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Spokane

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SUPERIOR COURT, STATE OF WASHINGTON

COUNTY OF SPOKANE

CITY OF SPOKANE VALLEY, a municipal
 corporation,

Cause: 25-2-00710-32

Plaintiff,

vs.

**MEMORANDUM IN
 SUPPORT OF MOTION
 FOR PROTECTIVE
 ORDER AND ATTORNEY'S FEES**

ALBERT W. MERKEL, an individual,

Defendant.

I. INTRODUCTION

Defendant, Albert W. Merkel ("Merkel") by and through his attorney Patrick J. Kirby submits this Memorandum in Support of his Motion For Protective Order pursuant to CR 26(c) to protect Merkel from annoyance, embarrassment, oppression, and undue burden and expense by an order prohibiting public disclosure of his personal and private communications and information he produces in discovery which are protected by his right to privacy in freedom of group and political association and freedom of speech under the First Amendment to the U.S. Constitution, and by RCW 42.56.050 and 42.56.230 and the Fourth and Fourteenth Amendments to U.S. Constitution, and invasion of private affairs protected by Washington State Constitution Article 1, Section 7.

**MEMORANDUM IN SUPORT
 MOTION FOR PROTECTIVE ORDER – 1**



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II. SUMMARY

This lawsuit is not about transparency in public agencies and compliance with the Public Records Act (“PRA”), RCW 42.56 *et seq.* Instead, this action brought by the City of Spokane Valley (“City”) against Merkel is an effort to strip him of his privacy and to embarrass him and oppress him as part of the political warfare waged against him by the City Council and City leadership. See Merkel Decl. The City’s motives became self-evident when Merkel, by and through his counsel, offered to provide the City with total, complete, and unfettered access to his social media public postings. See Kirby Decl. ¶¶ 16, 18, 21 Exh. B (email 07/02/2025). Nevertheless, Plaintiff’s counsel continued to insist upon Merkel producing copies of every private communication which mentions the City, its elected officials and leadership, and matters of public concern while refusing to stipulate to entry of a protective order which would prevent public disclosure of such highly sensitive personal materials.

If the Court denies Defendant’s Motion To Dismiss pursuant to CR 12 (b)(6), A protective order is necessary to prevent public disclosure of Merkel’s private communications and documents until such time the Court can conduct an *in camera* inspection of every email, text message, and note between Merkel and his supporters to determine whether it is a “public record.” Otherwise, all of Merkel’s private and personal communications since he came into public office on January 1, 2024, which are produced in discovery will be improperly designated by the City as “public records” and unlawfully produced by the City in response to public records requests.

III. PROCEDURAL HISTORY AND FACTS

1 See Declaration of defense counsel Patrick J. Kirby, dated and filed July 7, 2025, for
2 procedural history. See Declaration of Defendant Albert W. Merkel dated and filed July, 7,
3 2025, for facts.

4 IV. LEGAL AUTHORITY AND ARGUMENT

5 CR 26(c) Standard

6 “CR 26(c) allows the court to “make *any order which justice requires* to protect a party or
7 person from annoyance [or] embarrassment.” *Dalsing v. Pierce County*, 190 Wn. App. 251,
8 262, 37 P.3d 80 (2015) (citing CR 26(c)). “The plain meaning of CR 26(c) unambiguously
9 provides courts significant authority to craft various remedies to tailor the discovery process.”
10 *Id.* at 263. (citing *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 371, 16 P.3d 45 (2000))
11 (“Both the rule and the case law thus provide a trial court with substantial latitude to decide
12 when a protective order is appropriate and what degree of protection is required given the
13 unique character of the discovery process”).

14 A. MERKEL’S COMMUNICATIONS ARE PRIVILEGED AND PROTECTED BY 15 HIS RIGHT TO PRIVACY IN FREEDOM OF GROUP AND POLITICAL ASSOCIATION.

