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Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Maxwell, Kari

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO PRESS CLUB, INC.,

Petitioner,

v.

JANICE MCGEACHIN, in her official capacity as Lieutenant Governor of the State of Idaho,

Defendant.

Case No. CV01-21-11095

MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTIONS TO STRIKE AND DISMISS AND ON PETITION

I. INTRODUCTION

The Idaho Press Club, Inc. ("Petitioner") is a statewide association of journalists. It brings this action to compel the productions of public records sought by four of its members from the Office of the Lieutenant Governor, Janice McGeachin ("Respondent"). Three of those members sought the public's responses to Respondent's Education Task Force Feedback Form ("Feedback Forms"). Those requests were partially denied. The fourth member sought, *inter alia*, a copy of Respondent's agreement with its counsel, Colton Boyles and/or Boyles Law. That request was also denied.

Petitioner timely filed a petition for review of the denial of the four requests pursuant to I.C. § 74-115 of the Idaho Public Records Act.[1] Petitioner seeks disclosure of the records, an award of attorney fees pursuant to I.C. § 74-116(2) and the imposition of a statutory penalty under I.C. § 74-117.

As ordered by the Court, Respondent provided the unredacted records for in camera review, which was conducted prior to the hearing. Respondent also filed a motion to dismiss and a motion to strike, primarily on the ground that Petitioner lacks standing to proceed.

Oral argument on the petition and motions to dismiss and strike was held on August 13, 2021, after which the Court took the matters under advisement. The Court concludes that disclosure of the unredacted Feedback Forms is required, as is partial disclosure of Respondent's

[1] Petitioner also seeks a declaratory judgment under I.C. § 10-1201.

retainer agreement with counsel. An award of attorney fees and costs to Petitioner and the imposition of a civil penalty is ordered.

II. STANDARDS

In a public records case, a trial court's findings of fact will not be set aside unless clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal. *Cover v. Idaho Bd. of Correction*, 167 Idaho 721, 727, 476 P.3d 388, 394 (2020) (cite omitted). Issues of law are freely reviewed. *Id.*

Pursuant to IRCP 12(f), the court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Whether a claim should be dismissed under IRCP 12(b)(6) is a question of law. The court must look only to the pleadings to determine whether a claim for relief has been stated and, in doing so, draw reasonable inferences in favor of the plaintiff. *Hammer v. Ribi*, 162 Idaho 570, 573, 401 P.3d 148, 151 (2017).

III. THE RECORD

In early 2021, Respondent formed an Education Task Force aimed at examining "indoctrination" in Idaho education. Subsequently, Respondent posted the Feedback Form on her official website, allowing members of the public to provide comments regarding Idaho's education. The Feedback Form contained five questions: 1) name (optional); 2) email address (optional); 3) "to what level of education does your comment apply;" 4) "what best describes your position?" and, 5) feedback. Decl. Olson, Exhs. 1-2.

A. Dutton Request

On April 21, 2021, Audrey Dutton, a member of the Idaho Press Club and a reporter with the Idaho Capital Sun, made a public records request of Respondent, requesting:

> a copy of the Google Sheet data from [Respondent's Feedback Form], as the record exists at the time this public record request is processed. Please provide the data in its raw spreadsheet format.

Ver. Pet., Exh. A.

On April 26, 2021, Jordan Watters, Respondent's Chief of Staff, responded by email that Respondent would need additional time to respond to the request. Mr. Watters next responded May 4, 2021. He represented that the Education Task Force had received 3600 Feedback Forms and identified the percentage breakdown of responses to questions 3 and 4. With regard to questions 1 and 2 requesting names and email addresses, Mr. Watters responded that the

information would be redacted to protect personal identifying information, "which is exempt from disclosure per section 74-109(3), Idaho Code." *Id.* With regard to responses to question 5, entitled "Feedback," Mr. Watters stated:

> Responses to the question, '**Feedback**' are unique and some contain names, contact information, or other personally identifying information, which is exempt from disclosure. In order to release this information, each response will need to be analyzed and have any personally identifying information redacted.
>
> We estimate that this process will take an average of 30 seconds per response, requiring approximately 30 hours to complete. Per Idaho Code section 74-102(10), any work beyond two hours required to respond to an information request may be billed to the requesting entity. If you wish to receive the full list of responses to the 'Feedback' question, we estimate a cost of $560.00 (28 hours at $20/hour). We also estimate that it will take at least two weeks for this task to be completed.
>
> Please inform us if you wish to receive this additional information, understanding the cost and time constraints outlined above.

Id.

Mr. Watters' email did not include any statement that Ms. Dutton had 180 days to appeal the partial denial of her request or statement regarding the involvement of an attorney in the request. It did not include the raw spreadsheet data of the Feedback Forms over which Respondent did not assert an exemption.

Ms. Dutton responded that same day. She asked Mr. Watters to identify the specific exemption Respondent was relying on for the redaction of personally identifying information. After receiving no response, she emailed Mr. Watters again on May 18, 2021. Ver. Pet., Exh. B. On May 20, 2021, Mr. Watters responded via email, asserting the names, contact information, and other personally identifying information provided in responses to the Feedback Form were exempt from disclosure under Idaho Code § 74-109(3) because:

> the Education Task Force is co-chaired by Rep. Priscilla Giddings, who is a member of the Idaho Legislature. As Rep. Giddings has access to the information submitted through the feedback form, personally identifying information submitted through that form qualifies as 'a writing to a member of the Idaho legislature,' and is thus exempt from disclosure.

Id.

