks,

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov

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Any opinions expressed in this email are intended to only express the opinion of Al Merkel. No opinions, positions, or perspectives expressed shall be construed as the position or a commitment from the city or the council as a whole.

On Mar 14, 2024, at 11:39 AM, John Hohman <jhohman@spokanevalleywa.gov> wrote:

Hi Al,

I guess we will have to agree to disagree on our recollections of that conversation. I don't recall you asking my permission to use the physical address of City Hall for your account. In fact, I have no authority over the use of the address by councilmembers, who routinely receive written mail at this location. I did state that staff did not have time to move forward with an official City Nextdoor account but that changed and now we have that presence. Again, I never denied your use of the address, or you moving forward with an account that follows the Governance Manual Appendix H. I have no authority over those issues.

Let me know when you are ready to move forward your City linked Nextdoor account and I'll work with staff to deploy the records retention software as I have previously mentioned.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Wednesday, March 13, 2024 3:14 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: RE: Nextdoor account

John, that is not my recollection at all. I asked specifically to have a city based nextdoor account and you said specifically no. The email is not what I need, I need an address that I can verify to do so. You said that nextdoor was not an approved service and if I wanted to set this up I would have to ask the council. I said, that doesn't make any sense since the manual said "such as" and if I cannot use the cityhall to setup my nextdoor then I will use my personal account. That is when I said I would take the risk since you had denied me the ability to use the city hall as my address. I am happy to use the city email and city hall to setup an account if that is something that I can do. Considering that the governance manual change has not been passed yet it would be premature to deduct anything from my account. This will be my only official account, I look forward to the other council members declaring their facebook accounts which they use to comment on city business.

From: John Hohman <jhohman@spokanevalleywa.gov>
Sent: Wednesday, March 13, 2024 2:34 PM
To: Albert Merkel <amerkel@spokanevalleywa.gov>
Subject: RE: Nextdoor account

Hi Al,

The City's official Nextdoor account has nothing to do with your ability to create your own compliant account. Appendix H of the Governance Manual lays out the steps required to make that happen which you and I discussed back in December when it came forward for approval with the previous Council. You have had this ability since your official city email address went live on January 1, 2024. The two of us discussed this back in the first week of January but back then you seemed content with your existing account. I was concerned about your ability to comply with the public records requirements but you told me "I'll take that risk".

That being said, if you are now interested in having an account that complies with the Governance Manual, I can work with our IT manager to activate the Page Freezer software. Please let me know if this is what you are asking for. Please note that costs for this software will likely be deducted from your budget as discussed at last night's meeting.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Wednesday, March 13, 2024 12:33 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: Nextdoor account

Dear John,

I see the city has a Nextdoor account now, does this mean I can create an official city account using the city hall as my address now as I requested in December but was told no?

Thanks,

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov

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John Hohman

From: John Hohman
Sent: Monday, April 1, 2024 4:58 PM
To: Albert Merkel
Subject: RE: Per request

Hi Al,

As we have previously discussed, it's my job to limit risk to the City so that is why I shared my concerns with you regarding your assertions about your posts not being City business and that a court may likely not agree with your position. Such an outcome could likely cause monetary impacts to you and the City. That being said, also as previously stated, I have an affidavit for you to sign so we can be responsive to the requestor. I'll have that for you to sign tomorrow when you're here.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Friday, March 29, 2024 6:08 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: Re: Per request

Dear John,

As I have previously expressed, I have never been directed to post anything on behalf of the city or the council on my Nextdoor, I have a disclaimer representing that all posts are my views only. I have had no discussions since my time on council with other council members via Nextdoor. It is not a requirement that I have a Nextdoor for my position, nor has the city expressed it as such. I have not brought up anything on my Nextdoor during city council meetings to use with other council members. There are no public records on my Nextdoor and I am comfortable signing the affidavit. I have not removed or deleted my account, I wonder where you are getting this information from, and also who and why people are monitoring my account and reporting to you? You have also expressly stated both to me and the media that I do not in anyway represent the city or the council through Jill the PR person, clearly indicating that nothing I post furthers the city interest.

Have you or any staff member ever directed me to post anything on nextdoor? Has the council? The answer to both is no, nor would I consider it is my personal account.

I believe that this is yet another attempt on your part to use city authority to attempt to target me rather than serve my and my constituents interests as is your job. You seem to be making an open statement here that you disagree with my position on my personal account, have you done the same when other council members were asked for personal cell records or email records as has been done in the past?

Please provide the affidavit.

Thanks,

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov

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On Mar 29, 2024, at 4:36 PM, John Hohman <jhohman@spokanevalleywa.gov> wrote:

Hi Al,

Thanks for being willing to sign the affidavit. Nonetheless, I ask that you reconsider your decision to not provide the NextDoor content identified in the public records request that I handed to you on Wednesday March 27th of this week. My understanding is that you regularly post on your NextDoor "Spokane Valley Politics and Government" page about Spokane Valley City business, the ongoingings of Council meetings, your work as a councilmember, and use the site to solicit advice and opinions from constituents to guide your work and policy decisions as a City councilmember. Given this and other differences between your use of NextDoor and the social media uses at play in the cases you identified by a separate email, the City will face a substantial risk of liability for your non-disclosure of the requested information. For example, there is a high risk that a court could disagree with your interpretation of the law if a lawsuit was filed. The risk is increased by the Washington Legislature's and Supreme Court's policy requiring the Public Records Act to be liberally construed in favor of disclosure in order to promote transparency of government. In other words, your decision to not provide the records could expose the City, and you, to liability for violating the PRA. Such liability could include, among other things, payment of daily fines and the requestor's attorney fees and costs.

