

FILED

APR 25 2025

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON IN AND FOR SPOKANE COUNTY

CITY OF SPOKANE VALLEY, a municipal
corporation,

Plaintiff,

v.

ALBERT W. MERKEL, an individual,

Defendant.

NO. 25-2-00710-32

DECLARATION OF REID JOHNSON IN
SUPPORT OF OPPOSITION TO
MOTION TO DISMISS

I, REID G. JOHNSON, declare as follows:

1. I am over the age of 18 and competent to testify with regard to the matters contained herein, based on personal knowledge.

2. I am an attorney of record for the Plaintiff in this matter.

3. Attached hereto as **Exhibit A** is a true and correct copy of Investigation Report completed by Rebecca Dean, dated September 3, 2024, which is referenced in the Complaint as Exhibit A.

4. Attached hereto as **Exhibit B** is a true and correct copy of the Findings of Fact, Conclusions of Law, Decision, and Recommended Corrective Action in In Re: Appeal of

DECLARATION OF REID JOHNSON IN SUPPORT OF
OPPOSITION TO MOTION TO DISMISS: 1

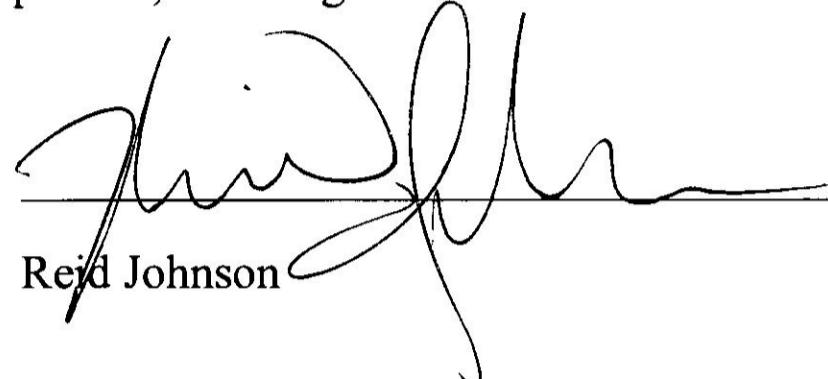
LAW OFFICES OF
LUKINS & ANNIS, PS
A PROFESSIONAL SERVICE CORPORATION
717 W Sprague Ave., Suite 1600
Spokane, WA 99201
Telephone: (509) 455-9555
Fax: (509) 747-2323

1 Councilmember Albert Merkel, dated December 13, 2024, which is referenced in the
2 Complaint as Exhibit B.

3 5. Attached hereto as **Exhibit C** is a true and copy of certain excerpts from the
4 City of Spokane Valley Governance Manual, dated April 16, 2024.¹

5 I certify under penalty of perjury under the laws of the State of Washington that the
6 foregoing is true and correct.

7 SIGNED THIS 25th day of April, 2025, at Spokane, Washington.

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Reid Johnson

¹ Documents whose contents are alleged in a complaint but which are not attached may be considered in ruling on a CR 12(b)(6) motion to dismiss. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

DECLARATION OF REID JOHNSON IN SUPPORT OF
OPPOSITION TO MOTION TO DISMISS: 2

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of April, 2025, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all entities as follows:

Patrick J. Kirby
Patrick J. Kirby Law Office, PLLC
4353 S. Greystone Lane
Spokane, WA 99223
pkirby@pkirbylaw.com

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Via E-Filing
- Via Email

Attorney for Defendant

LUKINS & ANNIS, P.S.

Fiona Spring, Legal Assistant

DECLARATION OF REID JOHNSON IN SUPPORT OF
OPPOSITION TO MOTION TO DISMISS: 3

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EXHIBIT A

REBECCA DEAN PLLC
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 *Pigayalup*.

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

EXHIBIT 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.3rd 45 (2015);

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

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

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

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

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

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

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

16 2.12.6. Investigator:

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

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

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

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

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

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

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

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

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

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

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

1 2.12.6.12. Exhibit I-11 Merkel Nextoor Posts, dated March and June, 2024;

2 2.12.6.13. Exhibit I-12 Merkel Nextdoor Posts, dated May 5, 2024;

3 2.12.6.14. Exhibit I-13 Merkel Nextoor Posts, dated April, 2024;

4 2.12.6.15. Exhibit I-14 Merkel Nissen Declaration, dated April 2, 2024;

5 2.12.6.16. Exhibit I-15 Jessica Yaeger Nextdoor Posts, dated May 10, 2024;

6 2.12.6.17. Exhibit I-16 City of Spokane Valley Governance Manual Chapter
5;

7 2.12.6.18. Exhibit I-17 City of Spokane Valley Governance Manual
Appendix H;

8 2.12.6.19. Exhibit I-18 City of Spokane Valley Appendix B, Rules of
9 Procedure for Proceedings Before the Hearing Examiner of the City
10 of Spokane Valley Washington, Chapters I & IV;

11 2.12.6.20. Exhibit I-19 Curriculum Vitae of Independent Investigator;

12 2.12.6.21. Exhibit I-20 *Nissen v. Pierce County*, 183 Wash. 2d 863 (2015);

13 2.12.6.22. Exhibit I-21 *West v. Vermillion*, 196 Wn. App 627 (2016);