A week later, Mr. Watters informed Ms. Dutton by email that he was consulting with the Attorney General's Office regarding her public records request. *Id.*, Exh. D. On June 2, 2021, he

emailed Ms. Dutton again, confirmed that he could provide her with a copy of Respondent's "existing spreadsheet" which included the "raw data correspond[ing] to the percentages emailed to you on May 4, 2021." He further noted that Respondent's spreadsheet contained other information, "such as narratives and contact information that appear to be outside the scope of your request. If you believe this additional information is within the scope of your original request, please let us know and we will provide you with any information not otherwise exempt from public disclosure." Ms. Dutton responded that she wanted "the full spreadsheet." *Id.*

On June 3, 2021, Mr. Watters finally emailed to Ms. Dutton a .pdf copy of Respondent's spreadsheet data of responses to the Feedback Form, thirty working days after her initial request. Ver. Pet., Exh. C. Columns B ("Your Name (optional)"), C ("Your Email Address (optional)"), and F (Feedback) were fully redacted. *Id.*

On June 4, 2021, Ms. Dutton sent an email to Mr. Watters asking him to confirm in writing that Respondent was denying her request for the information in columns B, C, and F, to identify the statutory basis for the denial, or to produce an unredacted copy of the records. Mr. Watters responded by email the same day stating:

> Your original request was for the raw data in spreadsheet format. In my prior communication with you, I informed you that we could provide you with a copy of our existing spreadsheet that includes the raw data you requested. I also informed you that, in addition to the raw data, the spreadsheet also contains information that appears to be outside the scope of your request. Your response confirmed that you wanted the spreadsheet, so I provided you with the raw data in spreadsheet format, and redacted the information that was outside the scope of your request.
>
> Your request below is for the spreadsheet in its entirety, which includes narratives and personal contact information, in addition to the raw data. We will treat this as a new request and review it in accordance with the Idaho Public Records Act. If we determine that a longer period of time is needed to review and process this request, we will provide you with timely notification."

Ver. Pet., Exh. D.

Later that day, Respondent posted about Ms. Dutton's public records request on her Facebook page, stating:

> Several weeks ago, a reporter with a new liberal media outlet calling itself the Capital Sun asked us to give them the unredacted list of feedback provided to our education task force. Not only are they requesting the comments, but they are also demanding the names and email address of those who made the comments. We

> have been making an effort to comply with their requests in a manner that is respectful of Idahoans and their personal information, but this would violate your rights and I am doing everything I can to protect your information. Why does the media want YOUR personal information? Do they plan to release it and encourage employers and government agencies to retaliate against Idahoans who have expressed concerns about Idaho's education system? I believe that releasing this information would have a chilling effect on YOUR right to communicate your concerns to elected officials in Idaho. I remain committed to taking whatever legal actions are necessary to protect your personal information from being exposed by the media.

Ver. Pet., Exh. E.

Respondent also tweeted her Facebook post, stating: "Why does the media want YOUR personal information? Do they plan to release it and encourage employers and government agencies to retaliate against Idahoans who have expressed concerns about Idaho's education system?" *Id.,* Exh. F.

Ms. Dutton and Mr. Watters exchanged further emails on June 8, 2021. Mr. Watters informed Ms. Dutton that "[t]he spreadsheet and the responses have been reviewed by this Office. As previously stated, a cost of $560.00 has been assigned for that review. You may pick up the document, in exchange for the payment in full, at 4:00 on Tuesday, June 8." Ver. Pet., Exh. G.

In her follow-up email to Mr. Watters, Ms. Dutton asked if the responses in the spreadsheet were redacted, and if so, what had been redacted. She also asked Mr. Watters to confirm that the redaction took 30 hours. Mr. Watters response was brief. He instructed Ms. Dutton to address all further questions to the Colton Boyles Law Firm. *Id.*

On June 14, 2021, Ms. Dutton received an email from Mr. Watters that included an attached letter. The letter stated that Ms. Dutton's April 21 and June 4, 2021 public records requests were granted in part and denied in part. The letter stated that her request for the information in columns B and C (i.e., names and email addresses) were denied. The letter also stated that her request for the information in column F, the feedback, was denied in part and granted in part. The letter further explained that because column F required further review and redaction requiring approximately 30 hours, Ms. Dutton would be charged $560.00. He concluded by stating, "[a]fter receiving the fee, we will work with you to find a mutually agreed upon time to transmit the record." Ver. Pet., Exh. H.

The June 14 letter cited several parts of the Act as the basis for Respondent's partial denial of the Dutton Request: Idaho Code §§ 74-104(1), 74-105(1), 74-105(8), 74-106(6), 74-106(9), 74-106(23), 74-106(28), 74-107(11), and 74-109, and the executive privilege. It further stated that certain federal laws "also support the partial denials, including the Family Education Rights and Privacy Act of 1974, Children's Online Privacy Protection Act of 1988, Freedom of Information Act of 1966, Children's Online Privacy Protection Act of 1988, the Privacy Act of 1974, Privacy Protection Act of 1980." The letter did not include citations to or otherwise reference specific provisions of these federal statutes. *Id.*

B. Jones Request

On April 28, 2021, Blake Jones, a reporter for Idaho Education News and a member of the Idaho Press Club, made a public records request of Respondent, requesting "copies of all responses submitted via the 'Education Task Force Feedback Form' on Respondent's website." Ver. Pet., Exh. I. He also requested a waiver of fees. Mr. Watters responded on May 4, 2021 with an email identical May 4 response to Ms. Dutton, i.e., he represented that the task force had received 3600 Feedback Forms, identified the percentage breakdown of responses to questions 3 and 4, represented that the responses to questions 1 and 2, i.e., name and email address, constituted personally identifying information exempt from disclosure under I.C. § 74-109(3), and explained that the cost of redacting personal information from question 5, i.e., the "Feedback" data field, would cost $560 and take two weeks to review.

Mr. Watters' email did not include any statement that Mr. Jones had 180 days to appeal the partial denial of his request or a statement regarding the involvement of an attorney in the request, which are required by statute. It did not include the raw spreadsheet data of the Feedback Forms over which Respondent did not assert an exemption. Mr. Jones responded on May 7, indicating that he did not want to pay to have the personal information redacted from the feedback data field.

