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Timothy W. Fitzgerald  
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 SPokane County Clerk6 **SUPERIOR COURT, STATE OF WASHINGTON**7 **COUNTY OF SPOKANE**

8 CITY OF SPOKANE VALLEY, a municipal )  
 9 corporation, ) Cause: 25-2-00710-32  
 10 vs. Plaintiff, )  
 11 ALBERT W. MERKEL, an individual, ) MEMORANDUM IN SUPPORT  
 12 Defendant. ) OF MOTION TO DISMISS AND  
 13 ) AWARD OF ATTORNEYS' FEES  
 14 ) AND COSTS  
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14 **I. INTRODUCTION**

15 Defendant, Albert W. Merkel ("Merkel") by and through his attorney Patrick J. Kirby  
 16 submits this Memorandum in Support of his Motion to Dismiss for failure to state a claim upon  
 17 which relief can be granted pursuant to CR 12(b)(6).

18 Defendant Merkel further moves the Court for an award of his attorneys' fees and costs  
 19 incurred in opposing the above captioned frivolous action advanced without reasonable cause  
 20 pursuant to RCW 4.84.185, and CR 11.

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 25 **MEMORANDUM IN SUPPORT OF  
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1

2                   **II. ISSUES**

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4                   The City of Spokane Valley (“City”) has NO STANDING to bring any legal action against  
5                   its City Councilmember Merkel under the Public Records Act RCW 42.56 *et seq.*, (“PRA”).

6                   *The City is not a requestor under the PRA*, rather the City is a responding agency under the  
7                   PRA, thereby the *City has no cause of action* against Merkel under the PRA or any other  
recognizable cause of action which would entitle the City to relief.

8                   The City’s Complaint alleges that Merkel’s social media posts and his private  
9                   communications with third parties constitute “public records” under the PRA based upon *its*  
10                   *own legal conclusions*. Complaint ¶¶ 3.26, 4.2, 4.5, Prayer ¶ 1. As such, the City’s Complaint  
11                   contains no sufficient factual matter, accepted as true, to state a claim to relief that is plausible  
12                   on its face.

13                   Moreover, The City’s Complaint omits any mention that it has suffered “money damages,”  
14                   “injury,” or “irreparable harm.” Rather, the City’s Complaint merely makes the legal  
15                   conclusions and speculations that Merkel’s actions/inactions have “exposed” the City to  
16                   “liability” under the PRA. Complaint ¶¶ 3.16, 3.37, and 6.2. Therefore, the City’s case is NOT  
17                   RIPE and presents a hypothetical or speculative dispute which is NOT JUSTICIABLE.

18                   As such the City’s Complaint with claims that it is entitled to declaratory relief, writ of  
19                   mandamus, and injunctive relief are entirely frivolous and Merkel is entitled to an award of his  
20                   attorneys’ fees and costs under RCW 4.84.185, and CR 11.

21                   **III. PROCEDURAL HISTORY AND ALLEGED FACTS**

22                   On February 11, 2025, the City filed its Complaint alleging, *inter alia*, its City  
23                   Councilmember Merkel has failed to comply with the PRA by providing the City records on his

24                   **MEMORANDUM IN SUPPORT OF  
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1 social media account, phone texts messages, and emails responsive to public records requests.  
2 Complaint ¶¶ 3.13 and 3.14. The City's Complaint further alleges Merkel has complied with  
3 *Nissen v. Pierce County*, 183 Wn.2d 863 (2015) by providing the City with a declaration denying  
4 that his social media posts and comments constitute "public records." Complaint ¶¶ 3.16, 3.26,  
5 3.41, 3.44, The City's Complaint further makes legal conclusion that Merkel's declarations are  
6 "legally deficient" and "improper." Complaint ¶¶ 3.16, 3.26, 3.32, 3.41, and 3.45.

7 The City's Governance Manual incorporates the PRA. Complaint ¶ 3.3. The City's  
8 Complaint further makes the legal conclusion that violated the City's Governance Manual  
9 Appendix H by making social media posts on his personal Nextdoor account related to the  
10 "conduct of City business and the performance of his office." Complaint ¶ 3.47. However, A city  
11 councilmember's social media posts used to provide information to supporters which does not  
12 contain specific details on the councilmember's work regarding City Council discussions,  
13 decisions or other actions do not constitute "public records" under the PRA. *West v. Puyallup*, 2  
14 Wn. App. 586, 599, 410 P.3d 1197 (Div. 2, 2018).

15 Finally, in a broad sense [the city councilmember's] informational posts may have  
16 furthered the City's interests to some minimal extent by providing a certain  
17 segment of the public with information about City events and activities. However,  
18 this tangential benefit to the City is not sufficient to establish that Door was acting  
19 within the scope of employment or her official capacity in disseminating general  
20 information about the City.