14 2.12.6.23. Exhibit I-22 *West v. City of Puyallup*, 2 Wn. App 2d 586 (2018);

15 2.12.6.24. Exhibit I-23 *West v. Clark County*, Court of Appeals No. 52843-
6-II (unpublished);

16 2.12.6.25. Exhibit I-24 Investigator Hearing Memorandum;

17 2.12.6.26. Exhibit I-25 Investigator Exhibit Lists;

18 2.12.6.27. Exhibit I-26 Investigator Witness List;

19 2.12.6.28. Exhibit I-27 Errata to Hearing Memorandum (Exhibit I-24);

20 2.12.6.29. Exhibit I-28 Investigator Motion in Limine;

21 2.12.6.30. Exhibit I-29 Final Argument of Investigator;

22 2.12.6.31. Exhibit I-30 Investigator's Proposed Findings of Fact and
Conclusions of Law;

23 2.12.6.32. Exhibit I-31 Investigator November 8, 2024 Letter to the Hearing
Examiner;

24 2.12.6.33. Exhibit I-32 Investigator Motion for Acceptance of Findings of
Fact and Conclusions of Law;

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

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

2.12.7. Exhibits from Appellant:

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

2.12.7.2. Exhibit A-16 Appellant Brief;

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

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

Requests for City Council Action (with Exhibits);

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

August 16, 2024;

2.12.7.7. Exhibit A-21 Merkel 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 2.43. It is significant to the Hearing Examiner that it is not Mr. Merkel's public or private
30 conversations that are subject to the Public Records Act. It is only public records that
31 are subject to the Public Records Act. Mr. Merkel remains free to talk to anybody

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

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

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

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

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

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

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

21 **III. CONCLUSIONS OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.13. *Lindke v. Freed*, 601 U.S. 187, 144 S. Ct. 756, 218 L.Ed.2d 121 (2024) is not
controlling in this case. The *Lindke* case has nothing to do with state statutes regarding
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
control over the instruments they have created." RCW42.30.010, 42.56.030
(Manual, p. 4)

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

12 3.19.1. Social Media

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

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

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

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

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

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

3 3.21. Chapter 5 of the Manual provides as follows:

4 3.21.4. “In order to foster an environment of ethical and professional conduct by all
5 Councilmembers, the Council has adopted the following process to be
6 implemented in the event a Councilmember is alleged to have violated a provision
7 of: ...

8 3.21.5. “(3) the Social Media Policy attached as Appendix H to this Governance
9 Manual; ...

10 3.21.6. “(9) other applicable laws and/or regulations governing the conduct of the
11 Councilmembers in their capacity as elected public officials. (Manual page 55A.)
12 The previously provided provisions are part of the Council Conduct Standards.
13 (Manual, p. 55B)

14 3.22. The Manual provides that:

15 3.22.7. “All Councilmembers must abide by the above-identified Council Conduct
16 Standards. Any Councilmember alleged to have violated Council Conduct
17 Standards is subject to the below enforcement provisions.”

18 3.23. The Manual establishes in chapter 5 a procedure for enforcement of the Council
19 Conduct Standards. (Manual, p. 55D)

20 3.24. The Council Conduct Standards are binding on Councilmember Albert Merkel. The
21 Enforcement Procedure set forth in the Manual was appropriately followed after
22 complaints that Councilmember Merkel had violated the Social Media Policy of the
23 City of Spokane Valley were lodged by Councilmember Yaeger on or about June 11,
24 2024 and August 1, 2024.

25 3.25. The City Manager, in accordance with the Manual, upon receipt of the written
26 complaints involving Councilmember Merkel promptly retained an independent third-
27 party attorney, Rebecca Dean, to conduct an independent review and investigate the
28 complaints of Councilmember Yaeger pursuant to the Governance Manual.

29 3.26. The retained attorney (referred to throughout this decision as Investigator) properly
30 determined that Councilmember Yaeger’s complaints alleged an actionable claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.42. Councilmember Merkel’s refusal to segregate and provide social media posts which
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,
segregated, and retrieved by the City of Spokane Valley in the event they are deemed
to be public records responsive to PRA requests submitted to the City.

15 3.45. Mr. Merkel has also violated the Councilmember Social Media Policy (Appendix H
16 to the Governance Manual) by posting on his personal/campaign Nextdoor social
17 media account matters that amount to discussions or descriptions of city business or
18 city governance. The Governance Manual Chapter 5, Council Conduct Standards and
19 Enforcement Sections A-C, read together, require Councilmembers to abide by the
20 Council Conduct Standards, including the City's Councilmember Social Media Policy
21 attached as Appendix H and "other applicable laws and/or regulations governing the
conduct of Councilmembers in their capacity as elected officials."

22 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,"
23 specifically RCW 40.14 et seq. and his obligations under *Nissen*, as claimed by
24 Councilmember Yeager in her complaint and supplemental complaint.