C. Norimine Request

On May 17, 2021, Hayat Norimine, a reporter for the Idaho Statesman and a member of the Idaho Press Club, made a public records request of Respondent stating:

> I am seeking any and all feedback that was provided through the online Education Task Force Feedback Form from April 21, 2021, to May 12, 2021. Please provide digital copies of the records whenever possible. If my request is denied or redacted in part, please include the specific Idaho code for any redactions and

> inform me of my rights of appeal. If some of the items are found to be exempt under Idaho's public records laws, please provide me the non-exempt portions, as required under Idaho Code 74-102. I am a reporter for the Idaho Statesman, and this request is made as part of news gathering and not for commercial use; therefore, I request a waiver of all fees for this request.

Ver. Pet., Exh. J.

On May 21, 2021, Mr. Watters responded with an email similar in content to the May 4 responses to Ms. Dutton and Mr. Jones, except that he explained in detail the basis for the exemption of personal identifying information under I.C. § 74-109(3), noting:

> Idaho Code section 74-109(3) exempts from disclosure 'personally identifying information relating to a private citizen contained in a writing to or from a member of the Idaho legislature.' The Education Task Force is co-chaired by Rep. Priscilla Giddings, who is a member of the Idaho legislature. As Rep. Giddings has access to the information submitted through the feedback form, personally identifying information submitted through that form qualifies as 'a writing to ... a member of the Idaho legislature,' and is thus exempt from disclosure.

Id.[2]

With regard to the redaction of personally identifying information in the "Feedback" filed, Mr. Watters stated: "[w]e estimate that this process will take an average of 30 seconds per response, which could require up to 79 hours to complete. Per Idaho Code section 74-102(10), any work beyond two hours required to respond to an information request may be billed to the requesting entity. If you wish to receive the full list of responses to the 'Feedback' question, we estimate a cost of up to $1,540.00 (77 hours at $20/hour). We also estimate that it will take at least 2-3 weeks for our limited staff to complete this task." *Id.*

Mr. Watters' email did not include any statement that Ms. Norimine had 180 days to appeal the partial denial of her request or statement regarding the involvement of an attorney in the request, which are required by statute. It did not include the raw spreadsheet data of the Feedback Forms over which Respondent did not claim an exemption. Further, Mr. Watters' email response did not address Ms. Norimine's request for a fee waiver. In reply, Ms. Normine indicated she would "put a hold of this request for now and see how I could limit it further..." *Id.*

[2] Additionally, Respondent represented there had been approximately 9500 responses to the Feedback Form at the time of Ms. Norimine's request, and the percentage breakdown of responses to questions 3 and 4 were different than in Respondent's May 4 responses to Ms. Dutton and Mr. Jones.

D. Corbin Request

On June 15, 2021, Clark Corbin, a reporter for the Idaho Capital Sun and member of the Idaho Press Club, contacted Respondent via email requesting: "an electronic or digital copy of the agreement the lieutenant governor, or lieutenant governor's office has with Colton Boyles or Boyles Law. I'd also like to request electronic copies of any bills or invoices from Colton Boyles or Boyles Law since April 20, 2021. Thanks, please let me know if you have any questions or if I can clarify anything in my request to make it easier to fulfill." Ver. Pet., Exh. K.

The following day, Mr. Watters responded, indicating Respondent was denying his request for a copy of the agreement Respondent has with Colton Boyles or Boyles Law, citing the attorney-client privilege, Idaho Code §§ 74-104, 74-106(28), 74-107(1), 74-107(2), 74-107(11), 74-109, and the executive privilege." *Id.* With regard to bills and invoices, Mr. Watters represented that no responsive records were found. *Id.*

IV. ANALYSIS

The Idaho Public Records Act grants a general right to the public to examine and copy public records of the state. I.C. § 74-102(1). A "public record" is defined under the Act, in relevant part, as including "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics." I.C. § 74-101(13). Under the Act, public records are presumed "open unless provided otherwise by statute." *Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250, 1256 (2014). "This Court narrowly construes exemptions to the disclosure presumption." *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002). The agency withholding records "bears the burden of persuasion and must 'show cause,' or prove, that the documents fit within one of the narrowly-construed exemptions." *Id.*

With regard to the institution of proceedings, the Idaho Public Records Act ("Act") provides:

> (1) The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter[.]

I.C. § 74-115(1).

Petitioner instituted the instant proceeding under I.C. § 74-115(1) and seeks the disclosure of unredacted Feedback Forms and any engagement agreement between Respondent and Colton Boyles or Boyles Law. Respondent did not file a response to the Petition setting forth how the exemptions it raised in response to the four public records requests applied to justify withholding the records at issue. Rather, Respondent filed motions to dismiss and strike, both attacking Petitioner's standing to proceed on behalf of the four individuals who requested the materials.[3] Because Petitioner's standing dictates whether the Petition can proceed, standing will be addressed first.[4]

A. Petitioner Has Associational Standing to Pursue this Action.

Respondent contends that the Petition should either be dismissed with prejudice and/or strike the substantive portions of the Petition dismissed because Petitioner lacks standing to bring this action on behalf of the four individual reporters.[5] Petitioner responds that it has associational standing. The Court agrees.

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[3]The declaratory judgment sought by Petitioner was for a declaration that Respondent's responses to the four public records requests at issue were untimely under I.C. § 74-103(1) and/or requested an improper fee under I.C. § 74-102(10)(a), (e) and (f) and/or were frivolous and intentionally made in bad faith. Ver. Pet., ¶¶ 50, 58, 66, 81. Respondent seeks to strike these provisions of the Petition on grounds that that the Act is Petitioner's "sole remedy." I.C § 74-115(1). As conceded by Petitioner at oral argument, the declaratory relief sought is merely a "belt and suspenders" approach and does not seek any additional relief than that provided under the Act. As recently noted by the Idaho Supreme Court in *Cover*, an agency's failure to comply with the procedural requirements of the Act informs the analysis of whether an award of attorney fees or the imposition of a civil penalty under the Act is warranted. *Cover,* 167 Idaho at 732, 476 P.3d at 399. Thus, Respondent's alleged non-compliance with the procedural requirements in responding to the requests at issue will be considered within the context of the Act, rendering the request for declaratory judgment redundant. However, I.C. § 10-1201 of the Uniform Declaratory Judgment Act provides, in part: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." Thus, while redundant, the provisions of the Petition seeking declaratory relief will not be stricken under IRCP 12(f). However, because all of the issues raised by the declaratory judgment are addressed in the context of the public records claim, and given Petitioner's concession that the declaratory relief claim need not be pursued to obtain the relief sought, it is dismissed without prejudice as moot.