21 *Id.* An elected public official's social media postings can best be described as a "megaphone"  
22 when it contains mostly a "litany of perceived wrongs," and *when such posts were not required*  
23 *or directed by the [public agency] on a social media site which the [public agency] has no*  
24 *control it's clear that they're no in furtherance of the public agency government or business.*"

25 *West v. Clark County*, 16 Wn. App. 2d 1013, 2021 WL 196396 \*4 (Div. 2, 2021) (emphasis  
26 added) (unpublished). Appendix H to the City's Governance Manual consistent with

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1 Washington court decisions interpreting the boundaries of the PRA provides, *inter alia*,  
2 “Personal communications that are not related to the conduct of government or the performance  
3 of your office are not public records.” Complaint ¶3.7 (emphasis added).

4 All three of the City’s alleged “causes of action” in its Complaint are virtually identical in  
5 that they require the Court to accept as true the legal conclusions by the City’s investigator and  
6 hearing examiner (both “retained” and fees paid by the City) that Merkel’s social media postings  
7 and private communications constitute “public records,” and Merkel violated the PRA by  
8 submitting “deficient” and improper *Nissen* declarations. Complaint ¶3.25 Exhibit A; and ¶3.26;  
9 ¶3.32. The City’s entire Prayer For Relief seeks an order from the Court compelling how Merkel  
10 shall perform his discretionary public official duties under the PRA and the City’s Governance  
11 Manual by submitting an amended declaration—a duty which he has already performed by  
12 submitting *Nissen* declarations. Complaint ¶ 3.16, 3.26, 3.32, 3.41, and 3.45.

13 The First Cause Of Action seeks an order declaring that all of Merkel’s social media  
14 posts, and private text messages and emails with third parties are communications regarding City  
15 business or the performance of his elected office and thereby “constitute public records.”  
16 Complaint ¶4.2, 4.5.

17 The Second Cause of Action seeks a writ of mandamus requiring Merkel to comply with  
18 the PRA and the City Governance Manual by restricting his social media postings regarding  
19 “City business or the performance of his office on his personal social media profile pages” to his  
20 official councilmember social media accounts, and to not discuss City business or the  
21 performance of his office on his personal social media profile pages. Complaint ¶5.6. In other  
22 words, the City’s Complaint seeks a writ of mandamus compelling Merkel’s compliance with its  
23 Governance Manual without any precision or certainty provided to Merkel how he is to exercise

1 his discretion in determining which social media postings or private communications constitutes  
2 “City business or the performance of his office.” The City’s Complaint invites this Court to  
3 instruct a city councilmember how to “re-do” his discretionary duties which he has previously  
4 performed.

5 The City’s Third Cause of Action seeks an injunction ordering Merkel to “preserve” all  
6 his text messages, emails and social media posts and direct messages “regarding City business or  
7 the performance of his office or which were made to further performance of his office during his  
8 term a Councilmember... to the extent they are responsive to public records requests...”, and to  
9 make them available to the City. Complaint 6.3¶ The Third Cause of Action further seeks an  
10 injunction to amend his declarations “produce truthful and legally sufficient *Nissen*  
11 declarations.” *Id.*

12 **IV. LEGAL AUTHORITY AND ARGUMENT**

13 **CR 12(b)(6) Standard For Dismissal:**

14 A dismissal under CR 12(b)(6) is for “failure to state a claim upon which relief can be  
15 granted.” *McCurry v. Chevy Chase Bank*, FSB, 169 Wn.2d 96, 102 (2010). “This weeds out  
16 complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.  
17 *Id.* “Dismissal under CR 12(b)(6) are appropriate only if “ it appears beyond a reasonable doubt  
18 that no facts exist that would justify recovery.”” *Jeckle v. Crotty*, 120 Wn.2d 374, 380, 85 P.3d  
19 931 (Div. 3, 2004) (quoting *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216,  
20 *cert. denied*, 515 U.S. 1169 (1995)). “We accept as true the allegations in the plaintiffs’  
21 complaint and the reasonable inferences that can be drawn from the allegations.” *Id.* (citing *Reid*  
22 *v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

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**MEMORANDUM IN SUPPORT OF  
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1       The City's Complaint makes legal conclusions that Merkel's "engaging in discourse with  
2 citizens" by use of his social media account amounts to "conducting city business" as such  
3 constitutes "public records" subject to the PRA. Complaint ¶3.18, 3.26. 3.32, 3.42, 3.47, 4.2, 4.5,  
4 Prayer for Relief ¶1. The City's Complaint legal conclusion further include that Merkel's  
5 declarations are "legally deficient" pursuant to *Nissen v. Pierce County*, 183 Wn.2d 863, 357  
6 P.3d 45 (2015) *Id.* See also Complaint ¶3.26, 3.32, 3.41, 3.45. A legal conclusion in a  
7 Complaint is not a factual allegation. See *Freyen v. Spokane Teachers Credit Union*, 23 Wn.  
8 App.2d 264, 275, 515 P.3d 996 (2022) ("We need not deem the complaint's legal conclusions as  
9 true.") See also *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 120,  
10 744 P.2d 1032 (1987) (In granting a CR 12(b)(6) motion to dismiss, "The court need not accept  
11 legal conclusions as correct.")