To date, the City has never had a Public Records Act violation. In fact, staff works diligently to make sure that we are compliant with the PRA. Given that a mistaken understanding of the law is not a defense to a PRA action, and the risk that a court could disagree with your opinion, I ask that you help protect the City by erring on the side of caution and transparency by producing the NextDoor content the requestor is seeking. It is my understanding that you may have removed or deleted your account. Regardless of the current status of your personal account, we believe a court would likely deem the materials as public records for the period requested so the posts would still need to be produced. However, if you insist on this path, I do have an affidavit for you to sign. Please let me know how you would like to proceed.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Wednesday, March 27, 2024 6:56 PM

To: John Hohman <jhohman@spokanevalleywa.gov>

Subject: Per request

As per our conversation, I have not used my personal account for city business.

I am happy to sign a Nissen affidavit to that effect.

Thanks

Al Merkel | City Council Pos 3

10210 E. Sprague Avenue | Spokane Valley, WA 99206

(509) 828-0097 | amerkel@spokanevalleywa.gov

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Attachment C-3

John Hohman

From: Albert Merkel
Sent: Tuesday, April 16, 2024 12:43 PM
To: John Hohman
Cc: John Whitehead
Subject: Re: Per request - Attorney/Client Privileged Communication

I'm confused as to what the city is searching for since it is the content from my Nextdoor, it makes no sense that the city would have any such content as they are not public records. Please see my email below that responds to everything you have written to me again

I disagree with your assessment. I asked you to cease writing to me about this directly, but you have continued to do so completely disregarding what I wrote,

I am not sure what to do here, so I am copying John Whitehead director of HR.

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov

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On Apr 16, 2024, at 10:11 AM, John Hohman <jhohman@spokanevalleywa.gov> wrote:

Hi Al,

I am not trying to compel you to produce your NextDoor content. As you know from my previous emails, I have repeatedly asked you to reconsider your refusal to disclose your NextDoor content related to City or City Council business. The reason for my requests is not to create any type of hostility between us, but rather to protect the City from a strong possibility that it will be sued by the requestor and the position you are taking will put the City in a weaker legal position. Should a PRA action be filed against the City, it will likely result in a favorable decision for the requestor and financial penalties for the City. My correspondence with you has been numerous because your actions are interfering with my ability to perform my job that requires me to see that all laws and ordinances are faithfully executed. We have explained the Public Records Act to you on several occasions so there should be no confusion on what is required to ensure compliance with the law.

Again, the City Attorney disagrees with your assertion that you are "merely providing general information about City activities" on your NextDoor accounts. Rather, after reviewing the content,

his observation is that your NextDoor use consists substantially of (a) dialogue between you and the public regarding City business, (b) discussion and defense of your councilmember thoughts, positions and proposals on matters that have been, are, or will be before Council for action, and (c) actively ask the public for input on City policy for your stated purpose of guiding your councilmember decisions on matters being considered by Council. The City Attorney is concerned that there is a high danger of a court finding such use to be in furtherance of City business in your desired direction, and hence to be use within your official capacity. The City Attorney highly doubts a court would conclude the public records designation hinges on whether your policies are consistent the Council majority. Your use of NextDoor is materially different than the elected's use of Facebook in the *West v. Puyallup* case, rendering the result in *West v. Puyallup* to be an unreliable indicator of how a court would rule in this matter.

My efforts to convince you to voluntarily provide the NextDoor content is not delaying the City's response to the requestor. The City is still in the process of searching for and gathering whatever NextDoor content the City has in its possession that is responsive to the request. No records will be produced until after that process is completed. My requests to you have been made while the City continues to search for responsive records, and therefore have not caused delay. Moreover, my efforts to convince you to disclose the responsive NextDoor content is in furtherance of the City's obligation to locate and produce all responsive records and ensure full compliance with the PRA. Accordingly, as referenced in the letter I provided you towards the end of March, the City will produce those responsive NextDoor records that it can locate this Wednesday (April 17th) unless it is presented with a court order preventing the disclosure before then. The delivery of materials will be incomplete without you providing the entire record of your posts for the time period requested. Ultimately, as I've mentioned above and many times previously, I cannot compel you to act in any way so I guess we will see where this issue ends up.

You also misunderstood a portion of my previous email. The discussion on the privileged nature of the communication was to inform you how this designation works and with whom the communication can be shared without destroying the privilege. It was not a threat and I did not share the City Attorney's previous email with City department heads or other Councilmembers.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Thursday, April 11, 2024 1:53 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: Re: Per request - Attorney/Client Privileged Communication

Dear John,

I once again, for at least for the 4th time, respectfully disagree with your interpretation and legal opinion. To reiterate what I have already shared, None of my social media posts are public records. None of my social media posts constitute "city business" nor are my posts done "in an official capacity." The City did not require or direct me to post on social media. None of my posts on social media furthered the City's interests. My social posts are merely providing general information about City activities and therefore contain my statements and opinions as a private citizen. Personal communications of a public official are not work-related and therefore are not subject to disclosure under the PRA. Discussions of a city

council member's job on social media are not acts done within the scope of city council duties. My affidavit speaks for itself. Furthermore, these attempts to compel me to turn over my personal accounts feel like infringements on my right to privacy and free speech rights. I have already stated my reasons for my disagreement. Frankly, this consistent badgering about an issue that I already gave a response on is making my work environment hostile and importantly is delaying the city's response to the requester which I signed on April 2, 2024. I don't believe that this is a good faith process delay as I have already provided and signed my truthful affidavit response, and already answered your questions. Please cease this hostile behavior, and in the future please show me the professional respect to take my answers to questions to be both truthful and considered, and please cease threatening me with releasing information to inappropriate parties like "department heads". I also suggest that all parties review any IT use policy the city has as accessing my social media on city owned equipment or on city time may be violations.