[4] Respondent also objected to the admissibility of the emails between her Chief of Staff and the individual requesters on grounds that they were unauthenticated and constituted hearsay. These emails and their attachments are attached as Exhibits A-D and G-K of the Verified Petition. As to authentication, the petition was verified by Petitioner and the contents verified as true. Respondent never denied that the emails were sent and/or received and, in her Answer, admitted that the language of these exhibits "speaks for itself." The Court finds the exhibits were adequately authenticated under IRE 901. As to the hearsay, the exhibits were not offered for the truth of the matter asserted, but to demonstrate that requests in writing were made and responses received. Consequently, they are not hearsay as defined by IRE 801(c). Further, emails from Respondent's chief of staff are not hearsay because they are statements by an authorized agent of a party-opponent offered against Respondent. IRE 801(d)(2)(C), (D).

[5] Specifically, in the motion to strike, Respondent argues that since Petitioner did not request records in its own name, any allegations speaking to Petitioner's request for records should be stricken. This argument is premised on

The issue of standing is a question of law. *Valencia v. Saint Alphonsus Med. Ctr. - Nampa, Inc.*, 167 Idaho 397, ——, 470 P.3d 1206, 1209 (2020). Standing is a concept of justiciability that "focuses directly on whether a particular interest or injury is adequate to invoke the protection of judicial decision." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (cite omitted). The traditional elements of standing have been articulated by the Idaho Supreme Court as follows:

> In order to satisfy the requirement of standing, a petitioner must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. Standing requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.

Coal. for Agric.'s Future v. Canyon Cnty., 160 Idaho 142, 146, 369 P.3d 920, 924 (2016) (internal quotes and cite omitted).

Relevant here is the rule that an association may have standing to seek judicial relief not only to protect its own interests, but those of its members. *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603-04, 130 P.3d 1138, 1141-42 (2006). In *Beach Lateral Water Users*, Idaho adopted the three-part test for determining associational standing articulated by the United States Supreme Court in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), to wit:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Id., quoting *Hunt, supra.*

As explained in *Beach Lateral Water Users*, the nature of relief sought typically dictates the question of associational standing. *Id.* When prospective relief is sought by the association, such as a declaration or injunction, "its benefits will likely be shared by the association's members without any need for individualized findings of injury that would require the direct participation of its members as named parties." *Id.*, citing *Hunt,* 432 U.S. at 343. Where damages are sought for injury to an individual member and the fact and extent of injury would require

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Respondent's contention that Petitioner does not have standing to pursue this action on behalf of its four member-reporters.

individualized proof that makes each member indispensable to the proper resolution of the case, then the third element is not met. *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 89, 675 P.2d 344, 349 (Ct. App. 1983), citing *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975). For example, in *Beach Lateral Water Users*, which involved the confirmation of a ditch easement, the Court found associational standing for injunctive relief, but not for quieting of title because it required the participation of the individual landowning members in the suit. 142 Idaho at 603-04, 130 P.3d at 1141-42

Applying the *Hunt* elements reveals that Petitioner has associational standing to pursue this action. In its Verified Petition, Petitioner described itself as:

> ...an Idaho non-profit corporation serving as a statewide association of working journalists from all facets of the media. Its mission is to promote excellence in journalism, freedom of expression, and freedom of information. For decades it has fought for open records and all aspects of freedom of the press, in the courts, in the legislature, and in the public arena. Audrey Dutton, Clark Corbin, Blake Jones, and Hayat Norimine are all Idaho journalists and members of the Idaho Press Club. The Idaho Press Club brings this action on their behalf and on behalf of its other members.

Ver Pet., ¶ 1.

As to the first element on *Hunt*, each of the members, i.e., Audrey Dutton, Clark Corbin, Blake Jones, and Hayat Norimine, has standing to sue in their own right. Under the Act, any "person" may seek to inspect a public record. I.C. § 74-102(1). If a request for disclosure is denied, a "person" may institute proceedings in the district court. I.C. § 74-115(1). A "person" is defined under the act as including "any natural person[.]" I.C. § 74-101(9). Thus, as natural persons, these individuals can request records and, if denied, would have standing to sue under the Act in their own right.

Respondent disputes that this first element is met, noting that none of the individual journalists would have standing to sue for a request made by another. Rather, each journalist would have to maintain his or her own action based on his or her specific request. This argument misapprehends the first *Hunt* element. The inquiry is not whether each individual journalist could bring this same action, including raising claims on behalf of all the other journalists, but whether each individual journalist could "sue in their own right[.]" *Hunt,* 432 U.S. at 343. In other words, could each journalist named bring suit in their own name regarding their own public records request? The answer, as explained above, is yes.

As to the second element, the Petition indicates that the interests Petitioner seeks to protect include freedom of information; specifically, open records and freedom of the press in governmental matters. The relief sought in this case is compelling public records from an elected official regarding the performance of her duties. Indeed, Respondent does not challenge this element and the Court finds it met.

As to the final element, the compelling of disclosure of public records which are the subject of a public records request under the Act is in the nature of injunctive relief. If Respondent fails to overcome the presumption of open records by establishing an exemption applies, the public records will be ordered released.

Respondent argues that the injury alleged is particular to each journalist, and will involve individual determinations as to disclosure, penalties and damages. However, Petitioner is not seeking any "damages" on behalf of its members. Rather, it seeks disclosure of the records, penalties under I.C. § 74-117 and attorney fees and costs under I.C. § 74-116. Neither the assessment of a statutory penalty for improperly refused public records requests nor attorney fees are an "injury" that requires individualized proof through the participation of each journalist.