12       A.     **THE CITY HAS NO STANDING TO ENFORCE UNDER THE PRA.**

13       The gravamen of this lawsuit is whether the City has standing to enforce the PRA against  
14 its Councilmember Merkel.

15       The PRA establishes two causes of action: (1) denial of an opportunity to inspect or copy  
16 a public record; (2) an agency's failure to make a reasonable estimate of the time required to  
17 respond or of the charges to produce copies. *Shavlik v. Snohomish County*, 2024 WL 4880662 \*5  
18 (Div. 1, Nov. 25, 2024) (unpublished) (citing RCW 42.56.550(1)-(2); Wash. State Bar Ass'n  
19 Public Records Act Deskbook). "[D]enial of access' claims include claims that an agency failed  
20 to produce records or failed to adequately search for records." *Id.* (citing Washington's Public  
21 Disclosure and Open Public Meetings Laws § 16.6 (2d ed. 2014)(emphasis added).

22       [T]he focal point of the judicial inquiry is the agency's search process, not the  
23 outcome of its search. The issue is *not* whether any further documents might  
conceivably exist but rather whether the government's search for responsive

1 documents was adequate[,] [which is determined under] a standard of  
2 reasonableness, and is dependent upon the circumstances of the case. ...  
3

4 *Id.* at \*5 (quoting *Forges v. City of Gold Bar*, 171 Wn.2d 857, 866, 288 P.3d 394 (Div.1, 2012)  
5 (emphasis in original) (internal quotations omitted). “When an agency does not find a record that  
6 should exist, the question for review is whether or not the search was adequate.” *Id.* (quoting  
7 *Kozol v. Wash. State Dep’t of Corr.*, 192 Wn. App. 1, 8, 366 P.3d 933 (Div.3, 2015) (citing  
8 *Neighborhood of All. Of Spokane County v. County of Spokane*, 172 Wn.2d 702, 719-720, 261  
9 P.3d 119 (2011)). “This is not to say, of course, that an agency must search *every* possible place  
10 a record may conceivably be stored, but only those places where it is *reasonably likely* to be  
11 found.” *Neighborhood*, 172 Wn.2d at 720 (emphasis in original).  
12

13 Therefore, the focal point of any judicial inquiry *in a lawsuit brought by a requestor* into  
14 the City’s potential “exposure to Public Records Act liability” (Complaint ¶¶ 3.16, 3.37)  
15 regarding Merkel’s social media postings and private communications is not whether any public  
16 records might conceivably exist but rather was the City’s search for responsive documents was  
17 adequate which determined under a standard of reasonableness.  
18

19 In *Valderrama v. City of Sammamish*, the requestor brought action alleging the city  
20 violated the PRA by failing to adequately search for and produce records of communications  
21 between certain council members stored on personal devices. 561 P.3d 288 (Div. 1, Dec. 16,  
22 2024). The city timely provided the requestor with all responsive public records along with  
23 *Nissen* affidavits from the council members. *Id.* at 297. The city provided three council members  
24 with *Nissen* affidavits explaining the nature and extent of their searches and why withheld  
25 documents were not responsive to the public records requests. *Id.* at 296. The requestor alleged  
three city council members of conducting “bad faith” searches on their private devices for  
responsive public records. *Id.* at 297. In a subsequent affidavit one city council member



1 added that he also searched Slack and Facebook Messenger for records, where he  
2 reviewed the content of his message threads individually but did not find  
3 messages related to City business. Rather, the messages were related to family  
4 matters, campaign matters, or his capacity as a Sammamish resident. [The council  
5 member] attested that to his recollection, he had not communicated with citizens  
6 about City business through WhatsApp, Slack, Telegram, or Facebook  
7 Messenger. He certified that any records withheld “are either personal in nature ...  
8 or are not responsive to the relevant request.”

9  
10 *Id.* at 297. The city of Sammamish asked the council member if he would allow the city’s IT  
11 director to search the councilmember’s private devices and accounts for responsive public  
12 records. *Id.* at 298. The requestor contended the city’s search was inadequate because evidence  
13 showed that the council members executed their affidavits “in bad faith and the city took no  
14 effective action to compel compliance with the PRA.” *Id.* The Court of Appeals affirmed the  
15 trial court’s decision to dismiss the requestor’s PRA lawsuit against the city because the  
16 requestor “cites no authority suggesting that to conduct an adequate search of public records,  
17 an agency must sue its employee to forensically search their private devices for public  
18 records.” *Id.* at 298 (emphasis added). “Where a party fails to cite to relevant authority, we  
19 generally presume that the party found none.” *Id.* (quoting *State Constr., Inc. v. City of*  
20 *Sammamish*, 11 Wn. App.2d 892, 906, 457 P.3d 1194 (2020)).