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

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

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

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

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

IV. DECISION

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

V. RECOMMENDATIONS FOR CORRECTIVE ACTION

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

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

Dated this 13 day of December, 2024,

ANDREW L. KOTTKAMP

Hearings Examiner for Spokane Valley

EXHIBIT C



Governance Manual

Comprehensive Collection of
Rules and Procedures



Governance Manual

Resolution 03-028 adopted 05-13-2003, replaced by
Resolution 04-013 adopted 05-25-2004, replaced by
Resolution 05-021 adopted 09-13-2005, replaced by
Resolution 06-022 adopted 11-14-2006, replaced by
Resolution 07-020 adopted 12-11-2007, replaced by
Resolution 09-012 adopted 09-08-2009, replaced by
Resolution 10-020 adopted 12-28-2010, replaced by
Resolution 12-002 adopted 04-10-2012, replaced by
Resolution 13-005 adopted 04-23-2013, replaced by
Resolution 14-003 adopted 02-25-2014, replaced by
Resolution 15-007 adopted 08-11-2015, replaced by
Resolution 16-012 adopted 11-01-2016, replaced by
Resolution 18-008 adopted 11-13-2018, replaced by
Resolution 18-011 adopted 12-18-2018, replaced by
Resolution 20-010 adopted 07-14-2020, replaced by
Resolution 22-021 adopted 11-22-2022, replaced by
Resolution 23-006 adopted 04-18-2023, replaced by
Resolution 23-014 adopted 12-19-2023, replaced by
Resolution 24-006 adopted 04-16-2024

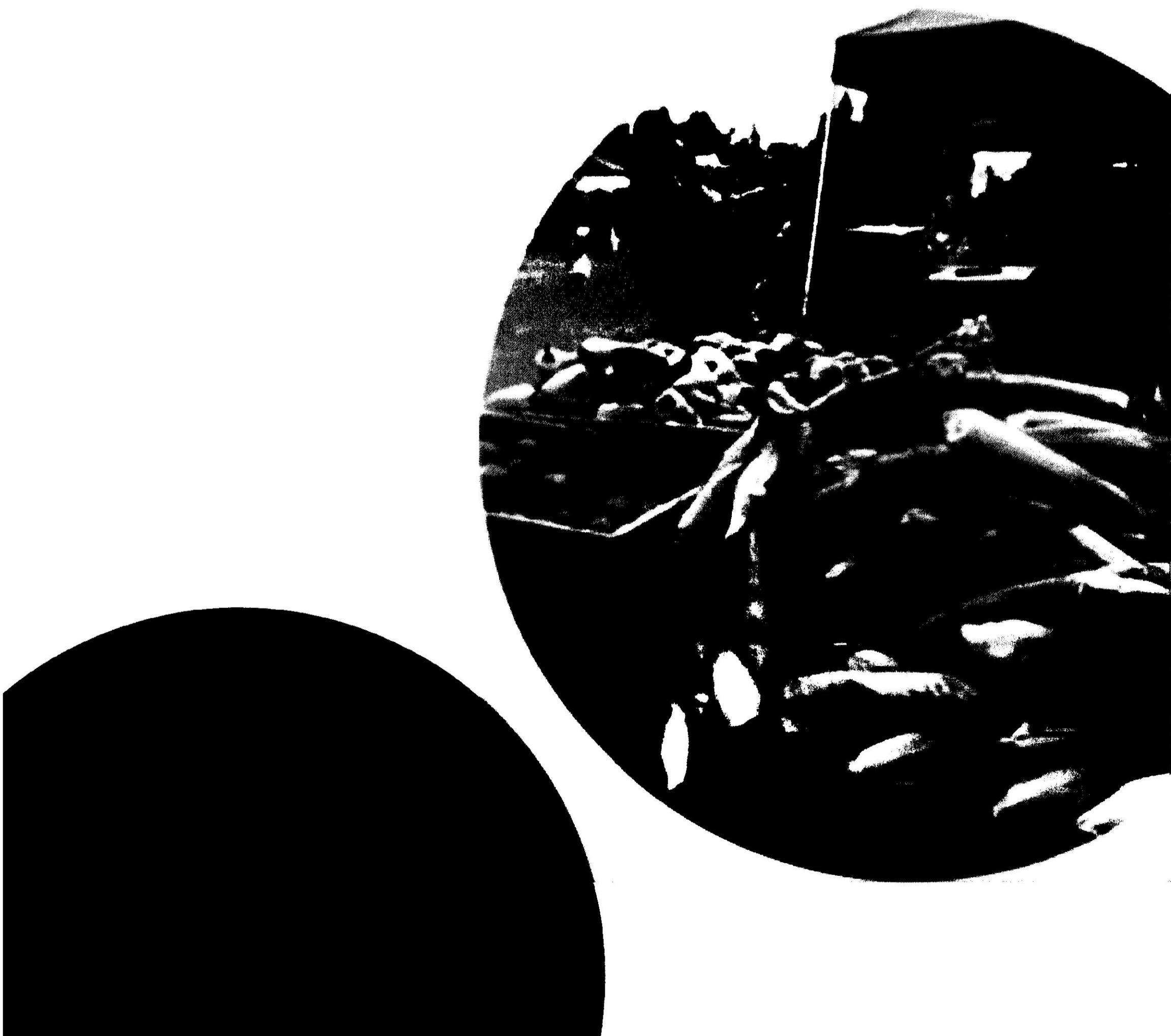
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Chapter 3

Council Contacts



A. CITIZEN CONTACT/INTERACTIONS OUTSIDE OF A COUNCIL MEETING

1. Mayor/Council Correspondence

Councilmembers acknowledge that in the Council/Manager form of government, the Mayor is recognized by community members as a point of contact. To facilitate full communications, staff shall work with the Mayor to circulate to Councilmembers, copies of emails and written correspondence directed to the Mayor regarding City business. This provision shall not apply to invitations for mayoral comments at various functions, nor requests for appointments or other incidental contact between citizens and the office of the Mayor.