16 “The First Amendment protects, among other rights, an individual’s right to free speech and
17 political association.” *Eugster v. City of Spokane*, 121 Wn. App. 799, 807, 91 P.3d 117 (Div. 3
18 2004), review denied 153 Wn.2d 1012 (2005) (citations omitted). “Inviolability of privacy in
19 group association may in many circumstances be indispensable to preservation of freedom of
20 association, particularly where a group espouses dissident beliefs.” *Id.* (citations omitted).

21 “In the discovery context, Washington has established a three-part test for First Amendment
22 challenges based on associational privilege. First, the party asserting the right is only required to
23

1 show some probability that the requested disclosure will harm its First Amendment rights.” *Id.*
2 (citing *Snedigar v. Hoddersen*, 114 Wash.2d 153, 158, 786 P.2d 781 (1990)).

3 “Once this threshold is met, the burden shifts to the party requesting discovery to establish
4 (1) the relevance and materiality of the information sought, and (2) that reasonable efforts to
5 obtain the information by other means has been unsuccessful.” *Id.* (citing *Snedigar*, 114 Wn.2d
6 at 164). “The state must demonstrate a compelling governmental interest in order to justify
7 chilling a party’s association right through disclosing information to the public.” *In re*
8 *Glaxosmithkline PLC*, 732 N.W. 2d 257, 269 (Minn. 2007) (emphasis added) (citing *NAACP v.*
9 *Alabama ex rel. Patterson*, 357 U.S. 449, 463, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Brock v.*
10 *Local 375, Plumbers Int’l Union*, 860 F.2d 346, 350 (9th Cir. 1988)).

11 “Finally, even if both of these required showings are made, the court must still balance the
12 claim of privilege against the need for disclosure to determine which is the strongest.” *Eugster*,
13 121 Wn. App. at 807 (citing *Snedigar*, 114 Wn.2d at 166).

14 “Where appropriate, courts have permitted discovery of information that affects association
15 rights but have prohibited dissemination of the information beyond the litigation context.” *In re*
16 *Glaxosmithkline PLC*, 732 N.W. 2d at 269 (citing *Marshall v. Bramer*, 828 F.2d 355, 360 (6th
17 Cir. 1987). “[A] chill on First Amendment association rights does not warrant a bar to
18 discovery into relevant matters, but instead warrants an ‘exercise [of] judicial discretion by
19 providing protection short of suppression.’” *Id.* (quoting *United States v. Duke Energy Corp.*,
20 218 F.R.D. 468, 473 (M.D.N.C. 2003)).

21 “We conclude that it is within the district court’s discretion to issue protective orders for the
22 purpose of protecting an individual or organization’s association right. Relief may include
23 prohibiting public disclosure of discovered materials that adversely affect the association right.”

1 *Id.* “The state must demonstrate a *compelling governmental interest* in order to release
2 documents protected by the First Amendment right to association.” *Id.* at 269-70 (emphasis
3 added). “The district court should also consider that discovery is intended primarily to assist in
4 preparation for trial or settlement, not necessarily for public education.” *Id.* at 272. (citing
5 *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).
6 “Therefore, the district court should evaluate the state’s asserted compelling governmental
7 interest in releasing pretrial discovery materials that may chill a party’s association right with the
8 policy underlying discovery in mind.” *Id.* at 272.

9 Here, Merkel’s Declaration demonstrates a reasonable probability of a chill on his group’s
10 association right is more than a subjective assertion of fear and reprisal. Instead, Merkel’s
11 Declaration cites specific evidence of past harassment of Merkel and his supporters due to their
12 associational ties and a reasonable probability of a chill on association rights by the public
13 disclosure of his private communications and notes. “But a party need not prove to a certainty
14 that its First Amendment rights will be chilled.” *Id.* at 271. “The party asserting the First
15 Amendment associational privilege is only required to *show some probability* that the requested
16 disclosure will harm its First Amendment rights.” *Snedigar*, 114 Wn.2d at 158 (emphasis added
17 in original).