Respondent next asserts that even if Petitioner has associational standing under *Hunt*, Petitioner does not have prudential standing. In addition to Article III standing, the federal judiciary has adhered to a set of "prudential principles" that bear on the question of standing. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1057 (9th Cir. 2004), citing *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982). Prudential standing requires that a plaintiff's grievance fall within the zone of interests protected by or regulated by the statutory provision invoked in the lawsuit. *Id.*

However, in analyzing the interplay of prudential standing with associational standing set forth in *Hunt, supra*, the United States Supreme Court concluded that the third element of *Hunt* is effectively a prudential test, while the first two elements embody the test for constitutional standing. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554-55 (1996). Thus, by satisfying the three *Hunt* elements, both constitutional standing and prudential standing will be met and, in this case, are met. *Id.*

Respondent's final argument regarding standing involves concerns about judicial economy, due process, state comity and separation of powers. This argument is in the form of a blanket statement, unaccompanied by any legal authority. However, where both constitutional

standing and prudential standing are met, it is unclear how Respondent's due process concerns can be violated by allowed Petitioner to maintain this action. Moreover, the doctrine of comity, which involves the application of one state's laws over another, has no application here, nor do issues implicating separation of powers. As to judicial economy, Respondent evidently overlooks the fact that if each journalist filed his or her own petition under the Act regarding their individual requests, the most reasonable and efficient use of judicial and party resources would be to consolidate those cases into one. This case comes to Court effectively in a consolidated form and, in this sense, preserves judicial economy.

In sum, having found Petition has associational standing to pursue this action, Respondent's motions to dismiss and to strike on standing grounds are denied.

B. Disclosure of the Public Records Sought is Warranted, in Part.

There are two categories of public records sought by Petitioner: 1) unredacted Feedback Forms, and; 2) the agreement between Respondent and/or her office and her counsel of record in this case, Colton Boyles ("hereinafter, "Engagement Agreement"). Both requests were denied, with several alleged exemptions listed in Respondent's responses to the individual requesters.

As discussed above, Respondent bears the burden of establishing that the withheld records are exempt under the narrowly construed exemptions in the Act. *Bolger*, 137 Idaho at 796, 53 P.3d at 1215. In responding to the Petition, however, Respondent failed to even attempt to establish that an exemption applied that would justify its non-disclosure of the requested records. Rather, the only mention of exemptions is in Respondent's responses to the four individual requests for records.[6] The application of those exemptions, therefore, will be analyzed.

1. <u>The Feedback Forms are not exempt.</u>

In response to the three public records requests seeking the Feedback Forms and/or the data provided in the Feedback Forms, Respondent cited to Idaho Code § 75-109(3) as a basis for the redacting all personally identifying information therefrom. Nearly two months after Ms. Dutton's initial request and weeks after Respondent had already denied her request for

[6] At oral argument, Respondent attempted to raise new arguments justifying the withholding of the Feedback Forms that were not raised in response to the original requests nor in Respondent's briefing. Respondent cannot withhold records under one exemption and assert that a wholly unrelated exemption applies at the hearing on the Petition, effectively "sandbagging" the Petitioner. While Respondent sought leave to conduct additional briefing on the new arguments, the Court denied the request on grounds that the response to the Petitioner was due as set forth in the governing scheduling order and Respondent cannot seek to extend an already time-compressed proceeding based on newly crafted "exemptions" that were not part of the original basis for withholding the records in the first place.

unredacted Feedback Forms under I.C. § 74-109(3), Respondent cited to fourteen other grounds for nondisclosure. The Court has reviewed the unredacted responses to the Feedback Form in their entirety as part of its in camera review and concludes that no exemption cited by Respondent applies justifying the redaction of personal identifying information contained therein.

a. Idaho Code § 74-109(3) does not apply.

Idaho Code § 74-109(3) exempts from disclosure "[p]ersonally identifying information relating to a private citizen contained in a writing to or from a member of the Idaho legislature." In its responses to the individual requesters, Respondent asserted that the exemption applied because Priscilla Giddings, a state legislator, was a member of the Education Task Force. Petitioner argues that the Feedback Form, which is available to the public on Respondent's website,[7] is not a writing "to or from a member of the Idaho legislature." Rather, the Feedback Form itself refers only to Respondent, not Priscilla Giddings or any other member of the Education Task Force. The Court agrees.

Construing I.C. § 74-109(3) narrowly, the exemption applies when a writing is specifically and intentionally directed to a member of the Idaho legislature. The Feedback Form was made available on Respondent's website, not on Priscilla Gidding's website. Neither the Education Task Force page on Respondent's website nor the Feedback Form mention Priscilla Giddings or any other member of the task force. Rather, the introductory language of the Feedback Form states:

> Lt. Governor Janice McGeachin's Education Task Force exists to examine indoctrination in Idaho Education and to protect our young people.
>
> Please provide your feedback regarding there and other related matters you have encountered in Idaho's education systems.

Decl. Olson, Exh. 2.