21  
22 *Similarly, the City of Spokane Valley has no duty or authority and NO STANDING*  
23 *under the PRA to sue Merkel to forensically search his social media accounts and private*  
24 *devices for public records.* The PRA only allows for “a person” file a motion in superior court  
25 to show cause why it has refused to allow inspection or copying of records response to his/her  
public records request. RCW 42.56.550(1). Nothing in the PRA provides that an agency may  
bring a motion to show why its employees or public officials have refused to allow inspection of  
his/her personal devices or communications for public records responsive to a request. “An  
agency’s affidavits are entitled to a presumption of good faith.” *Id.* at 296 (citing *Forbes*, 171

1 Wn. App. at 867). “When done in good faith, this procedure allows an agency to satisfy its duty  
2 to search for and disclose public records without unnecessarily infringing on its employees’  
3 constitutional rights.” *Id.* (citing *Nissen*, 183 Wn.2d at 886-87). Merkel’s *Nissen* declarations  
4 that his social media accounts and personal communications contain no public records are  
5 entitled to a presumption of good faith and satisfy the City’s duties to a requestor under the PRA.

6 ***The City has no standing to bring this action.*** The procedural framework under the PRA  
7 to contest Merkel’s declarations is for a requestor (“a person”) to file a motion to show cause  
8 under RCW 42.56.550(1)—not for the City to bring this action against Merkel. “The doctrine of  
9 standing prohibits a litigant from raising another’s legal rights.” *Haberman*, 109 Wn.2 at 138.  
10 (citations omitted). “Standing is a party’s right to make a legal claim or seek judicial  
11 enforcement of a duty or a right.” *Schreck v. Seattle Office of Economic Development*, 31 Wn.  
12 App. 2d 1062 \*2 (Div. 1, July 15, 2024) (unpublished) (granting CR 12(b)(6) motion to dismiss  
13 for lack of standing) (quoting *Kanam v. Kmet*, 21 Wn. App.2d 902, 909 (2022)). “But a plaintiff  
14 lacks standing if their injury is merely conjectural or hypothetical.” *Id.* (citing *Trepanier v. City*  
15 *of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992)).

16 **The City has no standing to seek declaratory relief, a writ of mandamus, or injunctive**  
17 **relief to enforce Merkel’s duties under the PRA because it is asserting the rights of a requestor**  
18 **and its “injury” is merely conjectural or hypothetical.** As such all the City’s “causes of action”  
19 should be dismissed pursuant to CR 12(b)(6).

1           **B. THE CITY HAS FAILED TO PRESENT A JUSTICABLE CONTROVERSY OR**  
2           **AN ISSUE OF MAJOR PUBLIC IMPORTANCE FOR DECLARATORY**  
3           **RELIEF.**

4           **A Justiciable Controversy Is Not Present Here.**

5           “A court will refuse to consider a declaratory judgment action when it determines that the  
6           plaintiff has not presented a justiciable controversy and has not presented an issue of major  
7           public importance.” *Lewis County v. State*, 178 Wn. App. 431, 435, 315 P.3d 550 (Div. 2, 2013)  
8           ~~review denied~~, 180 Wn.2d 1010 (2014)(citations omitted). “A justiciable controversy is

9           ‘(1) ... an actual, present and existing dispute, or the mature seeds of one, as  
10           distinguished from a possible, dormant, hypothetical, speculative, or moot  
11           disagreement, (2) between parties having genuine and opposing interests, (3)  
12           which involves interests that must be direct and substantial, rather than potential,  
13           theoretical, abstract or academic, and (4) a judicial determination of which will be  
14           final and conclusive.’”

15           *Id.*, 436-37 (quoting *Washington State Republican Party v. Wash. State Pub. Disclosure*  
16           *Comm'n*, 141 Wn.2d 245, 284, 4 P.3d 808 (2000)). “Each of these four elements must be met,  
17           otherwise the court ‘steps into the prohibited area of advisory opinions.’” *Id.* at 437 (quoting  
18           *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

19           The City’s Complaint presents a speculative dispute with Merkel because its Complaint  
20           does not name any requestors suing the City for violations of the PRA related to Merkel’s social  
21           media postings or private communications. The City’s Complaint makes bare legal conclusions  
22           that Merkel has violated the PRA, but it does not cite any orders or decisions or judgments by  
23           the Superior Court against the City for PRA violations resulting from Merkel’s discretionary  
24           actions showing that the City faces an actual, present, or an existing dispute. “[U]ntil the claim  
25           for financial responsibility from the [third party] became ‘something more discernible than an  
unpredictable contingency,’ the case was a hypothetical or speculative dispute.” *Id.* at 437-38

1 (quoting *Diversified Indus. Dev. Corp.* 82 Wn.2d at 815). “Each of these four elements must be  
2 met, otherwise the court ‘steps into the prohibited area of advisory opinions.’” *Id.* at 437  
3 (quoting *Diversified Indus. Dev. Corp.* 82 Wn.2d at 815)).