2. Concerns, Complaints and Suggestions to Council

When citizen concerns, complaints or suggestions are brought to any, some, or all Councilmembers, the Councilmember should, when deemed appropriate and/or necessary, consult with the city manager to, first determine whether the issue is legislative or administrative in nature and then:

- i. If legislative, and a concern or complaint is about the language or intent of legislative acts or suggestions for changes to such acts, and if such complaint suggests a change to an ordinance or resolution of the City, the matter may be referred, with Council consensus, to a future Council agenda for Council's recommendation in forwarding the matter to a committee, administration, or to the Council for study and recommendation.
- ii. If administrative, and a concern or complaint regards administrative staff performance, execution of legislative policy or administrative policy within the authority of the City Manager, the Councilmember should then refer the complaint directly to the City Manager for review, if said complaint has not been so reviewed. The City Council may direct that the City Manager brief the Council when the City Manager's response is made.

3. Administrative Complaints Made Directly to Individual Councilmembers

a. When administrative policy or administrative performance complaints are made directly to individual Councilmembers, the Councilmember should then refer the matter directly to the city manager for review and/or action. The individual Councilmember may request to be informed of the action or response made to the complaint. However, the city manager shall not be required to divulge information he/she deems confidential, in conformity with applicable statutes, ordinances, regulations, policies or practices.

b. Although citizens' direct access to elected officials is to be encouraged to help develop public policy, City Councilmembers should not develop a "personal intervention" pattern in minor calls for service or administrative appeals which may actually delay a timely customer service response. The best policy is to get the citizen into direct contact with customer service unless an unsatisfactory result has occurred in the past. In that case, refer to the paragraph above.

4. Social Media

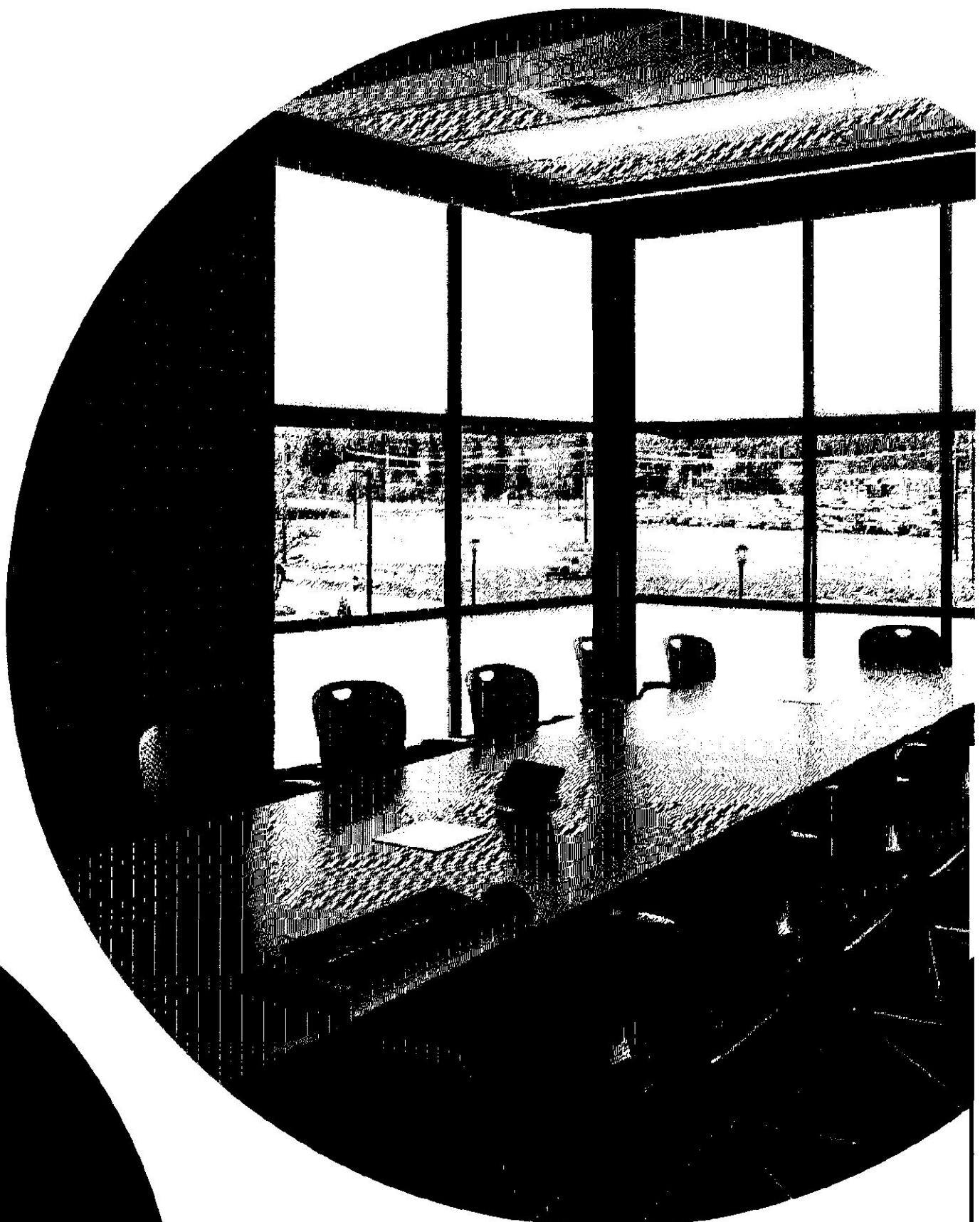
Councilmembers shall comply with the City Councilmember Social Media Policy which is attached hereto as Appendix H and wholly incorporated herein.

