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9 Timothy W. Fitzgerald
 10 SPOKANE COUNTY CLERK
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6 SUPERIOR COURT, STATE OF WASHINGTON

7 COUNTY OF SPOKANE

8 CITY OF SPOKANE VALLEY, a municipal)
 9 corporation,) Cause: 25-2-00710-32
 10 Plaintiff,)
 11 vs.) REPLY IN SUPPORT
 12 ALBERT W. MERKEL, an individual,) OF MOTION TO DISMISS AND
 13 Defendant.) AWARD OF ATTORNEYS' FEES
 14) AND COSTS
 15)
 16)
 17)
 18)
 19)

14 I. INTRODUCTION

15 Defendant, Albert W. Merkel ("Merkel") by and through his attorney Patrick J. Kirby
 16 submits this Reply in Support of his Motion to Dismiss for failure to state a claim upon which
 17 relief can be granted pursuant to CR 12(b)(6), and his motion for an award of his attorneys' fees
 18 and costs incurred in opposing the above captioned frivolous action advanced without
 19 reasonable cause pursuant to RCW 4.84.185, and CR 11.

20 II. LEGAL AUTHORITY AND ARGUMENT21 A. THE CITY HAS FAILED TO ESTABLISH STANDING FOR DECLARATORY
 22 RELIEF.

23 "To establish harm under the [Uniform Declaratory Judgment Act ("UDJA")] a party
 24 must present a justiciable controversy based on allegations of harm personal to the party that are

25 **REPLY IN SUPPORT OF
 MOTION TO DISMISS AND AWARD
 OF ATTORNEYS' FEES AND COSTS – 1**

1 substantial rather than speculative or abstract.” *Grant County Fire Prot. Dist. No. 5 v. City of*
2 *Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)(citation omitted). The requirement of
3 standing prohibits a litigant from raising the legal right of another. *Id.*

4 “This court has established a two-part test to determine standing under the UDJA. The
5 first part of the test asks whether the interest sought to be protected is arguably within the zone of
6 interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.*
7 (citations and quotations omitted). In *Grant County Fire Prot. Dist. No. 5*, the Supreme Court
8 held that the fire districts did not have standing to seek declaratory relief against cities seeking
9 annexation, “Since the statutes in question were not designed to protect their interests, they are
10 not within the zone of interest. Because the fire districts fail the zone of interest test, they cannot
11 have personal standing.” *Id.* Similarly, here the statute in question, the PRA, does not protect the
12 interest of municipalities and public agencies. The PRA protects the public’s access to
13 information by providing a procedure framework for individual requestors to seek judicial
14 review of agency action denying opportunity to inspect or copy public records. See RCW
15 42.56.550. The PRA was not designed to protect interests of government agencies. The City’s
16 interests are not within the zone of interests to be protected by PRA.

17 Agencies and municipalities may have representational standing when acting on behalf of
18 their residents seeking declaratory relief in, “a controversy is of substantial public importance,
19 immediately affects significant segments of the population, and has a direct bearing on
20 commerce, finance, labor, industry, or agriculture, this court has been willing to take a less rigid
21 and more liberal approach to standing.” *Id.* at 803 (citations and quotations omitted). The City
22 does not have standing under the representational standing doctrine because its Complaint
23 alleges “controversy” involving the PRA—not commerce, finance, labor, industry, or

24
25 **REPLY IN SUPPORT OF
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OF ATTORNEYS’ FEES AND COSTS – 2**

1 agriculture. “This case does not present one of the rare exceptions for deciding a declaratory
2 judgment without a justiciable controversy.” *Cf. Stevens County v. Stevens County Sheriff’s*
3 *Dept.*, 20 Wn. App. 2d 34, 46, 499 P.3d 917 (Div. 3, 2021), review denied 199 Wn.2d 1008
4 (2022) (county’s action under UDJA claiming enforcement of a statute violate the constitutional
5 rights of citizens involuntarily committed would not cause injury in fact to the county for
6 standing, and was not in the zone of interest of statute, and county did not present an issue of
7 overwhelming public importance allowing the court to render an advisory opinion).

8 “The second part of the test considers whether the challenged action has caused injury in
9 fact, economic or otherwise, to the party seeking standing. Both tests must be met by the party
10 seeking standing.” *Grant County Fire Prot. Dist. No. 5*, 150 Wn.2d at 802 (emphasis
11 added)(internal quotations and citations omitted). The City’s Complaint is void of any
12 allegations of injury in fact, economic or otherwise.