4 “Here, the [City] presents a similar hypothetical or speculative dispute and simply cannot  
5 show that the first justiciability element is met.” *Id.* at 438. “As in *Diversified Industries*, the  
6 [City] presents a question of an unpredictable contingency because the [City]’s action did not  
7 include facts of any financial liability claim that it presently faced.” *Id.* (citing 82 Wn.2d at 815).  
8 “The [City] does not cite any cases where aggregation of several past claims have been sufficient  
9 to create an ‘actual, present and existing dispute, or the mature seeds of one.’” *Id.* (citing  
10 *Republican Party*, 141 Wn.2d at 284)(quoting *Wash. State Coal. for the Homeless v. Dep’t of  
11 Soc. & Health Servs.*, 133 Wash.2d 894, 917, 949 P.2d 1291 (1997))).

12 The City’s Complaint fails to meet its burden of showing the City has met the four  
13 justiciability elements, and therefore its First Cause of Action seeking declaratory judgment  
14 should be dismissed pursuant to CR 12(b)(6) for failure to state a claim upon which relief can be  
15 granted. In this case, the City is asserting the rights of others under the PRA. Nor does the City  
16 establish direct injury necessary to establish standing. The only injury alleged in the City’s  
17 complaint is that Merkel’s action “exposes” the City to PRA “liability,” City without any further  
18 explanations. Complaint ¶¶ 3.16, 3.37, and 6.2. But the possibility of some future claim for  
19 damages does not present a justiciable issue. *Diversified*, 82 Wn.2d at 814. Tangential claims of  
20 injury in fact that a public agency could be exposed to liability should be dismissed for lack of  
21 justiciability. *Stevens County v. Stevens County Sheriff’s Dept.*, 20 Wn. App.2d 34, 45 (Div. 3,  
22 2021), *review denied* 199 Wn.2d 1008)(2022).

23 Major Public Importance Exception Does Not Apply Here.

24  
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1       “Courts will apply the major public importance exception only in rare cases where the  
2 public’s interest is overwhelming and the issue has been adequately briefed and argued.” *Lewis*  
3 *County*, 178 Wn. App. at 440 (citing *To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 416, 27  
4 P.3d 1149 (2001), *cert. denied*, 535 U.S. 931, 122 S.Ct. 1304, 152 L.Ed.2d 215 (2002)).  
5       “Although our Supreme Court has relaxed the criteria for standing in certain cases that raise an  
6 issue of substantial public importance, it has limited this application to cases that have a direct  
7 bearing on commerce, finance, labor, industry, or agriculture.” *Stevens County*, 20 Wn. App.2d  
8 at 46 (citing *Lakehaven Water & Sewer Dist. v. City of Federal Way*, 195 Wn.2d 742, 771, 466  
9 P.3d 213(2020)). Here, the City’s Complaint does not allege any major public importance  
10 related to commerce, finance, labor, industry, or agriculture.

11       In addition, “For the exception to apply, the dispute must also be ripe.” *Lewis County*,  
12 178 Wn. App. at 440 (citing *League of Educ. Voters v. State*, 176 Wash.2d 808, 820, 295 P.3d  
13 743 (2013)). “Whether a claim is ripe depends on whether the issues raised are ‘primarily legal,  
14 and do not require further factual development, and if the challenged action is final.’” *Id.* (citing  
15 *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013)). “If a claim is speculative and  
16 hypothetical, it is not ripe.” *Id.* (citing *Diversified Indus.*, 82 Wn.2d at 815). “We also consider  
17 the hardship to the parties of withholding court consideration.” *Id.* (citing *Jaffar*, 177 Wn.2d at  
18 525).

19       Here, the City’s claims are not ripe for review in addition to the City’s Complaint failure  
20 to make allegations showing that the public interest is *overwhelming*. The City’s Complaint  
21 cannot “compare its case to other cases where the major public importance exception has  
22 applied. Washington courts have applied this exception in cases involving, for example,  
23 eligibility to stand for public office, freedom of choice in elections, and the constitutionality of

1 excise taxes.” *Id.* (citing *Coal. For Homeless*, 133 Wn.2d at 917).

2 “This case does not present one of the rare exceptions for deciding a declaratory judgment  
3 without a justiciable controversy. While the assertion of constitutional rights is important, by  
4 itself, it does not qualify a case as one presenting ‘issues of broad overriding public import’  
5 warranting exception from the justiciable requirement.” *Stevens County* 20 Wn. App.2d at 46  
6 (citing *Diversified*, 82 Wn.2d at 814). “Nor will a court invoke the exception to render a  
7 judgment on a hypothetical or speculative controversy, where concrete harm has not been  
8 alleged.” *Id.* at 46-47 (citing *Walker v. Munro*, 124 Wn.2d 402, 415, 879 P.2d 920) (1994)).