5. Donations

On occasion, Councilmembers could be contacted by citizens or businesses regarding donations. See Spokane Valley Municipal Code 3.34. for policy on donations.

Chapter 5

Council Conduct Standard and Enforcement



A. PURPOSE

The behavior and actions of individual Councilmembers can affect, both positively and negatively, the perception of the entire Council and public confidence in the Council and the city. Therefore, each Councilmember has a vested interest in promoting the ethical and professional conduct of his/her fellow Councilmembers.

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(s) is alleged to have violated a provision of:

- (1) Sections A.1.h, A.2., or C of Chapter 4 of this Governance Manual;
- (2) the Statement of Ethics attached as Appendix C to this Governance Manual;
- (3) the Social Media Policy attached as Appendix H to this Governance Manual;
- (4) Chapter 42.23 RCW (Code of Ethics for Municipal Officers);
- (5) Chapter 42.30 RCW (Washington Open Public Meetings Act);
- (6) RCW 42.17A.555 (prohibiting use of public facilities for campaigning);
- (7) RCW 35A.13.120 (prohibiting interference with administrative/executive staff);
- (8) paragraph D.1.b herein and set forth below, or
- (9) other applicable laws and/or regulations governing the conduct of the Councilmembers in their capacity as elected public officials.

B. COUNCIL CONDUCT STANDARDS

The “Council Conduct Standards” consist of items (1) through (9) described in the immediately preceding section.

C. COMPLIANCE REQUIRED

All Councilmembers must abide by the above-identified Council Conduct Standards. Any Councilmember alleged to have violated the Council Conduct Standards is subject to the below enforcement provisions. However, said enforcement provisions shall apply only to that conduct occurring after the date Council passed the resolution adopting this Chapter 5 of the Governance Manual.

D. ENFORCEMENT PROCEDURE

1. **Complaint:** Any Councilmember may submit a written complaint to the city manager alleging a fellow Councilmember(s) has violated, during their tenure as an elected Councilmember, one or more provisions of the Council Conduct Standards. The following subsections apply to all such complaints.

- a. **Required Content of Complaint:** The written complaint must identify the (i) Councilmember submitting the complaint; (ii) Councilmember alleged to have violated the Council Conduct Standards, (iii) specific Council Conduct Standards alleged to have been violated, and (iv) specific conduct the accused Councilmember is alleged to have committed.

To the extent known by the Councilmember submitting the complaint, the complaint shall also identify the following for each alleged violation (i) when the violation occurred, (ii) where and how the violation occurred, (iii) all individuals believed to have witnessed, or otherwise have firsthand knowledge of the alleged conduct, and (iv) documents/records related to the alleged conduct (including the identity of the custodian and the location of said documents/records). If the complaining Councilmember has information or documents/records in their possession that tend to support or discredit the allegations, they must provide the same with the written complaint.

- b. **Frivolous Complaints Prohibited: Councilmembers are prohibited from submitting Frivolous Complaints** under this Chapter. If the Investigator (identified in paragraph 2 below) determines during their review/investigation that a Councilmember has submitted a Frivolous Complaint, then the submission of the complaint itself shall be a violation of the Council Conduct Standards subject to discipline under this Chapter 5.

“Frivolous Complaint” is defined as a complaint that:

- (i) contains false allegations, and no facts have been presented or revealed during the investigation of the complaint that would cause an unbiased person, exercising reasonable judgment and discretion, to believe the false allegations were true; and/or
- (ii) is determined by the Investigator to be unfounded, and the Investigator determines that the Councilmember who submitted the complaint possessed information or physical evidence discrediting the veracity of the allegations but did not provide it to the Investigator.

- 2. **Review/Investigation:** Upon receipt of the written complaint, the city manager shall promptly retain an independent third-party attorney (hereinafter “Investigator”) to conduct an independent review and investigate the complaint and allegations therein as follows:

- a. **Initial Review for Sufficiency.** The Investigator shall first review the complaint to determine if the complaint alleges an actionable claim. If the Investigator determines that the complaint fails to allege conduct which, when assuming the allegations to be true, constitutes a violation(s) of the Council Conduct Standards, then the complaint shall be considered insufficient (hereinafter an “Insufficient Complaint”). The Investigator shall submit a written report to the city manager explaining the basis for the Insufficient Complaint determination. The Investigator’s delivery of the written report to the city manager shall close the matter.

If the Investigator determines that the complaint alleges conduct which, when assumed to be true for purposes of initial review, constitutes a violation(s) of the Council Conduct Standards, then the Investigator shall conduct a full investigation of the allegations identified in the complaint.