Best Regards,

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | almerkel@spokanevalleywa.gov

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Any opinions expressed in this email are intended to only express the opinion of Al Merkel. No opinions, positions, or perspectives expressed shall be construed as the position or a commitment from the city or the council as a whole.

On Apr 10, 2024, at 3:54 PM, John Hohman
<jhohman@spokanevalleywa.gov> wrote:

Hi Al,

As I mentioned last week when we spoke after the Council meeting, I asked Kelly to review your changes to affidavit as I was concerned about your added language. Please see his detailed response below. Once again, I ask that you reconsider your position because it puts the City and you at legal risk which could include significant monetary penalties. Please let me know if you wish to stand by the language you wrote into the affidavit or if you wish to produce the requested documents. We have received additional Public Records Requests involving your communications which I will be forwarding shortly so this seems like it will be an ongoing issue.

Please note that Kelly and I discussed [REDACTED] and he advised that [REDACTED]

Thanks,
John

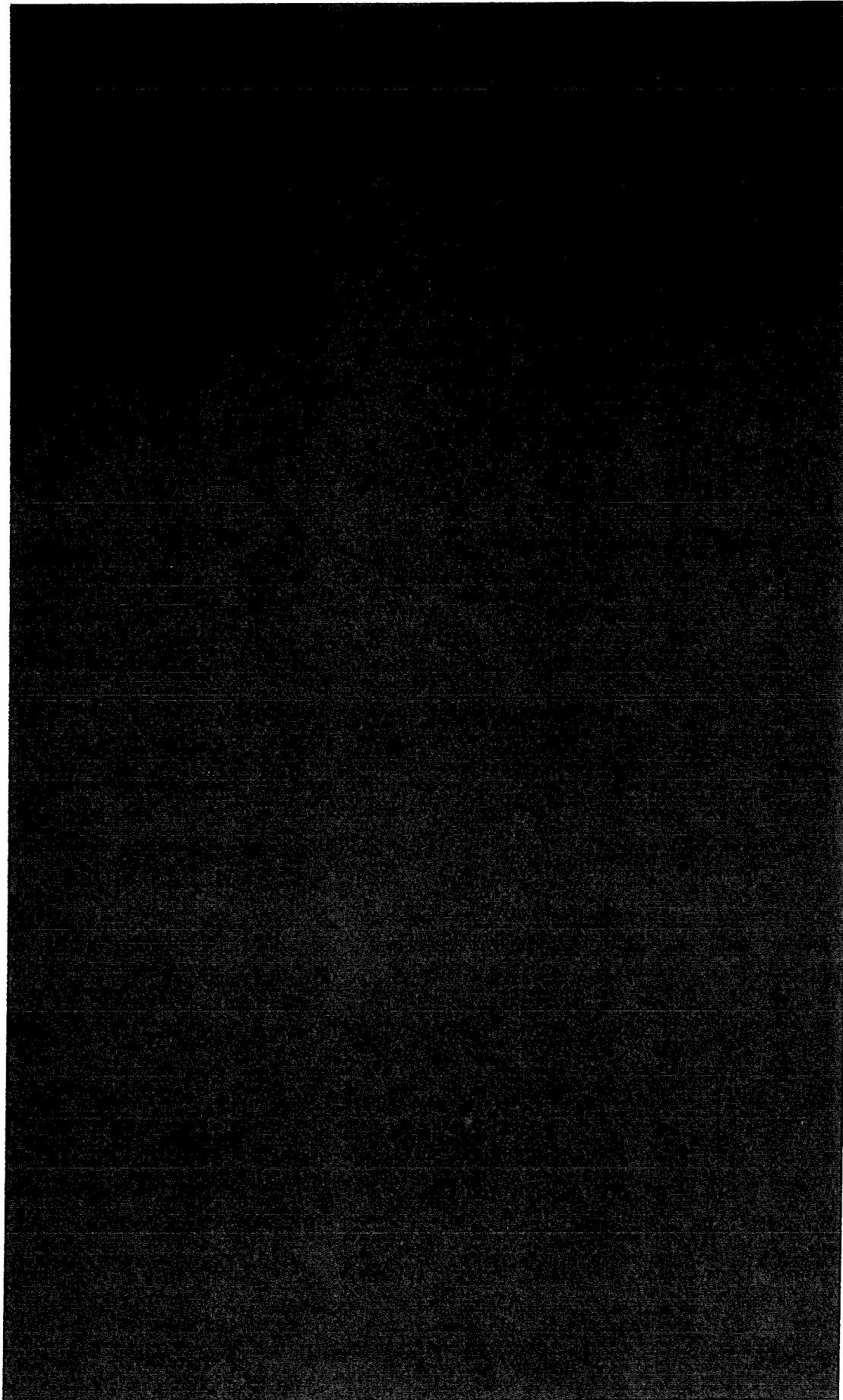
From: Kelly Konkright <kKonkright@spokanevalleywa.gov>
Sent: Monday, April 8, 2024 1:58 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: RE: Per request - Attorney/Client Privileged Communication