9 **C. MANDAMUS MAY NOT BE USED TO COMPEL MERKEL TO PERFROM  
DUTIES WHICH INVOLVE HIS DISCRETION AS A PUBLIC OFFICIAL.**

10 “A writ of mandamus ‘is a rare and extraordinary remedy because it allows courts to  
11 command another branch of government to take a specific action, something the separation of  
12 powers typically forbids.’” *Wiklem v. City of Camas*, 31 Wn. App.3d 575, 585, 551 P.3d 1067  
13 (Div. 2, 2024) (quoting *Colvin v. Inslee*, 195 Wn.2d 879, 890-91, 467 P.3d 953 (2020)). “Courts  
14 have the power to issue a writ of mandamus only ‘[w]hen the law requires a government official  
15 to take a particular action.’” *Id.* (quoting *Colvin*, Wn.2d at 892). “And ‘mandamus cannot control  
16 the discretion that the law entrusts to an official.’” *Id.* (quoting *Colvin*, 195 Wn.2d at 893).  
17 “Therefore, a writ of mandamus is an appropriate remedy only ‘[w]here the law prescribes and  
18 defines the duty to be performed with such precision and certainty as to leave nothing to the  
19 exercise of discretion or judgment.’” *Id.* (quoting *Colvin*, 195 Wn.2d at 893)(quoting *SEIU*  
20 *Healthcare* 775NW v. *Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010))).

21 “When obtaining a writ of mandamus, ‘the petitioner must demonstrate that (1) the party  
22 subject to the writ has a clear duty to act, (2) the petitioner has no plain, speedy, and adequate  
23 remedy in the ordinary course of law, and (3) the petitioner is beneficially interested.’” *Id.* at  
24

1 585-86 (quoting *Am. Prop. Cas. Ins. Ass'n on Behalf of Washington-Licensed Members v.*  
2 *Kreidler*, 200 Wn.2d 654, 659, 520 P.3d 979 (2022)). First, Merkel fulfilled his duty to act by  
3 providing *Nissen* declarations to the City. Second, The City has no adequate remedy at law  
4 because it has no standing under the PRA. Third, the City has is not beneficially interested  
5 because its Complaint does not allege any “irreparable harm” or actual damages—only  
6 speculative “exposure to liability under the PRA. Complaint ¶¶ 3.16, 3.37, and 6.2.

7 “Directing the performance of a discretionary duty would ‘usurp the authority of the  
8 coordinate branches of government.’” *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310  
9 (2009)(citing *Walker* 124 Wn.2d at 410 ; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.  
10 Ed. 60 (1803) (“[t]he province of the court is, solely, to decide on the rights of individuals, not to  
11 enquire how the executive, or executive officers, perform duties in which they have a  
12 discretion”). “A court may compel a state officer to perform a discretionary duty but cannot  
13 direct how such discretion shall be exercised.” *Id.* (emphasis added) (citing *O'Connor v.*  
14 *Matzdorff*, 76 Wn.2d 589, 606–07, 458 P.2d 154 (1969)).

15 The act of signing a *Nissen* Declaration by a public official and certifying that no “public  
16 records” are contained within social media postings and his private communications are acts of  
17 authorized discretion. There is no legal authority suggesting an agency must sue its employees  
18 and officials to forensically search their private devices for public records. *Valderrama*, 561 P.3d  
19 at 298. There is no legal authority suggesting the City may or must sue Merkel to forensically  
20 search his private devices to double-check his discretion in signing a *Nissen* declaration —even  
21 in instances of alleged “bad faith” by the City. See *Id.* The proper procedure set forth in the  
22 PRA is for the requestor—not the public agency—to bring an action in Superior Court to  
23 challenge the city official’s *Nissen* Declaration stating that he no responsive public records in his

1 possession. See RCW 42.56.550.

2 The City's Complaint claims for relief relate as to how Merkel performed his  
3 discretionary duty by seeking a writ of mandamus ordering him to "re-do" his discretionary act  
4 by providing the City a "legally sufficient" amended declaration. Complaint ¶6.3.5. The City's  
5 Complaint confirms that Merkel performed his discretionary duties by submitting a *Nissen*  
6 declaration stating that he did not have "public records" in his possession. Complaint ¶3.16.  
7 However, the City is petitioning this Court to order Merkel how to perform his discretionary  
8 public duties without any precision or certainty provided to Merkel how he is to exercise his  
9 discretion in determining which social media postings or private communications constitutes  
10 "City business or the performance of his office." *Cf. Wiklem*, 551 P.3d at 586 (dismissal of  
11 petition for writ of mandamus appropriate when petitioner claimed county's signature  
12 verification process breached its duty to verify signatures on a petition where the signature  
13 verification process was a discretionary act therefore it was not a judicial function subject to writ  
14 of mandamus). Here the City's Complaint alleges that Merkel fulfilled his duty under the PRA  
15 by providing the City signed *Nissen* declarations that he searched and did not find public  
16 records in his social media posting private communications. Complaint ¶¶3.16, 3.26, 3.32, 3.41,  
17 3.45, and 6.3.5. The City's Complaint does not allege that Merkel ignored his duties. Rather, the  
18 gravamen of the City's Complaint relates to how Merkel performed his discretionary duties  
19 under the PRA and *Nissen*. The crux of the City's dispute with Merkel is the City's legal  
20 conclusions that his declarations are "legally deficient" under the PRA, yet the City has no  
21 recognizable cause of action under the PRA or otherwise to challenge Merkel's discretionary  
22 exercise of his duties. Complaint ¶¶ 3.16, 3.26, 3.41. Therefore, mandamus would not be  
23 appropriate here.