18 There is no compelling government interest by the City to justify chilling Merkel’s
19 association right through disclosing his private communications and notes information to the
20 public, particularly at this stage of proceedings before the Court has had an opportunity to
21 conduct an *in camera* inspection.

22 “We point out in this connection, however, that *in camera* review of associational materials
23 is *not* a course to be routinely undertaken in a First Amendment case, but is justifiable *only* if

1 essential to fairly evaluate the competing interests at stake.” *Snedigar*, 114 Wn.2d at 167.

2 **B. MERKEL’S PRIVACY RIGHTS ARE IMPLICATED AND IMPLICIT IN THE**
3 **BROAD PURPOSE OF CR 26(C).**

4 In addition to Merkel’s privacy under the associational privilege under the First Amendment,
5 the Court must also take into consideration his privacy interests implicated an implicit in the
6 broad purpose of CR 26(c). “The article I, section 7 [of the Washington State Constitution]¹
7 ‘private affairs’ protection asserted by [the Defendant] is not a ‘privilege’ within the meaning of
8 *Snedigar* or CR 26(b)(1) but rather is a privacy interest that the trial court necessarily evaluates
9 when considering a motion for a protective order under CR 26(c).” ” *T.S. v. Boy Scouts of*
10 *America*, 157 Wn.2d 416, 431, 138 P.3d 1053 (2006).

11 “Under CR 26(c), a judge is given broad discretion in fashioning discovery orders in order to
12 protect a person’s privacy.” *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619,
13 629, 818 P.2d 1056 (1991). “The *Doe* opinion thus showed that, if a trial court finds under
14 CR 26(b)(1) no applicable privileges (and also concludes that the information sought is
15 ‘relevant’—that is, ‘reasonably calculated to lead to the discovery of admissible
16 evidence’), the court may then entertain a motion for a protective order under CR 26(c)
17 and ‘for good cause shown ... may make any order which justice requires to protect a
18 party or person from annoyance, embarrassment, [or] oppression.”” *Boy Scouts of*
19 *America*, 157 Wn.2d at 430)(quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d
20 772, 780-89, 819 P.2d 370 (1991)). “[T]he United States Supreme Court had likewise
21

22 ¹ “No person shall be disturbed in his private affairs, or his home invaded, without authority of
23 law.” Wash. St. Const. Article I, §7

1 recognized prior to *Doe* that, “[a]lthough [CR 26(c)] contains no specific reference to privacy or
2 to other rights or interests that may be implicated, such matters are implicit in the broad purpose
3 and language of the Rule.” *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 n. 21.

4 The discovery process opens “[a] realm of privacy which courts had previously left
5 undisturbed, and we had explicitly stated that the trial court’s weighing of those privacy
6 interests is inherent in CR 26(c)” *Boy Scouts of America*, 157 Wn.2d at 430. The Court
7 must necessarily take into consideration the privacy interests of the parties in the
8 discovery process which does not require or condone publicity. *Id.* at 431 (citing
9 *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 236, 256, 654 P.2d 673 (1982)).

10 In addition to Article I, Section 7, Merkel’s privacy interests also prohibit invasion of a
11 person’s privacy when an agency’s disclosure of a person’s information would be: (1) would be
12 highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW
13 42.56.050. In addition, The PRA prohibits public inspection of “any record used to prove
14 identity, age, residential address, social security number, or other personal information required
15 to apply for a driver’s license or identicard.” RCW 42.56.230(7)(a). Thereby the Court has broad
16 discretion under CR 26(c) in fashioning a protective order to protect Merkel’s privacy with
17 regards to his highly sensitive personal and private communications which are not a legitimate
18 concern to the public including his date and place of birth and his employment history.

19 “The trial court in the instant case foresaw a ‘fishing expedition’ and protected the donor by
20 requiring a greater showing of entitlement before allowing discovery of the donor’s name.”
21 *Howell*, 117 Wn.2d at 629. “The trial court did not abuse its discretion in refusing
22 [Plaintiff]’s discovery request.” *Id.* at 630.