- b. *Investigation.* The Investigator shall investigate the allegations in the complaint and determine whether, on a more probable than not basis, that the accused Councilmember violated the Council Conduct Standards. The Investigator may use all reasonable and lawful means to investigate the allegations, including but not limited to interviewing witnesses, obtaining documents pertinent to the allegations, and interviewing the Councilmember alleged to have committed a violation(s). Regardless of whether they are the subject of a complaint hereunder, all Councilmembers shall reasonably cooperate with the investigation and make themselves reasonably available to answer questions and provide documents requested by the Investigator.

If a subject Councilmember refuses to participate in the investigation or fails to timely deliver documents requested by the investigator, it will be understood that the subject Councilmember does not dispute the complaint.

- c. *Report.* After completing the investigation, the Investigator shall provide a written report to the City Manager that contains the following: (a) a summary of the complaint and matter(s) investigated, (b) the steps taken by the Investigator to review and/or investigate the allegations, (c) the Investigator's findings of fact pertinent to the complaint and the evidentiary bases therefore, (d) a conclusion/determination as to whether the Council Conduct Standards were violated, (e) for each standard violated, the specific Council Conduct Standard violated and the facts demonstrating the violation occurred, and (e) recommendation(s) as to whether and what corrective action, if any, should be taken under the circumstances.

If the Investigator concludes that a Frivolous Complaint was submitted, then the Investigator's report shall also include the above information regarding the Frivolous Complaint.

The city manager shall deliver, without undue delay, a copy of the Investigator's report to the Councilmember that was the subject of the investigation. If the Investigator's report determines a Frivolous Complaint was submitted, then a copy shall also be delivered to the Councilmember who submitted the Frivolous Complaint. Delivery by email to the Councilmember's official city-issued email address shall be sufficient. Delivery shall be deemed to have been completed at the time the email was sent to the Councilmember.

3. **Hearing:** If the Investigator's report contains a finding that an accused Councilmember violated one or more Council Conduct Standards (including filing a Frivolous Complaint), then said Councilmember has the right to request a hearing before the city hearing examiner to contest the Investigator's findings and/or conclusions.

- a. To request a hearing, the Councilmember found to have violated the Council Conduct Standards (hereafter the "Subject Councilmember") must deliver a request for hearing to the city Manager by 5 p.m. on the seventh (7th) business day following the date the city manager delivered the Investigator's report to the Subject Councilmember. Delivery of a hearing request shall be by email to the city manager's official city-issued email address.

If a Subject Councilmember fails to timely deliver the hearing request, then it will be understood that the Subject Councilmember does not dispute the Investigator's findings and conclusions, and the matter shall proceed to the Council Review Meeting identified herein.

- b. At the hearing, (a) the Investigator shall present the evidence supporting the findings and conclusions in the Investigator's report, and (b) the Subject Councilmember may present evidence in their defense. The Subject Councilmember may represent themselves or retain their own attorney at their own expense.
- c. The proceedings before the hearing examiner shall be scheduled and conducted as identified in Appendix B of the Spokane Valley Municipal Code. The hearing examiner's decision is the final decision of the City on the matter.

4. **Council Review Meeting:** If the hearing examiner determines that no violation occurred, then the decision shall be final, and the matter closed. If the hearing examiner issues a decision finding, on a more probable than not basis, that the Subject Councilmember violated the Council Conduct Standards or filed a Frivolous Complaint, or the Subject Councilmember did not timely request a hearing, then an Executive Session of the Council will be called as soon as practicable to discuss the complaint, the hearing examiner's findings and/or the Investigator's report, and potential corrective action by Council (hereinafter referred to as "Council Review Meeting"). However, the Subject Councilmember(s) may insist any discussion of the violation(s) found against her/him take place in a meeting of the Council open to the public, in which case the discussion shall take place in an open public meeting of the Council. Regardless of whether the Council Review Meeting occurs in an Executive Session or open public meeting, the Subject Councilmember(s) shall be provided up to fifteen (15) minutes to speak to the hearing examiner's findings and conclusions (or Investigator's report when no hearing is timely requested) during the Council Review Meeting.

Following a discussion by the Council of the violation(s), the Council may:

- a. Take no action.
- b. In an open public session of the Council, by a **majority-plus-one vote** of the Council, issue a verbal **Reprimand** of the Subject Councilmember(s) found to have committed a

violation(s). A verbal **Reprimand** declares the conduct of a Subject Councilmember(s) to be unacceptable but not of such severity as to warrant a Public Censure. Issuance of the verbal **Reprimand** shall include a description of the violation(s) and the Hearing Examiner's findings and conclusions. In the case where the Subject Councilmember(s) did not timely request a hearing, then the verbal reprimand shall also include a description of the Investigator's report.