13 The City’s Response (p. 16) relies upon *Wash. State Hous. Fin. Comm’n v. Nat'l*
14 *Homebuyers Fund, Inc.*, for the proposition that, “standing is not intended to be a particularly
15 high bar.” 193 Wn.2d at 704, 712, 445 P.3d 533 (2019). However, the City’s Response
16 conspicuously omits the salient part of the quotation, “Instead, the doctrine serves to prevent a
17 litigant from raising another’s legal right.” *Id.* (emphasis added). Justiciability is a jurisdictional
18 prerequisite under the UDJA. *Stevens County*, 20 Wn. App. 2d at 40-41. The requirement of
19 standing is folded into the requirements for justiciability. *Id.* at 41 (citing *To-Ro Trade Shows v.*
20 *Collins*, 144 Wash.2d 403, 411, 27 P.3d 1149 (2001)).

21 The City’s reliance upon *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (Div.
22 3, 2015) is misplaced. *Zink* is distinguished from this case because Benton County sought
23 declaratory judgment under the PRA after the requestor Zink e-mailed multiple times making

1 demands with thinly veiled litigation threats. *Id.* at 275. The court of appeals held Benton County
2 had a personal stake in the outcome and had suffered an injury for declaratory purposes, “based
3 on Ms. Zink’s (the requestor’s) explicit threats to sue Benton County.” *Id.* at 279. Here, the
4 City’s Complaint makes no reference to any threats of litigation from requestors or Merkel.
5 Moreover, Benton County filed a declaratory action against the requestor threatening to sue the
6 county—not against one of its own officials as the City has done here against Merkle. *Id.* at 272-
7 73.

8 The City’s reliance upon *City of Burlington v. Wash. St. Liquor Control Bd.*, 187 Wn.
9 App. 853, 351 P.3d 875 (2015) is misplaced. The city of Burlington appealed a decision by the
10 Liquor Control Board’s decision to allow a spirits license holder to relocate the license from a
11 state-run location to a small convenience store. *Id.* at 858. The court of appeals reversed the trial
12 court’s decision that the city lacked standing to challenge the Board’s decision under the
13 Administrative Procedure Act, RCW 34.05. *Id.* The court of appeals held, “the APA delineates
14 standing requirements that differ from the general standing test applicable in other contexts....”
15 *Id.* at 861. “The [zone of interest] test focuses on whether the Legislature intended the
16 agency to protect the party’s interests when taking the action at issue.” *Id.* at 863
17 (quotations and citations omitted). The court of appeals held that the Liquor Act, RCW
18 66, provided procedural protection for the city’s interest by requiring the Board to
19 consider and give due weight to the city’s objections to licenses. *Id.* at 865. Here, there is
20 no agency decision being reviewed under the APA. Further, the PRA provides for
21 judicial review only for a “person” making the public records request to require the
22 responsible agency to show cause why it refused to allow inspection or copying of a
23

1 public record. RCW 42.56.550. There is no procedural protection in the PRA for a
2 municipality's or agency's interest.

3 The City is not within the zone of protection of the PRA to establish standing for
4 judgment declaring that Merkel's social media postings and personal electronic
5 communications constitute "public records." The proper procedure for such a judgment
6 from this Court is for a requestor to seek judicial review pursuant to RCW 42.56.550.
7

8 **B. MANDAMUS MAY NOT BE USED TO COMPEL MERKEL TO PERFORM
DUTIES WHICH INVOLVE HIS DISCRETION AS A PUBLIC OFFICIAL.**

9 The City seeks a writ of mandamus ordering Merkel to comply with its Social Media Policy
10 in its Governance Manual. "The purpose of this policy is to ensure that public records created by
11 a Councilmember's social media use are preserved and able to be produced as required by the
12 Washington Public Records Act." Complaint ¶3.8 (emphasis added). See also Complaint ¶ 3.3,
13 and 5.4. Thereby the City has incorporated the PRA into its Social Media Policy. The City's
14 claim for writ of mandamus seeking Merkel's "compliance" with its Social Media Policy is vis-
15 à-vis a challenge Merkel's discretionary duties exercised under the PRA, which would not be
16 appropriate judicial function.

17 By seeking a writ of mandamus ordering Merkel to "comply" with its Governance Manual,
18 the City invites this Court to assume a continuous duty to review all of Merkel's social media
19 postings and private electronic communications to determine whether they are personal or
20 campaign accounts or constitute city business in performance of his office pursuant to the PRA.