1                   **D. THE CITY'S CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED.**

2                   The City's Complaint does not show it has a clear legal or equitable right, that has a well-  
3                   grounded fear of immediate invasion of that right, and it will suffer actual and substantial injury.

4                   It is an established rule in this jurisdiction that one who seeks relief by temporary  
5                   or permanent injunction must show (1) that he has a clear legal or equitable right,  
6                   (2) that he has a well-grounded fear of immediate invasion of that right, and (3)  
7                   that the acts complained of are either resulting in or will result in actual and  
8                   substantial injury to him.

9                   *Tyler Pipe Industries, Inc. v. State Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213  
10                   (1982)(citations omitted). “The listed criteria must be examined in light of equity including  
11                   balancing the relative interests of the parties and, if appropriate, the interests of the public.” *Id.*

12                   The controversy in this case is whether the City can challenge Merkel's *Nissen*  
13                   declarations that his social media and private electronic communications contain no public  
14                   records responsive to public records requests pursuant to the PRA. Complaint ¶¶ 3.16, 3.26, 3.32,  
15                   3.41, 3.45, 6.3.5, and Prayer ¶3.e. As set forth above, the City's Complaint has not made the  
16                   requisite showing of likelihood of success on the merits due to a *lack of standing under* the PRA,  
17                   and its speculative harm by “exposure” to liability under the PRA. Complaint ¶¶3.16, 3.37, and  
18                   6.2. When establishing the necessity of a clear right, “an injunction will not issue in a doubtful  
19                   case.” *Id.* at 793 (internal quotations omitted). Here, The City's case is not only doubtful—but  
20                   too obscure because the City has no protectable interest under the PRA. The City's Complaint  
21                   fails to establish a clear or equitable right order Merkel to retrieve and make available to the City  
22                   all his private communications for inspection by the City. As such, the City's Complaint does  
23                   not meet the requisite showing of a likelihood of success on the merits.

24                   Moreover, the above criteria “must be examined in light of equity including balancing the  
25                   relative interests of the parties and, if appropriate, the interests of the public.” *Id.* “A court

1 should not issue an injunction when the harm it will do to a defendant is disproportionate to the  
2 damage caused a plaintiff by the action he asks be enjoined.” *Agronic Corp. of America v.*  
3 *deBough*, 21 Wn. App. 459, 464, 585 P.2d 821 (Div. 1, 1978)(citation omitted). The outcome of  
4 balancing of the interests of the public and Merkel in protecting the individual’s right to privacy  
5 under the PRA clearly outweighs the City’s alleged need for Merkel to make available to the  
6 City his private electronic communications due to the City’s unspecified and speculative  
7 “exposed liability.” *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 412-13,  
8 259 P.3d 190 (2011) (citing RCW 42.56.050<sup>1</sup>). See also RCW 42.56.230 (“The following  
9 personal information is exempt from public inspection and copying under this chapter: (3)  
10 Personal information in files maintained for employees, appointees, or elected officials of any  
11 public agency to the extent that disclosure would violate their right to privacy;”).

12 Here granting an injunctive relief to the City would cause disproportionate damage to  
13 Merkel’s privacy interests compared to the City’s alleged speculative “exposure” monetary  
14 damages for PRA liability. Complaint ¶¶ 3.16, 3.37 “[T]he PRA has never authorized  
15 ‘unbridled searches’ of every piece of information held by an agency or its employees to find

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16 <sup>1</sup> RCW 42.56.050 provides: “A person’s “right to privacy,” “right of privacy,” “privacy,” or  
17 “personal privacy,” as these terms are used in this chapter, is invaded or violated only if  
18 disclosure of information about the person: (1) Would be highly offensive to a reasonable  
19 person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing  
20 with the right to privacy in certain public records do not create any right of privacy beyond those  
21 rights that are specified in this chapter as express exemptions from the public’s right to inspect,  
22 examine, or copy public records.”

1 records the citizen believes are responsive to a request.” *Nissen*, 183 Wn.2d at 885 (citing  
2 *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004)). “The PRA allows a trial  
3 court to resolve disputes about the nature of a record “based solely on affidavits,” RCW  
4 42.56.550(3), without an in camera review, without searching for records itself, and without  
5 infringing on an individual’s constitutional privacy interest in private information he or she  
6 keeps at work.” *Id.*

7 The City’s Complaint fails to demonstrate that the City has a well-grounded fear of  
8 immediate invasion by Merkel of its clear legal or equitable rights. Merkel has not taken any  
9 actions which cause immediate, concrete, and specific harm to the City. To the contrary, the  
10 City’s Complaint allegations of exposure to PRA liability by Merkel are speculative and  
11 undocumented without any mention of “money damages,” “injury,” or “irreparable harm.” “An  
12 injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is  
13 not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury. *Tyler*  
14 *Pipe Industries, Inc.*, 96 Wn.2d at 796 . The City’s Complaint does not reference any judgment  
15 which has been entered against the City resulting from Merkel’s actions or inactions. The  
16 City’s Complaint does not establish actual or substantial harm in its claim for injunctive relief  
17 and it should be dismissed.