Under these circumstances, no reasonable argument can be made that a private citizen's response to the Feedback Form is a writing specifically and intentionally to Priscilla Giddings. Indeed, given the breadth of governmental communications and records members of the

[7]The web address is https://lgo.idaho.gov/education-task-force. A screen shot of this page and the on-line Feedback Form as they appeared on July 15, 2021 is attached as Exhibits 1 and 2 to Decl. Olson.

legislature may be privy to, to read the exception to mean "communications to which a member of the legislature has access" would result in the exception swallowing the rule. The exemption does not apply.[8]

b. *Respondent's other cited bases for redaction do not apply.*

With regard to the other bases for redaction cited by Respondent in its formal denial letter to Ms. Dutton, the Court finds none apply.[9]

i. I.C. § 74-104(1)

This provision exempts "[a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation" Respondent failed to cite to any federal law or regulation or state law that "specifically" exempts personal identifiers from public records of the type requested here. The general reference to federal laws is insufficient to support a claim of exemption.

ii. I.C. § 74-105(1)

This provision exempts "[i]nvestigatory records of a law enforcement agency, as defined in section 74-101(7), Idaho Code[.]" A law enforcement agency is defined as: "any state or local agency given law enforcement powers or which has authority to investigate, enforce, prosecute or punish violations of state or federal criminal statutes, ordinances or regulations." I.C. § 74-

[8] At oral argument, Respondent argued that the exemption applied because she, as President of the Idaho Senate under art. IV, § 13 of the Idaho Constitution, was acting legislatively in soliciting public responses on the Feedback Forms. While, as previously indicated, the Court did not allow Respondent's newly raised arguments, this argument is nevertheless futile. The exemption applies to "a member of the Idaho legislature" which, narrowly construed, plainly does not include the Lieutenant Governor, even if she acts in furtherance of a legislative matter. The fact that the Idaho Constitution gives Respondent the title of President of the Senate with a very limited role does not make her a member of the legislature. "There is no novelty in the appointment of a person to preside as speaker who is not a constituent member of the body over which he is to preside." *Sweeney v. Otter*, 119 Idaho 135, 141, 804 P.2d 308, 314 (1990), quoting Story, Joseph, *Story on the Constitution*, § 737 (1873). Rather, she is a member of the executive department, which is distinct from the legislative department under the separation of powers clause of the Idaho Constitution. I.C. § 67-801; Idaho Const., art. II, § 1. Moreover, the Feedback Forms were not sent to Respondent in her role as President of the Senate.

[9] At oral argument, Respondent attempted to cobble together selective portions of various statutory exemptions to suggest that the records were properly withheld when these portions were construed together. However, this approach is contrary to the requirement that Respondent "prove [] that the documents fit within one of the narrowly-construed exemptions." Bolger, 137 Idaho at 796, 53 P.3d at 1215. Either an exemption applies to the records or it does not. Partial, commingled application of multiple exemptions is not sufficient, and the assertion otherwise is frivolous, calling into question whether counsel's arguments are in violation of IRCP 11(b).

101(7). As Lieutenant Governor, Respondent does not enjoy any of these powers, nor does the Education Task Force. *See*, I.C. § 67-809 (duties of lieutenant governor).

iii. I.C. § 74-105(8)

This provision exempts "investigative reports, resulting from investigations conducted into complaints of discrimination made to the Idaho human rights commission[.]" Neither Respondent nor her Education Task Force are tasked with investigating discrimination complaints made to the Idaho human rights commission.

iv. I.C. § 74-106(6)

This provision exempts: "[r]ecords of a personal nature related directly or indirectly to the application for and provision of statutory services rendered to persons applying for public care for people who are elderly, indigent or have mental or physical disabilities, or participation in an environmental or a public health study[.]" Neither Respondent nor her Education Task Force handle such applications.

v. I.C. § 74-106(9)

This provision exempts "information obtained as part of an inquiry into a person's fitness to be granted or retain a license, certificate, permit, privilege, commission or position, private association peer review committee records authorized in Title 54, Idaho Code." Neither Respondent nor her Education Task Force issue licenses or are tasked with determining whether a person is fit to retain such a license.

vi. I.C. § 74-106(23)

This provision exempts "records and information contained in the time sensitive emergency registry created by chapter 20, title 57, Idaho Code, together with any reports, analyses and compilations created from such information and records." The time sensitive emergency registry is a data system that provides collection, analysis, interpretation and dissemination of information relating to trauma, stroke and heart attack. I.C. § 57-2002(9). The Feedback Forms are entirely unrelated to this registry.

vii. I.C. § 74-106(28)

This provision exempts the disclosure of any personal information related to any Idaho fish and game licenses, permits and tags absent written consent. The Feedback Forms have no relation to fish and game licenses, nor does Respondent or her Education Task Force have any duties in this regard.

viii. I.C. § 74-107(11)

This provision exempts "[r]ecords of any risk retention or self-insurance program prepared in anticipation of litigation or for analysis of or settlement of potential or actual money damage claims against a public entity and its employees or against the industrial special indemnity fund except as otherwise discoverable under the Idaho or federal rules of civil procedure." The Feedback Forms are not risk retention or self-insurance records prepared in connection with a money damage claim.

xi. Executive Privilege

The executive privilege, sometimes called the "deliberative process privilege," is incorporated into Exemption 5 of the Federal Freedom of Information Act ("FOIA"). 5 U.S.C. § 552(b)(5). This privilege permits agencies to withhold documents "'to prevent injury to the quality of agency decisions' by ensuring that the 'frank discussion of legal or policy matters' in writing, within the agency, is not inhibited by public disclosure." *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997), quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). Notably, it applies only to federal agencies, not state agencies. Idaho has opted to protect some portions of the Legislature's deliberative process under I.C. § 74-109(1), but those protections do not apply here. Further, the Feedback Forms are not an inter-agency writing. It is a writing from a member of the public to Respondent. Consequently, the "executive privilege" clearly does not apply.

x. Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g

This federal statute was enacted "to assure parents of students ... access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67–68 (1st Cir. 2002), quoting 120 Cong. Rec. 39,862 (1974) (joint statement of Sens. Pell and Buckley explaining major amendments to FERPA). Under its terms, educational institutions, with a few exceptions not material here, must obtain written parental consent prior to releasing students' records or information derived therefrom. *Id.* The requests for the Feedback Forms do not seek the educational records of students; thus, the statute does not apply.

xi. *Children's Online Privacy Protection Act of 1988, 15 U.S.C. § 6501, et seq.*