Following the issuance of the verbal **Reprimand**, the Subject Councilmember(s) found to have committed a violation(s) shall be provided fifteen (15) minutes during the open public meeting to speak to the Hearing Examiner's findings (and/or Investigator's report) and/or Council's disciplinary decision in the following circumstances: (1) the Council Review Meeting occurred in an Executive Session of Council, or (2) the Council Review Meeting occurred in a separate open public meeting prior to the open public meeting at which the discipline is imposed.

c. If a **majority-plus-one** of the Council determines the severity of the violation(s) committed by a Subject Councilmember(s) is of such magnitude, **OR** that the Subject Councilmember(s) who was previously issued a verbal Reprimand commits subsequent violations, the Council may, in an open public session of the Council:

i. By way of a formal resolution adopted by a **majority-plus-one vote** of the Council, issue a **Public Censure** of the Subject Councilmember(s) found to have committed a severe or subsequent violation(s). A **Public Censure** declares that a Subject Councilmember(s) has committed a violation(s) that requires admonishment greater than that provided for in a verbal Reprimand but does not require additional measures be taken. The **Public Censure** resolution shall include a description of the violation(s) and a copy of the hearing examiner's findings and conclusions. In the case where the Subject Councilmember(s) did not timely request a hearing, then the resolution shall also include a copy of the Investigator's report.

Following the adoption of the **Public Censure** resolution, the Subject Councilmember(s) found to have committed a violation(s) shall be provided fifteen (15) minutes to speak to the hearing examiners findings, Investigator's report, and/or Council's disciplinary decision, but only in the following circumstances: (1) the Council Review Meeting occurred in an Executive Session of Council, or (2) the Council Review Meeting occurred in a separate open public meeting prior to the open public meeting at which the discipline is imposed.

ii. By way of a formal resolution adopted by a **majority-plus-one vote** of the Council, **Remove** the Subject Councilmember(s) found to have committed a severe or subsequent violation(s) from his/her Council Committee assignments for a period of time deemed appropriate by a **majority-plus-one vote** of the Council. The **Removal** resolution shall include a description of the violation(s) and a copy of the Hearing Examiner's findings and conclusions. In the case where the Subject Councilmember(s)

did not timely request a hearing, then the resolution shall also include a copy of the Investigator's report.

Following adoption of the **Removal** resolution, the Subject Councilmember(s) found to have committed a violation(s) shall be provided fifteen (15) minutes to speak to the hearing examiner's findings, Investigator's report, and/or Council's disciplinary decision, but only in the following circumstances: (1) the Council Review Meeting occurred in an Executive Session of Council, or (2) the Council Review Meeting occurred in a separate open public meeting prior to the open public meeting at which the discipline is imposed.

Nothing herein shall be construed as giving Council authority to remove a Councilmember from their position as a Councilmember.

- iii. By way of a formal resolution adopted by a **majority-plus-one vote** of the Council, **Remove** the Subject Councilmember(s) found to have committed a severe or subsequent violation(s) from her/his (a) Council Committee assignments, AND (b) assignments to non-City boards, committees, or commissions to which the City Mayor has authority to appoint members (with or without Council approval). Said removal shall be for a period of time deemed appropriate by a **majority-plus-one vote** of the Council. The Removal resolution shall include a description of the violation(s) and a copy of the hearing examiner's findings and conclusions. In the case where the Subject Councilmember(s) did not timely request a hearing, then the resolution shall also include a copy of the Investigator's report.

Following adoption of the **Removal** resolution, the Subject Councilmember(s) found to have committed a violation(s) shall be provided fifteen (15) minutes to speak to the hearing examiner's findings, Investigator's report, and/or Council's disciplinary decision, but only in the following circumstances: (1) the Council Review Meeting occurred in an Executive Session of Council, or (2) the Council Review Meeting occurred in a separate open public meeting prior to the open public meeting at which the discipline is imposed.

Nothing herein shall be construed as giving Council authority to remove a Councilmember from their position as a Councilmember.

Council does not have authority to overrule the hearing examiner's findings of fact or conclusions whether Council Conduct Standards were violated. Council's role is limited to determining whether and how to discipline the Subject Councilmember.

NOTE: The application of one of the remedies described above shall not preclude the application of additional remedies described above or otherwise available at law. Furthermore, certain violations committed by a Councilmember(s) may be subject to prosecution or other legal action pursuant to Washington State law.

If a Councilmember does not cease conduct that has been deemed in violation of the Council Conduct Standards, then the Council may direct city administration to pursue legal action to prevent ongoing violations, provided such an action is not prohibited by applicable law.

In the event a Councilmember intentionally violates provisions of the Council Conduct Standards which cause harm or damages to the city, then the Council may by affirmative vote seek to recover those damages against the Councilmember on behalf of the city, provided such action is not prohibited by applicable law.

5. ***Appeal:*** If the Subject Councilmember had requested a hearing to contest the Investigator's findings, then the Subject Councilmember may appeal the Hearing Examiner's decision and the Council's disciplinary decision to the Washington Superior Court for Spokane County ("Superior Court"), but only after completion of the Council Review Meeting.

The Subject Councilmember must exhaust the available administrative remedies described herein prior to seeking an appeal in the Superior Court. A failure to request a hearing shall result in dismissal of an appeal to Superior Court.

Appeal shall be by the Subject Councilmember filing a Petition for Review or other legally sufficient pleading with the Superior Court and delivering a copy of the Petition for Review to the city manager within ten (10) business days after the Council Review Meeting is completed. The manner in which the notice of appeal must be delivered to the city manager is the same as that required for a request for hearing before the city hearing examiner.

