



1 PATRICK J. KIRBY, WSBA #24097  
 2 **PATRICK J. KIRBY LAW OFFICE, PLLC**  
 3 4353 S. Greystone Lane  
 4 Spokane, Washington 99223  
 5 Telephone: (509) 835-1200  
 6 pkirby@pkirbylaw.com  
 7 *Attorney for Defendant Albert W. Merkel*

FILED

JUL 15 2025

7 Timothy W. Fitzgerald  
 8 SPOKANE COUNTY CLERK

6 **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, ) **REPLY IN  
 12 Defendant. ) SUPPORT OF MOTION  
 13 ) FOR PROTECTIVE  
 14 ) ORDER AND ATTORNEY'S FEES**

14 **I. INTRODUCTION**

15 Defendant, Albert W. Merkel (“Merkel”) by and through his attorney Patrick J. Kirby  
 16 submits this Reply in Support of his Motion For Protective Order pursuant to CR26(c).

17 **II. SUMMARY**

18 “It is worth repeating that records an employee maintains in a personal capacity will not  
 19 qualify as public records, even if they refer to, comment on, or mention the employee’s public  
 20 duties.” *West v. Puyallup*, 2 Wn. App.2d 586, 598, 410 P.3d 1197 (Div.2 2018) (quoting *Nissen*  
 21 *v. Pierce County*, 183 Wn.2d 863, 881 n. 8, 357 P.3d 45 (2015)).

22 **None of the interrogatories (“ROGs”) or requests for production (“RFPs”) by**  
 23 **Plaintiff City of Spokane Valley (“City”) mentions “city business.”**

24 **REPLY IN SUPPORT MOTION FOR**  
 25 **PROTECTIVE ORDER – 1**

Rather, the Plaintiff City's overly broad discovery seek disclosure of all of Defendant Merkel's private communications with his political associates, supporters, friends, and family members which mentions or refers to the, "Mayor, City Manager, other Councilmembers, and/or the City Attorney for the City of Spokane Valley," and the City's "actions, initiatives, proposals, resolutions, ....councilmember meetings," from January 2024 to the present See Kirby Decl. Exh. "A," ROGs Nos. 20, 21, 23, and 24; RFPs Nos. 6, 7, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, and 28.

### III. PROCEDURAL HISTORY AND FACTS

On June 9, 2025, Defendant Merkel’s counsel sent an email to Plaintiff’s counsel, “In the event the Court does not grant Defendant’s Motion To Dismiss, “I also propose a Protective Order which will prevent disclosure of Mr. Merkel’s private electronic communications from becoming public records until after the court can review the communications *in camera* to determine if they are ‘public records’....” Kirby Decl. 07/07/2025, ¶11, Exh. “B,” pp.10-11.

**On June 24, 2025, Plaintiff's counsel** Reid Johnson sent a reply email to Defendant Merkel's counsel *agreeing to extend the time until two weeks after July 18, 2025, for Defendant Merkel to produce responsive records.* Kirby Decl. 07/07/2025, ¶12, Exh. "B," p.10.

Defendant Merkel’s initial objections to Plaintiff City’s ROGs and RFPs based upon his Fourteenth Amendment right to privacy also includes the First Amendment’s associational right to privacy derived from the Due Process Clause. “The First and Fourteenth Amendments protect the freedom of an individual to associate for the purpose of advancing beliefs and ideas.” *Pilloud v. King County Republican Central Committee*, 189 Wn.2d 599, 603, 404 P.3d 500 (2017).

## **REPLY IN SUPPORT MOTION FOR PROTECTIVE ORDER – 2**



1       Later **June 24, 2025**, Defendant Merkel's counsel sent a reply email to Plaintiff's counsel  
2 for the second time requesting, "**Will you stipulate to a... Protective Order which will**  
3 **prevent disclosure of Mr. Merkel's private electronic communications from becoming**  
4 **public records until after the court can review the communications *in camera* to determine**  
5 **if they are 'public records'....**" Kirby Decl. 07/07/2025, ¶13, Exh. "B," p 9.

6       **On June 26, 2025**, Plaintiff's counsel Reid Johnson sent Defendant Merkel's counsel a  
7 reply email indicating, "**the City will not stipulate to your proposal. You will need to seek**  
8 **court approval for your proposed protective order.**" Kirby Decl. 07/07/2025, ¶¶ 13, 14, Exh.  
9 "B," p. 9.

10       During the June 30, 2025, CR 26(i) telephonic discovery conference Defendant Merkel's  
11 counsel *explicitly raised First Amendment right to privacy privilege objections* to Plaintiff's  
12 City's ROGs and RFPs, to which Plaintiff's City's counsel refused to recognize the objection  
13 and rejected the objection out of hand. Kirby Decl. 07/07/25 15, & 16. Later on June 30,  
14 Defendant Merkel's counsel sent an email to Plaintiff's counsel, *inter alia*, "***I will file a CR***  
15 ***26(c) Motion For Protective Order for protect Mr. Merkel from Disclosing to the City of SV***  
16 ***his private communications and political communications, or in the alternative, a protective***  
17 ***order prevent the City from disclosing in response to a public records request any such***  
18 ***materials until such time the Court may conduct an *in camera* inspection....***" Kirby Decl.  
19 07/07/25, Exh. "B," pp.5-6.

20       On July 1, 2025, Plaintiff's counsel sent an email to Defendant Merkel's counsel refusing  
21 to recognize Defendant's objections, instead asserting Defendant Merkel's First Amendment  
22 objection was "waived," and demanded, "As a result, Interrogatories Nos. 19, 21, 22, 23, 24 and  
23  
24

1 RFP Nos. 9-30 require supplementation," without mentioning consideration of a protective  
2 order. Kirby Decl. 07/07/25, Exh. B, pp.3-4.