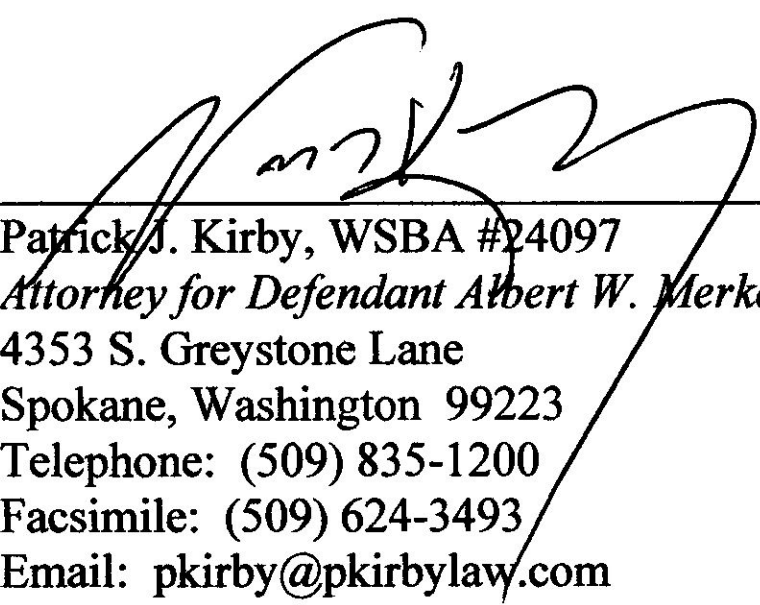
“CR 37(a)(4) requires a court to award attorney fees to a party who files a successful protective order under CR 26(c) unless the party opposing the motion was substantially justified in doing so or other circumstances make the award unjust...” *Dalsing*, 190 Wn. App. at 267.

V. CONCLUSION

The City is not justified in opposing Merkel's motion to prevent the public disclosure of his emails, text messages, notes, other forms of communication, and his personal private information until the Court may take the appropriate action of *in camera* inspection to consider whether the evidence is not "a public record," or exempted from the PRA, or if privileged under the right to privacy in group association under First Amendment, and Article 1, Section 7. The only explanation for the City's refusal to stipulate to a protective order is to annoy, embarrass, oppress, and unduly burden Merkel with unnecessary expense in attorney's fees in bringing this motion.

1 DATED this 7th day of July, 2025.

2 PATRICK J. KIRBY LAW OFFICE, PLLC.

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24 **MEMORANDUM IN SUPORT**
25 **MOTION FOR PROTECTIVE ORDER – 9**

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CERTIFICATE OF SERVICE

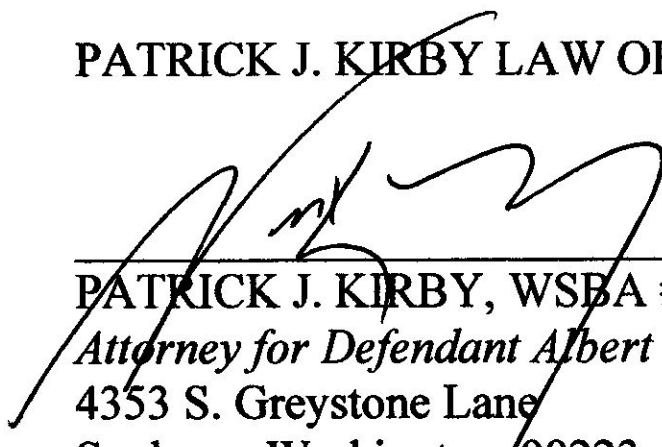
I HEREBY CERTIFY that on the 7th day of July, 2025, I caused to be served a true and correct copy of the foregoing document to the following:

☒ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
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☒ EMAIL

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**MEMORANDUM IN SUPORT
MOTION FOR PROTECTIVE ORDER – 10**

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