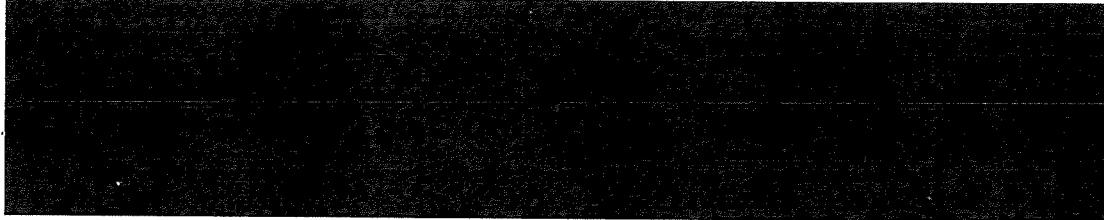
John,

From a legal perspective, [REDACTED]

[REDACTED]

[REDACTED]





Thanks,

Kelly E. Konkright | City Attorney
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 720-5150 | kkonkright@spokanevalleywa.gov

image001.png

This email and any attachments may be subject to disclosure pursuant to Washington State's Public Record Act, chapter 42.56 RCW.

From: John Hohman <jhohman@spokanevalleywa.gov>
Sent: Monday, April 8, 2024 12:15 PM
To: Kelly Konkright <kkonkright@spokanevalleywa.gov>
Subject: FW: Per request - Attorney/Client Privilleged Communication

Kelly,



Thanks,
John

From: John Hohman
Sent: Monday, April 1, 2024 4:58 PM
To: Albert Merkel <amerkel@spokanevalleywa.gov>
Subject: RE: Per request

Hi Al,

As we have previously discussed, it's my job to limit risk to the City so that is why I shared my concerns with you regarding your assertions about your posts not being City business and that a court may likely not agree with your position. Such an outcome could likely cause monetary impacts to you and the City. That being said, also as previously stated, I have an affidavit for you to sign so we can be responsive to the requestor. I'll have that for you to sign tomorrow when you're here.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Friday, March 29, 2024 6:08 PM

To: John Hohman <jhohman@spokanevalleywa.gov>

Subject: Re: Per request

Dear John,

As I have previously expressed, I have never been directed to post anything on behalf of the city or the council on my Nextdoor, I have a disclaimer representing that all posts are my views only, I have had no discussions since my time on council with other council members via Nextdoor. It is not a requirement that I have a Nextdoor for my position, nor has the city expressed it as such. I have not brought up anything on my Nextdoor during city council meetings to use with other council members. There are no public records on my Nextdoor and I am comfortable signing the affidavit. I have not removed or deleted my account, I wonder where you are getting this information from, and also who and why people are monitoring my account and reporting to you? You have also expressly stated both to me and the media that I do not in anyway represent the city or the council through Jill the PR person, clearly indicating that nothing I post furthers the city interest.

Have you or any staff member ever directed me to post anything on nextdoor? Has the council? The answer to both is no, nor would I consider it is my personal account.

I believe that this is yet another attempt on your part to use city authority to attempt to target me rather than serve my and my constituents interests as is your job. You seem to be making an open statement here that you disagree with my position on my personal account, have you done the same when other council members were asked for personal cell records or email records as has been done in the past?

Please provide the affidavit.

Thanks,

**Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov**

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On Mar 29, 2024, at 4:36 PM, John Hohman <jhohman@spokanevalleywa.gov> wrote:

Hi Al,

Thanks for being willing to sign the affidavit. Nonetheless, I ask that you reconsider your decision to not provide the NextDoor content identified in the public records request that I handed to you on Wednesday March 27th of this week. My understanding is that you regularly post on your NextDoor "Spokane Valley Politics and Government" page about Spokane Valley City business, the ongoing Council meetings, your work as a councilmember, and use the site to solicit advice and opinions from constituents to guide your work and policy decisions as a City councilmember. Given this and other differences between your use of NextDoor and the social media uses at play in the cases you identified by a separate email, the City will face a substantial risk of liability for your non-disclosure of the requested information. For example, there is a high risk that a court could disagree with your interpretation of the law if a lawsuit was filed. The risk is increased by the Washington Legislature's and Supreme Court's policy requiring the Public Records Act to be liberally construed in favor of disclosure in order to promote transparency of government. In other words, your decision to not provide the records could expose the City, and you, to liability for violating the PRA. Such liability could include, among other things, payment of daily fines and the requestor's attorney fees and costs.

To date, the City has never had a Public Records Act violation. In fact, staff works diligently to make sure that we are compliant with the PRA. Given that a mistaken understanding of the law is not a defense to a PRA action, and the risk that a court could disagree with your opinion, I ask that you help protect the City by erring on the side of caution and transparency by producing the NextDoor content the requestor is seeking. It is my understanding that you may have removed or deleted your account. Regardless of the current status of your personal account, we believe a court would likely deem the materials as public records for the period requested so the posts would still need to be produced. However, if you insist on this path, I do have an affidavit for you to sign. Please let me know how you would like to proceed.