18 Examined in the light of balancing the relative interests of the parties and the public, the  
19 City’s Complaint fails to contain any sufficient factual matter, accepted as true, showing its  
20 equitable need for injunctive relief outweighs the potential harm to the interests of the public and  
21 Merkel in protecting the individual’s right to privacy.

22 **E. MERKEL SHOULD BE AWARDED HIS ATTORNEYS’ AND COSTS**  
23 **RESPONDING TO THE CITY’S ENTIRELY FRIVOLOUS LAWSUIT.**

24 “An action is frivolous if it ‘cannot be supported by any rational argument on the law or

1 facts.” *Eller v. East Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 191-92, 244 P.3d 447  
2 (2010)(citing *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, *review*  
3 *denied*, 113 Wash.2d 1001, 777 P.2d 1050 (1989)). “As with CR 11 trial court is not required to  
4 find an improper purpose under RCW 4.84.185 before awarding fees.” *Id.* at 192 (citing  
5 *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009)). “It is  
6 enough that the action is not supported by any rational argument and is advanced without  
7 reasonable cause.” *Id.*

8 As set forth above, the City has no standing to assert Merkel failed to comply with PRA. The  
9 City’s Complaint alleges facts which present a hypothetical or speculative dispute which is not  
10 ripe. Therefore, the City Complaint asserting “exposure to liability” under the PRA due to  
11 Merkel’s “legally deficient” *Nissen* declarations is not a justiciable controversy. Finally, the  
12 City’s Complaint fails to allege any “irreparable harm,” or “damages,” yet seeks *extraordinary*  
13 *equitable relief* by way declaratory judgment, writ of mandamus, and injunction. The City’s  
14 entire lawsuit against Merkel is advanced without cause, and as whole are frivolous. The Court  
15 may award Merkel his attorneys’ fees and expenses under RCW 4.84.185. *See Id.* at 194.

16 **V. CONCLUSION**

17 Dismissal of the City’s Complaint under CR 12(b)(6) are appropriate because if it  
18 appears beyond a reasonable doubt that no facts exist that would justify the City to recovery of  
19 declaratory relief, the writ of mandamus, or injunctive relief. The City has no standing under the  
20 PRA or otherwise to seek extraordinary equitable relief because the City is asserting the rights of  
21 a requestor and its “injury” is merely conjectural or hypothetical. The City’s claims of “exposure  
22 to liability” under the PRA due to Merkel’s actions are hypothetical and speculative dispute  
23 which are not ripe and therefore not justiciable. The allegations in the City’s Complaint that

1 Merkel's *Nissen* declarations are "legally deficient" are based upon legal conclusions which the  
2 Court may may not accept as true. The City's Complaint fails to allege any cause immediate,  
3 concrete, and specific harm to warrant the extraordinary equitable relief it seeks. The City's  
4 entire lawsuit against Merkel is advanced without cause, and as a whole is frivolous, thereby the  
5 Court may award Merkel his attorneys' fees and expenses under RCW 4.84.185 and CR 11.

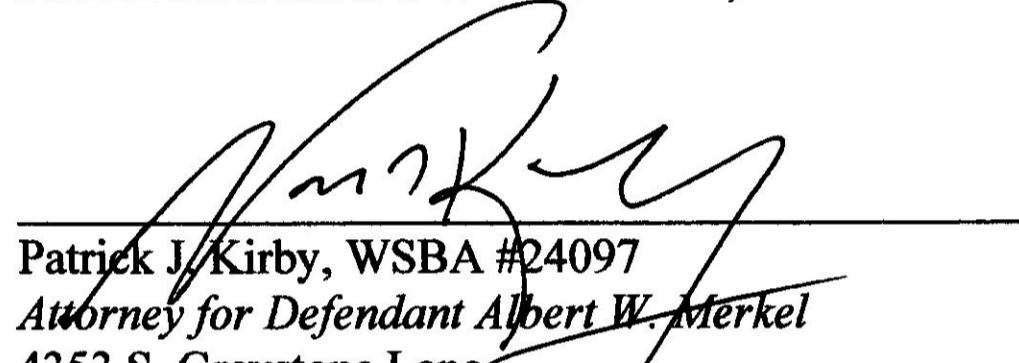
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DATED this 3<sup>rd</sup> day of April, 2025.

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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND AWARD  
OF ATTORNEYS' FEES AND COSTS – 20**

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5 day of April 2025, I caused to be served a true and correct copy of the foregoing document to the following:

HAND DELIVERY  
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 OVERNIGHT MAIL  
 FACSIMILE  
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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND AWARD  
OF ATTORNEYS' FEES AND COSTS – 21**