3 After Plaintiff's counsel repeatedly ignored and rejected requests by Merkel's  
4 defense counsel to stipulate to a protective order, Defendant Merkel had no choice but to file  
5 this Motion For Protective Order.

6 **IV LEGAL AUTHORITY AND ARGUMENT**

7 **A PROTECTIVE ORDER AND *IN CAMERA* INSPECTION IS NEEDED TO**  
8 **PROTECT MERKEL'S PRIVATE AND PRIVILEGED COMMUNICATIONS.**

9 The heart of this dispute is whether every electronic communication Defendant Merkel sent  
10 to his political associates, supporters, friends, and family members since joining the City  
11 Council in January 2024 which mentions or refers to the mayor, city manager, other  
12 councilmembers, and/or the city attorney, City actions, initiatives, proposals, resolutions, and  
13 councilmember meetings are "public records." Such a determination cannot be made without  
14 an *in camera* inspection.

15 "In other words, the PRA applies only to 'records related to the employee's public  
16 responsibilities.'" *West v. Puyallup*, 2 Wn. App.2d at 599-600 (*city council member was not*  
17 *conducting city business* *on her social media by merely providing general information*  
*about City activities and occasionally about her activities*).

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

24 *Id.* at 599.

25 *This lawsuit is all about petty politics.* Defendant Merkel objects to disclosure of his

26 **REPLY IN SUPPORT MOTION FOR**  
27 **PROTECTIVE ORDER – 4**

1 private communications to his political antagonists on the City Council, and the City Manager  
2 and City Attorney because he has legitimate fears of retribution against him and his supporters.  
3 See Merkel Decl. 07/07/01. The PRA provides that a trial court may conduct an *in camera*  
4 review. RCW 42.56.550( 3). “[W]hen a requester asks for records of a specific type, this should  
5 not serve as a springboard for a broad exploration through discovery into matters not related to  
6 the request.” *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702,  
7 747, 261 P.3d 119 (2011)(Madsen concurring)(emphasis added). “If improper discovery  
8 requests are made, a party can seek a protective order.” *Id.* (citing CR 26(c)). *Id.* “A trial court  
9 may, on its own initiative, act to limit abusive discovery.” *Id.* (citing CR 26(b)). “A trial court  
10 exercises broad discretion in imposing discovery sanctions.” *Id.*(citations omitted).

11 In *Wilkenson v. F.B.I.*, the non-party failed to make a threshold showing the information  
12 sought by subpoena would impair her group activities. 111 F.R.D. 432, 437 (C.D. Cal. 1986).  
13 Such is not the case here. See Merkel Decl. 07/07/2025.

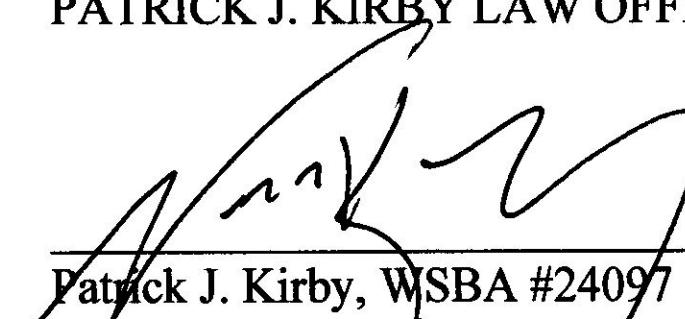
14 **IV. CONCLUSION**

15 If the Court denies Defendant Merkel’s Motion to Dismiss, this Court needs to protect  
16 his right to privacy with a Protective Order which allows for his discovery responses to be  
17 marked “CONFIDENTIAL” and viewed only by Plaintiff’s outside counsel until the Court can  
18 conduct an *in camera* inspection to determine whether any of his private communications are  
19 “public records.”

20  
21  
22  
23  
24  
25 **REPLY IN SUPPORT MOTION FOR  
PROTECTIVE ORDER – 5**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
DATED this 15<sup>th</sup> day of July, 2025.

PATRICK J. KIRBY LAW OFFICE, PLLC.

  
Patrick J. Kirby, WSBA #24097  
Attorney for Defendant *Albert W. Merkel*  
4353 S. Greystone Lane  
Spokane, Washington 99223  
Telephone: (509) 835-1200  
Facsimile: (509) 624-3493  
Email: pkirby@pkirbylaw.com

**REPLY IN SUPPORT MOTION FOR  
PROTECTIVE ORDER - 6**

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> 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  
 FAXSIMILE  
 EMAIL

LUKINS & ANNIS, P.S.  
Reid G. Johnson, WSBA # 44338  
Michael J. Hines, WSBA #19929  
Zaine M. Yzaguirre, WSBA #58265  
717 W. Sprague Ave., Suite 1600  
Spokane, WA 99201

**Telephone:** (509) 455-9555  
**Fax:** (509) 747-2323  
**Email:** [rjohnson@lukins.com](mailto:rjohnson@lukins.com)  
[mhines@lukins.com](mailto:mhines@lukins.com)  
[zyzaguirre@lukins.com](mailto:zyzaguirre@lukins.com)

~~PATRICK J. KIRBY LAW OFFICE, PLLC~~

~~PATRICK J. KIRBY, WSBA #24097  
Attorney for Defendant Albert W. Merkel  
4353 S. Greystone Lane  
Spokane, Washington 99223  
Telephone: (509) 835-1200  
Facsimile: (509) 624-3493  
Email: pkirby@pkirbylaw.com~~

**REPLY IN SUPPORT MOTION FOR  
PROTECTIVE ORDER – 7**