Thanks,
John

From: Albert Merkel <amerkel@spokanevalleywa.gov>
Sent: Wednesday, March 27, 2024 6:56 PM
To: John Hohman <jhohman@spokanevalleywa.gov>
Subject: Per request

As per our conversation, I have not used my personal account for city business.

I am happy to sign a Nissen affidavit to that effect.

Thanks

Al Merkel | City Council Pos 3
10210 E. Sprague Avenue | Spokane Valley, WA 99206
(509) 828-0097 | amerkel@spokanevalleywa.gov

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Any opinions expressed in this email are intended to only express the opinion of Al Merkel. No opinions, positions, or perspectives expressed shall be construed as the position or a commitment from the city or the council as a whole.

Attachment D

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6
7 IN RE THE APPEAL OF:) Case No. APP-2024-0001
8)
9 ALBERT MERKEL from the) Independent Investigator's
Findings and Conclusions) Proposed Findings of Fact
of Rebecca Dean,) and Conclusions of Law
Independent Investigator,)
10
11
12

HEARING HELD BEFORE
HEARING EXAMINER ANDREW KOTTKAMP
ON OCTOBER 24, 2024

13
14
15 SPOKANE VALLEY CITY HALL
16 10210 E. SPRAGUE AVENUE
SPOKANE VALLEY, WASHINGTON
17
18
19
20
21
22
23

24
25 AUDIO TRANSCRIBED BY:
CINDY J. CHATTERTON, CCR
CCR NO. 2951

1 APPEARANCES
2 (ALL PARTIES APPEARING IN PERSON)
3
4

5 HEARING EXAMINER ANDREW KOTTKAMP
6 KOTTKAMP, YEDINAK & ESWORTHY, PLLC
7 435 Orondo Avenue
8 Wenatchee, WA 98801
9

10 FOR THE INVESTIGATOR:

11 12 MR. JAMES KING
13 EVANS, CRAVEN & LACKIE, P.S.
14 818 W. Riverside, Suite 250
15 Spokane, WA 99201-0910
16

17 18 CLIENT ALSO PRESENT:
19 MS. REBECCA DEAN
20 REBECCA DEAN, PLLC
21 2212 Queen Anne Avenue, #158
22 Seattle, WA 98109-2312
23

24 FOR THE APPELLANT:

25 19 MR. ALBERT MERKEL
20 COUNCILMEMBER, CITY OF SPOKANE VALLEY
21 10210 E. Sprague Avenue
22 Spokane Valley, WA 99206
23
24

1 I N D E X

2 IN RE THE APPEAL OF ALBERT MERKEL
3 NO. APP-2024-0001
4 October 24, 2024

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1 (COMMENCING AUDIO TRANSCRIPTION)

2 (09:00:00 HEARING BEGINS)

3
4 * * * P R O C E E D I N G S * * *

5
6 HEARING EXAMINER: Andy Kottkamp.

7 MR. MERKEL: Thank you so much for making
8 the time for us.

9 HEARING EXAMINER: Well, my pleasure, Mr.
10 Merkel. Thank you.

11 ADMINISTRATIVE ASSISTANT: Hearings
12 Examiner, we are on the record whenever you are
13 ready.

14 HEARING EXAMINER: We'll let Mr. Merkel
15 get settled here.

16 MR. MERKEL: Thank you very much. I
17 appreciate it.

18 What was it again?

19 HEARING EXAMINER: "Valley 2024".

20 MR. MERKEL: "Valley 2024". Okay. I'm
21 connected. All right. Ready to roll.

22 HEARING EXAMINER: Ready, Mr. Merkel?

23 MR. MERKEL: Yes, sir. Thank you.

24 HEARING EXAMINER: Ready, Mr. King?

25 MR. KING: Yes.

1 HEARING EXAMINER: All right. Everybody,
2 we are on the record, and I am going to call this
3 meeting to order. This is the October 24th, 2024,
4 meeting of the Spokane Valley Hearing Examiner.

5 My name is Andy Kottkamp, and I have been
6 appointed by the City of Spokane Valley to serve as
7 the Hearing Examiner on various items, including the
8 matter that's on the agenda for today.

9 I'll consider any testimony and evidence
10 presented today, as well as all the exhibits that
11 have already been submitted, in order to make a
12 decision.

13 Now, I'm going to go through just to kind of
14 give everybody an idea, a reminder, I guess, for the
15 parties that are here today, what's in the order on
16 prehearing conference about how we're going to
17 proceed with the hearing.

18 It'll start out with the -- there's no
19 opening statements. The Investigator will be given
20 an opportunity to present their testimony and
21 evidence. They've indicated that they need -- would
22 like two hours of time for that, including
23 cross-examination.

24 Then the Appellant will be given an
25 opportunity to present their -- his testimony and

1 evidence, again, with a two-hour limit that he has
2 agreed to, and then the Investigator rebuttal for
3 one-half hour.

4 There is no general public testimony in this
5 matter. This is a matter between the Investigator
6 and the Appellant, and the Hearing Examiner making
7 the decision. So, there's no time for a general
8 public testimony to come up and state your
9 testimony.