APPENDIX H

Councilmember Social Media Policy

OFFICIAL COUNCILMEMBER-SPECIFIC SOCIAL MEDIA ACCOUNTS

Councilmembers may choose to create and maintain a Councilmember-specific social media account, such as on Facebook, X (formerly Twitter) and/or Instagram, to communicate with constituents as part of their Councilmember role. When doing so, Councilmembers agree to the following guidelines:

Requirements:

1. Before setting up a social media account on any given platform, you must receive written verification from the city's IT manager that the social media platform is sufficiently compatible with the city's social media archiving platform to assure that all content, including posts and comments, is archived for public records retention. Such verification may be by email from the IT manager to you. If the IT manager does not provide the above verification, then you are not able to establish a Councilmember-specific account on that particular social media platform.
2. Create the account using your @SpokaneValleyWA.gov email alias. On Facebook, per Facebook policy, create a 'page' from your personal 'profile'.
3. When creating Councilmember accounts, include:
 - Title including your official role of "Councilmember" in the name (Ex. Councilmember first last name)
 - Category of "Government Official"
 - Identifiable, official Councilmember photo (can be provided by city staff)
 - Disclaimer, "All content is mine and does not represent the views of the Spokane Valley City Council or City of Spokane Valley."
4. Familiarize yourself with and adhere to the City of Spokane Valley Social Media Policy, outlined in Administrative Policy and Procedure No. 300.020 Communications Policy.
5. Contact the city's IT manager regarding your new account(s) and provide the account handles. The IT manager or designee will associate your account with the city's social media archiving platform, currently Page Freezer, to ensure that all content, including posts and comments, is archived for public records retention. Content may be public record if it relates to the conduct of government or the performance of your office. Costs for the social media archiving platform shall be deducted from each Councilmembers' individual annual budgets.
6. Be aware that the Open Public Meetings Act (OPMA) applies to social media/electronic platform interactions between elected officials just as it does to in-person or phone interactions. Please do not have a discussion of agency business publicly or privately on

social media, because if it constitutes a quorum, you may be in violation of the OPMA. An OPMA prohibited meeting may be deemed to have occurred electronically when a quorum is ultimately involved and a discussion of city business occurs.

7. Be aware that all posts, comments and content are public records when they are set forth on an official city account and may constitute speech protected by the constitutions of Washington and the United States of America. Councilmembers shall not delete their posts, comments or content. Posts, comments or content of third parties on Councilmember's official social media accounts shall not be deleted unless the content at issue violates the city's Social Media Policy as outlined in Administrative Policy and Procedure No. 300.020 Communications Policy.
8. The Council desires to ensure Council remains in compliance with the OPMA. The Council therefore agrees that this policy prevents any individual Councilmember from (a) following another Councilmember's social media accounts, and (b) engaging (such as liking, sharing, and commenting) on any fellow Councilmember's social media pages.
9. A Councilmember shall not post content on any social media platform regarding the City (including but not limited to city business, projects or programs) that they know or should know is factually false at the time said content was posted. A Councilmember shall not cause others to post content on social media platforms that the Councilmember knows or should know is factually false.

If a Councilmember posts factual information on a social media platform that they believed was accurate at the time of posting but later becomes aware that the information is false, then they shall correct the false statements immediately after they become or should have become, aware that the information is false. Such correction shall be completed by editing the original post clearly identifying the update or posting a new message on the same social media platform that clearly identifies (1) the post containing false information, (2) the false information within the post, and (3) if known, the accurate factual information.

Whether and/or when a Councilmember knew or should have known information is false is determined using the "reasonable person" standard. That is, a Councilmember "should have known" the information to be false when a reasonable person, under the same or similar circumstances, would have understood that the information is false.

10. Once a Councilmember term ends, close the page. All records will be archived through the city's archiving platform.

Recommendations:

11. For best practices, post regularly (suggested minimal post of once per week). Accounts that are not actively used should be closed or hidden.
12. Keep your followers informed of city events, projects and opportunities to get involved and inform city decision-making by sharing City of Spokane Valley social media messages.

PERSONAL OR CAMPAIGN SOCIAL MEDIA ACCOUNTS OF INDIVIDUAL COUNCILMEMBERS

Councilmembers who maintain a personal or campaign social media account shall:

1. Use a personal or campaign email alias. Do not use an @SpokaneValleyWA.gov alias to set up and manage any personal or campaign account. State law prohibits the use of official city accounts for campaign purposes so all campaign-related social media communications must be made on personal or campaign accounts. Campaign purposes include supporting or opposing any candidate for public office and supporting or opposing any ballot proposition.
2. Post a disclaimer on your personal account that identifies the account purpose and that the opinions expressed are your own.
3. Not write posts on personal or campaign accounts that relate to the conduct of city government or the performance of your office. Merely posting Council agendas or information regarding city events or providing general information regarding the City's activities is not conducting city business and will not convert your personal post or the posts of others into public records. Personal communications that are not related to the conduct of government or the performance of your office are not public records. However, if you use your personal account to transact city business, any posts or comments generated in doing so may be public records.
4. Not link private or campaign accounts to a city account, with the exception of Facebook requirements for setting up a Facebook page.
5. Refrain from discussing personal accounts in public meetings or documents.
6. Not use city devices to maintain or access private accounts.

Resources

- City of Spokane Valley Social Media Policy
- Association of Washington Cities social media guidelines for elected officials
- MRSC social media policies