This federal statute makes it illegal for operators of a website or online service directed to children under 13, or any operation that has actual knowledge that it is collecting personal information from a child under 13, to collect personal information from a child in violation of 15 U.S.C. § 6502(b). 15 U.S.C. § 6502(a)(1). As described by one court, this act addresses the "'collection of personal information' from child app users." *New Mexico ex rel. Balderas v. Tiny Lab Prods.*, 457 F. Supp. 3d 1103, 1112 (D.N.M. 2020), *on reconsideration,* 2021 WL 354003 (D.N.M. Feb. 2, 2021). The Feedback Form is not offered by Respondent in connection with a child app or other online service or website directed to children under 13. Consequently, it does not apply.

xii. *Freedom of Information Act of 1966, 5 U.S.C. § 552*

Respondent did not cite to a particular provision of FOIA justifying her non-disclosure; however, as discussed above in connection with the executive privilege assertion, FOIA does not apply.

xiii. Privacy Act of 1974, 5 U.S.C. § 552a

This federal statute deals with information about individuals that is collected, maintained and used by federal agencies. It does not apply to state agencies. *See*, U.S.C. § 551(1); *St. Michael's Convalescent Hosp. v. State of Cal.*, 643 F.2d 1369, 1373 (9th Cir. 1981). Thus, this statute does not apply.

xiv. Privacy Protection Act of 1980, 42 U.S.C. § 2000aa

This statute makes it unlawful for the government to search for or seize any work product materials possessed by a journalist in connection with the investigation of a criminal offense. For obvious reasons, this statute does not apply here.

2. The Engagement Agreement is exempt, in part.

In response to Mr. Corbin's request for a copy of the Engagement Agreement between Respondent and Colton Boyles, Respondent asserted that the agreement was exempt from disclosure under the attorney-client privilege, the executive privilege, and the following statutory exemptions: I.C. §§ 74-104, 74-106(28), 74-107(1), 74-107(2), 74-107(11) and 74-109. The Engagement Letter was provided to the Court for an in camera review.

As discussed above, the executive privilege does not apply to shield the engagement letter from disclosure, nor does the fish and game exemption (I.C. § 74-106(28)) or the risk retention records exemption (I.C. § 74-107(11). The other bases raised will be addressed.

a. *Attorney-Client privilege protects the Engagement Letter, in part.*

As an initial matter, the attorney-client privilege is not specifically protected in any statutory exemption set forth in the Act despite being a long-standing privilege under Idaho law. However, I.C. § 74-107(11), which exempts records of any risk retention or self-insurance program prepared in anticipation of litigation or settlement of a claim, specifically provides that "nothing in this subsection is intended to limit the attorney-client privilege...otherwise available to any public agency[.]" Thus, while buried in its provisions, the Act at least impliedly acknowledges that the attorney-client privilege applies to an agency. Further, I.C. § 74-104(1) exempts "[a]ny public record exempt from disclosure by...state law[.]" Because the attorney-client privilege is state law, it can justify the withholding of public records.

The attorney-client privilege in Idaho is codified at I.C. § 9–203, which provides that because "[t]here are particular relations in which it is the policy of the law to encourage confidence ... [a]n attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." I.C. § 9–203(2). "Communications between attorney and client made in the course of professional employment are protected by the attorney-client privilege." *State v. Iwakiri,* 106 Idaho 618, 621, 682 P.2d 571, 574 (1984) (citing I.C. § 9–203).

Idaho Rule of Evidence 502 further specifies the contours of the attorney-client privilege in Idaho. For the attorney-client privilege to apply, the communication must be (1) confidential within the meaning of the rule, (2) made between persons described in the rule, and (3) for the purpose of facilitating the rendition of professional legal services to the client. IRE 502(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." IRE 502(a)(5).

Idaho appellate courts have not squarely addressed whether engagement letters are privileged communications under IRE 502. Federal common law generally holds that "the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed" are not protected, but "correspondence, bills,

ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." *Paul v. Winco Holdings, Inc.*, 249 F.R.D. 643, 654 (D. Idaho 2008), citing *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir.1992). Under this standard, the court in *Paul* found the engagement letters between the client and counsel to be privileged. *Id.* Other federal courts have reached the opposite conclusion. *Montgomery Cty. v. MicroVote Corp.*, 175 F.3d 296, 304 (3d Cir. 1999)(holding the attorney-client privilege does not shield fee agreement letter).

Applying IRE 502(b) and I.C. § 74-104(1), the Engagement Letter is a privileged public record and was properly withheld. While not expressly identified as confidential, it is a communication specifically addressed to Respondent (client) from Boyles (attorney), thus evincing the intent that it not be further disclosed. Moreover, the letter reveals the purpose of the engagement, which falls within the privilege. At oral argument, Petitioner clarified that all it seeks is the amount of the fee. This information alone is not protected, as Respondent concedes. Thus, the Court concludes that disclosure of the Fee Agreement, redacting everything but the fee amounts, is warranted.

b. *Other exemptions do not apply to Engagement Letter.*

No basis for exemption cited by Respondent other than the attorney-client privilege applies to the Engagement Letter.

i. I.C. § 74-107(1)

This provision exempts "trade secrets." The Engagement Letter does not qualify as a trade secret as that term is defined under the Act.

ii. I.C. § 74-107(2)

This provision exempts various business records of a private enterprise that are required by law to be inspected by a public agency. The Engagement Letter does not qualify as such a record.

iii. *I.C. § 74-109*

This provision, consisting of six different subsections, protects various records pertaining to the legislative branch, including draft legislation, communications by or to member of the legislature, legislative audit records and draft redistricting plans. While Respondent did not identify any particular subsection as applying to the Engagement Letter, it is evident none apply.