10 Only those witnesses that were specifically
11 identified in the prehearing witness disclosures
12 will be allowed to testify, if at all, once we --
13 because we do have a motion in limine that's before
14 us. And I'll actually take that up at the end of
15 the Investigator's case-in-chief.

16 After the rebuttal, then the record will be
17 closed, and then we will have no closing arguments
18 today. The Investigator -- this has, again, all
19 been agreed to in the order of prehearing
20 conference.

21 The Investigator, within 10 days after the
22 record closes, will provide their written summation
23 and any proposed findings of fact and conclusions of
24 law that they wish to provide. Then the Appellant
25 will have 15 days from after the record closes to

1 also provide their written summation and any
2 proposed findings and conclusions that you'd like
3 the Hearing Examiner to consider. And then, 20 days
4 after the record closes, the Investigator's reply
5 will be due.

6 Now, my decision would normally -- then, at
7 that point, the record would close. My decision
8 would be due within 10 days of that point. So, that
9 would be 30 days after the record closes.

10 I'm going to ask the parties, at this time --
11 because there's a lot of stuff to go through,
12 obviously -- if the parties would have any objection
13 to allowing the Hearing Examiner an additional 10
14 days. So, that would be 40 days after the record
15 closes for the Hearing Examiner's decision.

16 Mr. King?

17 MR. KING: No objection from the
18 Investigator, Your Honor.

19 HEARING EXAMINER: All right. Thank you.

20 And Mr. Merkel?

21 MR. MERKEL: No objections.

22 HEARING EXAMINER: All right. Thank you
23 very much.

24 I'm going to go through and state the
25 evidence that's come in, but I want to make a couple

1 of other things here on the record.

2 So, outside of receiving the --

3 MR. MERKEL: Mr. Hearing Examiner?

4 HEARING EXAMINER: Yes.

5 MR. MERKEL: Can I just make a very quick
6 note on the previous statements that you made? Just
7 note, for the record, that I objected to closing
8 statements in writing. That I would have rather had
9 them been in person today.

10 HEARING EXAMINER: Okay. I appreciate
11 that.

12 MR. MERKEL: Thank you.

13 HEARING EXAMINER: I forgot to mention
14 that. But they will be written summations.

15 Other than reviewing the exhibits that have
16 been submitted by both sides, the materials on the
17 order for prehearing conference that were
18 considered, there's been briefing that's been
19 provided. Other than receiving and reviewing those
20 items, I've not had any communication regarding the
21 item that's on for today's agenda.

22 And then, I don't have any interest in this
23 matter. I'll be able to fairly and objectively
24 consider this matter. And so, I will be able to
25 hear and consider the matter in a fair and objective

1 manner. So, I'll start out with those
2 representations.

3 If there is anybody here today who objects to
4 my participation as a Hearing Examiner; if so, you
5 need to state so at this time.

6 Mr. Merkel.

7 MR. MERKEL: I'm not objecting to your
8 representation as a Hearing Examiner. I agree with
9 you that you have no objectionable issues with
10 hearing this issue, no personal issues.

11 I'm just kind of, as a standing objection,
12 that I think that this entire matter is ultra vires
13 to what is allowed in the manual.

14 HEARING EXAMINER: Thank you very much.
15 Your objection is noted.

16 So, with that, a couple more things. If you
17 do have any cellphones, if you would check them now,
18 as I'm going to do, and make sure that they're
19 either off or in silent mode as not to disrupt the
20 hearing.

21 We do have a large group of members of the
22 public here today. I'd ask that everybody maintain
23 a proper decorum; that there be no cheering or
24 booing or anything of that nature; that we treat
25 this matter like -- treat this room like we're in a

2 So, with that, we do have some exhibits that
3 I'm going to admit into the record. First of all,
4 from the Independent Investigator, we have Exhibits
5 1-A through -- or I-A through I-15 that are
6 referenced in their exhibit list.

7 Is there any need for me to go through and
8 actually name what those 15 exhibits are that are
9 named in that list, Mr. King?

10 MR. KING: Not as far as we're concerned.

11 HEARING EXAMINER: All right. Thank you.

14 MR. MERKEL: No need. Thank you.

15 HEARING EXAMINER: All right. So, then
16 there's also exhibits from the hearing memorandum
17 from the Investigator. And they were identified as
18 Exhibits 1 through 8. I'm now going to identify
19 those as Exhibits I-16, 17, 18, 19, 20, 21, 22, and
20 23. So, those were, generally, some cases and some
21 excerpts from the Spokane Valley Municipal Code.

22 There is -- I'm going to -- Exhibit I-34,
23 just so that we have these in here too, the
24 Investigator's Hearing Memorandum; Exhibit I-35, the
25 exhibit list; I-36, the witness list; I-37, the

1 errata to the hearing memoranda; and Exhibit 38, the
2 Investigator's motion in limine.

3 We have, from the Appellant, Exhibit A-1
4 through 15, and the Appellant's witness list -- or
5 exhibit list, excuse me.

6 Mr. King, is there any need for me to
7 specifically name those in the record?

8 MR. KING: No.

9 HEARING EXAMINER: All right. Thank you.

10 Mr. Merkel, would you like those specifically
11 named at all?

12 MR. MERKEL: No, thank you.

13 HEARING EXAMINER: All right. Then
14 Exhibit A-16 will be the Appellant's brief; Exhibit
15 A-17 will be the letter to John Holman, dated
16 9/27/24; Exhibit A-18 will be the 9/24/24, City of
17 Spokane Valley request for city -- for council
18 action, with exhibits; Exhibit A-19 will be the
19 Appellant's exhibit and witness list; Exhibit A-20
20 is the MRSC, quote, Election Season Tips and
21 Reminders, end quote, with the date of August 16,
22 2023. So, those are the exhibits that I have for
23 the -- for the Appellant.