21 **C. THE CITY'S CLAIM FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED.**

22 In *Kucera v. State Dept. of Transp.*, 140 Wn.2d 200, 995 P.2d 63 (2000). the Supreme
23 Court dissolved a trial court's preliminary injunction after holding that property owners had an

1 adequate remedy at law and there was no factual finding by the trial court that the ferry
2 significantly and adversely impacted the environment. The Supreme Court held:

3 An injunction is an extraordinary equitable remedy designed to prevent serious
4 harm. Its purpose is not to protect a plaintiff from mere inconveniences or
5 speculative and insubstantial injury. *Tyler Pipe Indus.*, [96 Wn.2d 785, 796, 638
6 P.2d 1213 (1982)]. As the trial court explicitly made no finding with regard to
7 causation, it cannot be said the respondents satisfied their burden of establishing
8 actual and substantial harm in their request for injunctive relief.

9 *Id.* at 221 (emphasis added). Similarly, here, the City's Complaint cannot satisfy the burden of
10 establishing actual and substantial harm. There is no allegation of actual economic loss or
11 irreparable harm which faces the City as a result of Merkel's *Nissen* declarations. Instead, the
12 City makes vague and hypothetical allegations of speculative PRA liability "exposure."
13 Complaint ¶¶ 3.16, 3.37.

14 In *Union Gap, t City of Union Gap v. Printing Press Props., LLC*, 2 Wn. App. 2d 201,
15 233, 409 P.3d 239 (Div. 3, 2018) the court of appeals held that the city's dispute with a property
16 owner over cutting a boulevard curb without a permit from the city "presents an actual, present,
17 and existing dispute between Union Gap and Printing Press regarding Valley Mall Boulevard
18 access." *Id.* at 233. Here, there is no actual, present, and existing dispute between the City and
19 Merkel because the City's Complaint contains no allegations it has suffered actual and
20 substantial harm as a result of Merkel's alleged actions and inactions. The dispute in *Union Gap*
21 concerned the intent of a parties to a development agreement. *Id.* at 224.

22 The City does not have a zone of interest protected by PRA which would justify this
23 Court to issue an injunction ordering Merkel to "retrieve and preserve" all his social media
24 postings and private electronic communications during his term in office and make them
25 available for the City. The City's contrived need for an unbridled search by the City of all

1 aspects of Merkel's personal life does not outweigh the harm to Merkel by stripping him of his
2 right to privacy.

3 **D. MERKEL SHOULD BE AWARDED HIS ATTORNEY'S FEES AND COSTS
RESPONDING TO THE CITY'S ENTIRELY FRIVOLOUS LAWSUIT.**

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5 “[W]e find that notice in general that sanctions are contemplated is sufficient for the later
imposition of CR 11 sanctions.” *Biggs v. Vail*, 124 Wn.2d 193, 876 P.2d 448 (1994)

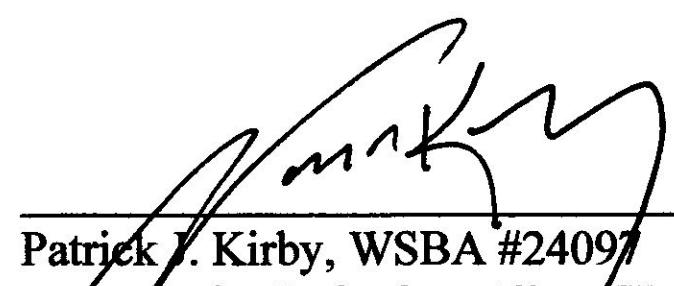
6 Here, on February 5, 2025, (the day after the City Council voted to authorize this lawsuit to
7 be filed against Merkel) Merkel provided explicit written notice to the City of Spokane Valley
8 Attorney and the City Manager that he viewed their claims were politically motived. Merkel
9 Decl., Exh “A.” Merkel’s letter concludes with, “If the City files a lawsuit against me I will file
10 counterclaims for violations of my civil rights, frivolous action, and seek judgment for recovery
11 of my actual damages and my attorneys’ fees.” *Merkel Decl.*, Exh. “A.” The notice Merkel
12 provided to the City Attorney and City Manager clearly shows that he was contemplating
13 seeking the imposition of sanctions under both RCW 4.84.185 and CR 11.

14
15 **III. CONCLUSION**

16 The Court should dismiss this frivolous lawsuit and award Merkel his attorney’s fees.

17 DATED this 2nd day of May, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of May 2025, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FACSIMILE
- EMAIL

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