24 And then, there's going to be one, what I'm
25 going to call a Hearing Examiner exhibit, just so

1 that we have it in the record. It was procedural.

2 HE-1 will be the order on prehearing conference.

3 As I indicated before we got -- or right
4 after we got started, there is a motion in limine.

5 And what I'm going to do is I'm going to go through
6 the -- have the Investigator present their case.

7 And then, prior to the Appellant presenting your
8 case, then we'll consider that motion in limine.

9 Is there anything other, preliminarily, Mr.
10 King, that you want to bring up this morning?

11 MR. KING: The only other issue is that,
12 as you're aware from reviewing the exhibits, the
13 Investigator went through a large volume of
14 documents.

15 ADMINISTRATIVE ASSISTANT: Can you get
16 near the microphone, please?

17 MR. KING: I'm sorry. I'll go to the
18 podium.

19 As part of the Investigator's work in this
20 matter, as our materials indicate, the Investigator
21 went through a large volume of posts by
22 Councilmember Merkel on Nextdoor and selected posts
23 for demonstrative and illustrative purposes that are
24 appended to her report and which has already been
25 admitted.

1 I am simply going to use, illustratively, the
2 volume of materials reviewed that led to the
3 selection of the items that have been marked for
4 exhibit. I don't intend to mark it. It's
5 available, obviously, for Councilmember Merkel to
6 review or for the Hearing Examiner to review.

7 But I thought that our record would become,
8 perhaps, unwieldy by introduction of each of these
9 posts, since we have selected examples that are a
10 matter of record and have been admitted as exhibits.

11 So, that's the only other housekeeping matter
12 I wish to mention.

13 HEARING EXAMINER: All right. Mr.
14 Merkel, just let you know, what my understanding of
15 this is is that big stack of papers is not an
16 exhibit and is not part of the record.

17 So, when we create a formal record that is
18 going to go through any appeal or any place past
19 this hearing, that the only exhibits that will be
20 following along with that hear- -- with that appeal
21 are the exhibits that have been admitted into the
22 record.

23 It is very common, in trial practice, for one
24 party or the other to consider documents in an
25 illustrative way, as Mr. King is stating. So, it's

1 just to say, Well, this is something that I saw but
2 it's not an exhibit.

3 The Hearing Examiner is going to -- would
4 give whatever weight the Hearing Examiner finds
5 appropriate for that. Quite frankly -- well, I'm
6 not going to prejudge it. But it's not as -- it's
7 not as solid as the evidence of exhibits that are
8 before the Hearing Examiner.

9 There could be an objection for hearsay, of
10 course, that, Well, she's talking about something
11 that's not in the record. And I would overrule that
12 objection, because the strict evidence rules aren't
13 guiding me. But, once again, it would just go to
14 the weight and not the admissibility.

15 So, with that explanation, do you have any
16 objection to the use of all of the documents that
17 were reviewed by Ms. -- sorry, Ms. Dean in making
18 her report, her being able to refer to those in her
19 testimony?

20 MR. MERKEL: So, she's referring to other
21 posts in this pile? I thought we were talking about
22 just this -- the example of this being a big pile of
23 documents is what we're talking about.

24 HEARING EXAMINER: Are you going to go
25 through and --

1 MR. KING: I am not. And I do not intend
2 to refer to the substance of any specific document
3 in this volume that has not already been marked and
4 admitted as an exhibit.

5 HEARING EXAMINER: I misunderstood. I'm
6 sorry.

7 MR. MERKEL: As I understand what you're
8 basically saying is is that you picked out -- I
9 don't know -- 15, 16 things out of my huge amount of
10 posts.

11 HEARING EXAMINER: Got it. Okay. Any
12 objection to that?

13 MR. MERKEL: No objection.

14 HEARING EXAMINER: Okay. Thank you.

15 Anything else, preliminarily, Mr. King?

16 | MR. KING: (No audible answer).

17 HEARING EXAMINER: And then, Mr. Merkel,
18 anything preliminarily before we jump into the
19 Investigator's side of things?

20 MR. MERKEL: Yes. Just a few things to
21 note as standard objection -- or standing
22 objections. As we discussed in the prehearing
23 conference, I don't have any right to subpoena. I
24 don't have any right to -- apparently, I don't have
25 any right to request documents from the city with

1 any force of law.

2 I did make a request of documents from the
3 city. Several of the items that I requested were
4 not proffered by the city, despite the city having
5 them. I put some specific examples in my hearing
6 memorandum.

7 But, you know, just as a standing objection,
8 I feel that these items, specifically, don't allow
9 me to completely -- to provide a complete defense.
10 And I think that, as a whole, this is violating my
11 standard due process rights.

12 Thank you.

13 HEARING EXAMINER: All right. Thank you
14 very much.

15 All right. Mr. King, are you ready to
16 proceed? I'll have you identify yourself for the
17 record.

18 MR. KING: Can I respond very briefly to
19 Councilmember Merkel's version?

20 HEARING EXAMINER: Sure.

21 MR. KING: The rules do provide for an
22 offer of proof regarding witness testimony, if they
23 were here, and I'd probably demand an offer of
24 proof. Likewise, any alleged documents that go to
25 Mr. Merkel's defense, he would be entitled to make

1 an offer of proof having to do with that.

2 And in the absence of any offer of proof, any
3 objection along the lines suggested would probably
4 not be well taken. So, I simply want to offer that
5 for the record.

6 And then, we would call, as our first
7 witness, Investigator Rebecca Dean.

8 MR. MERKEL: Can I respond to the
9 comments made by the Investigator?

10 HEARING EXAMINER: Yes, briefly.

11 MR. MERKEL: Very briefly.

12 Just as a quick response to that. By way of
13 offer of proof, I am happy to present --

14 HEARING EXAMINER: Not yet. No. That
15 will all be during your case-in-chief. If you're
16 trying to call witnesses, that's when we're going to
17 get to his motion in limine and whatever offer of
18 proof that could be --

19 MR. MERKEL: Right.

20 HEARING EXAMINER: -- made.

21 MR. MERKEL: That's not what I -- what I
22 was getting to is that while I understand what he
23 was saying in terms of I could provide an offer of
24 proof, even with an offer of proof, I have no way to
25 compel the witnesses to come and testify.

1 HEARING EXAMINER: All right. And for
2 the record, I would agree. I've looked at the
3 Spokane Valley Community Code -- or Municipal Code
4 in great detail, and I couldn't find any authority
5 that I am allowed to issue subpoenas.

6 MR. MERKEL: And same applies to getting
7 the information from the city. Even if I had an
8 offer of proof, I have no way to compel the city to
9 give me that information. I could just simply
10 justify why I'm asking for it to you, but that
11 doesn't necessarily compel them to give it to me.

12 Thank you.

13 HEARING EXAMINER: Thank you very much.

14 Mr. King? And for the record, can you
15 identify yourself?

16 MR. KING: Yes. I am James King. I am
17 Co-Investigator with Ms. Dean and charged with the
18 presentation of the Investigator's evidence in this
19 matter.

20 HEARING EXAMINER: All right. Thank you
21 very much.

22 So, we'll have witnesses take their seat over
23 in this little box over here. I'll have you state
24 your name and your address, and then I will put you
25 under oath.

1 You know, and while you're getting set up
2 here, I completely failed to state why we're here.
3 And we're here, this is an appeal by Mr. Merkel of
4 an investigation report regarding violation of
5 council conduct standards. The investigative report
6 had been submitted by Ms. Dean. And Mr. Merkel
7 timely appealed that report and the conclusions set
8 forth within the report.

9 And then, that's why we're here today.
10 It's for the Hearing Examiner to, then, make a
11 decision as to whether or not the report is
12 basically correct or not, whether or not the
13 conclusions made were correct. And then, if they
14 were -- not saying they were. Because I have -- I
15 can say, "Yes, they were" or "No, they weren't."
16 But if they were, then I'd make a recommendation to
17 city council as to further action by the City of
18 Spokane Valley.

19 So, anyway, forgot to say that at the very
20 beginning, why we're here.

21 So, Mr. King.

22 MR. KING: Thank you.

23 HEARING EXAMINER: Have her name and
24 address, and then I'll swear her in as a witness.

25 MR. KING: All right. Would you, for the

1 record, state your full name and your professional
2 address?

3 MS. DEAN: Yes. It's Rebecca Dean. And
4 my professional address is 2212 Queen Anne Avenue
5 North, Number 158, Seattle, Washington 98109.

6
7 REBECCA DEAN,

8 duly sworn to tell the truth, testified as follows:

9
10 HEARING EXAMINER: All right. Thank you.

11 Now, Mr. King.

12 MR. KING: Thank you.

13
14 DIRECT EXAMINATION

15 BY MR. KING:

16 Q. Ms. Dean, will you, first of all, explain to the
17 Hearing Examiner what your profession is?

18 A. Yes. I'm a lawyer with an investigation practice.

19 Q. Please describe your educational background leading
20 to your obtention of a law degree.

21 A. Sure.

22 I was -- I received my undergraduate degree
23 in 1975 from Linfield College. I worked for 10
24 years in Human Resources. I returned to school and
25 attended the University of Washington Law School,

1 This meeting is adjourned.
2
3 (01:40:31 ADJOURNED)
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1 C E R T I F I C A T E

2 STATE OF WASHINGTON)
3 COUNTY OF GRANT) ss.
45 I, Cindy J. Chatterton, certify under penalty of
6 perjury under the laws of the State of Washington that
7 the following is true and correct:

- 8 1. I am a certified court reporter;
- 9 2. I received the electronic recording from the
10 Spokane Valley City Attorney's Office, as it was received
11 from Marianne Lemons, Administrative Assistant in the
12 Community and Public Works Division of the City of
13 Spokane Valley;
- 14 3. This transcript is a true and correct record of
15 the proceedings to the best of my ability;
- 16 4. I am in no way related to or employed by any
17 party in this matter, nor any counsel in the matter; and
- 18 5. I have no financial interest in the outcome or
19 end result of the litigation.

20 Dated this 18th day of December, 2024..
2122 /s/ Cindy J. Chatterton, CCR #2951
23 Moses Lake, Washington
24