C. Attorney Fees and Costs Are Warranted in Favor of Petitioner.

As discussed, the Act allows for an award of reasonable costs and attorney fees to the prevailing party if the Court finds the refusal to provide records was frivolously pursued. I.C. § 74-116(2). Whether a party is the prevailing party is a question of discretion for the trial court. IRCP 54(d)(1)(B); *Advanced Medical Diagnostics, LLC v. Imaging Center of Idaho,* 154 Idaho 812, 814, 303 P.3d 171, 173 (2013). Thus, the trial court must: (1) correctly perceive the issue as one of discretion; (2) act within the outer boundaries of its discretion; (3) act consistently with the legal standards applicable to the specific choices available to it; and (4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

1. Petitioner is the prevailing party.

"In determining the prevailing party, the court examines the final result obtained in relation to the relief sought, whether there were multiple claims or issues, and the extent to which either party prevailed on each separate issue or claim." *Am. Semiconductor., Inc. v. Sage Silicon Sols., LLC*, 162 Idaho 119, 134, 395 P.3d 338, 353 (2017), *reh'g denied* (June 8, 2017), quoting *First State Bank of Eldorado v. Rowe*, 142 Idaho 608, 615, 130 P.3d 1146, 1153 (2006). In addition, when there are claims, counterclaims and cross-claims, "the mere fact that a party is successful in asserting or defeating a single claim does not mandate an award of fees to the prevailing party on that claim." *Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003). Instead, "the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Eighteen Mile Ranch,* 141 Idaho at 719, 117 P.3d at 133.

The Petition sought disclosure of two sets of records, the Feedback Forms and the Engagement Letter. Although the Court concluded that the Engagement Letter was exempt from discovery in part, it concluded that the Feedback Forms and portions of the Engagement Letter were improperly withheld. Because the Feedback Form was at issue in three of the four public records requests and was the primary focus of the Petition, the Court finds Petitioner is the prevailing party, despite the fact that the Court has not required the disclosure of some portions of the Engagement Letter.

2. Respondent's refusal to disclose the Feedback Forms was frivolous.

In determining whether an agency's refusal to disclosure public records was frivolous, the Idaho Supreme Court relies on the definition of the term as provided in another title of the Idaho Code, to wit: "not supported in fact or warranted under existing law and cannot be

supported by a good faith argument for an extension, modification, or reversal of existing law." *Hymas v. Meridian Police Dep't*, 159 Idaho 594, 602, 364 P.3d 295, 303 (Ct. App. 2015), quoting I.C. § 12-123(1)(b)(ii). The reasonableness of the agency's position is also relevant. *Id.*, cites omitted. Against this framework, the Idaho Supreme Court framed the inquiry as "whether respondent ignored plain and unambiguous statutory language or whether it acted reasonably in the face of statutory ambiguity." *Id.* Further, as discussed, an agency's failure to comply with the procedural requirements under the Act can lead to a finding of frivolousness. *Cover,* 167 Idaho at 732, 476 P.3d at 399.

a. The exemptions cited were plainly inapplicable.

The Court finds this standard met here. The exemptions relied upon by Respondent in partially denying the three requests for the Feedback Form were plainly inapplicable. The fact that Respondent found counsel that was willing to advance frivolous arguments and positions does not make Respondent's reliance thereon reasonable. As demonstrated above, the exemptions cited in response to Ms. Dutton's request were so irrelevant to the Feedback Form that it appeared Respondent may have blindly selected them at random. Through I.C. § 74-109(3) was perhaps the most relevant exemption of all cited, Respondent's reliance on that provision in partially denying the Dutton, Jones and Norimine requests was decidedly misplaced given the plain language requiring that the writing be "to or from a member of the Idaho legislature[.]" There is nothing ambiguous about this language, nor can there be any reasonable argument that the Feedback Form was a writing to Priscilla Giddings or any other member of the legislature. Section 74-109(3), Idaho Code, is narrowly tailored to protect constituents' letters to legislators, which does not include the Feedback Forms by any measure.

b. Respondent failed to follow timing and notice provisions of Act, but complied with fee provisions.

The Act sets forth in almost checklist form the process an agency must follow when responding to a public records request. An agency must respond to a public records request within three working days of receiving the request. I.C. § 74-103(1). If an agency determines it will need more time to locate or retrieve responsive records, it may, upon written notice to the requestor, extend the time to fulfill the request to ten days from its receipt. *Id.* If an agency responding to a request withholds or redacts responsive records, it must give written notice of the full or partial denial and the notice must indicate the statutory authority for the denial. I.C. § 74-

103(4). The notice must also indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so, and state that either "the attorney for [Respondent] has reviewed the request" or that "[Respondent] has had an opportunity to consult with an attorney regarding the request for examination or copying of a record and has chosen not to do so." *Id.*

Ms. Dutton's request for a "copy of the Google Sheet data" from the Feedback Form was made on April 21, 2021. As required by I.C. 74-103(1), Respondent's chief of staff, Jordan Watters, responded within three working days and indicated he needed more time to respond. On May 4, 2021—within ten working days of the request—Mr. Watters emailed Ms. Dutton, providing some limited percentage data from the Feedback Form, but also indicating the personally identifying information contained in the name and email address data fields were redacted that similar information contained in the feedback data field would need to be redacted at a cost of $560. He also cited I.C. § 74-109(3) as a basis for the redactions. Thus, in substance, the response was a partial denial of Ms. Dutton's request, even if it did not expressly say so.

While the partial denial itself was timely, it failed to comply with the Act. Mr. Watters did not include that Ms. Dutton had a right to an appeal or time periods for doing so, he did not add language regarding the involvement of an attorney, and he did not provide the full extent materials not claimed as exempt until June 3, 2021, when he emailed Ms. Dutton a .pdf copy of Respondent's spreadsheet data of responses with the name, email address and feedback data fields fully redacted.[10] It was not until June 14, 2021—38 working days after the initial request—that Respondent finally issued a compliant partial denial of her request.[11]

Mr. Jones requested "copies of all responses submitted via the 'Education Task Force Feedback Form' on Respondent's website." Similarly, Ms. Norimine requested "any and all feedback that was provided through the online Education Task Force Feedback Form from April 21, 2021, to May 12, 2021." While Respondent timely responded in writing to both requests, the

[10] The Feedback data field was fully redacted rather than selectively redacted because Ms. Dutton did not agree to pay the $560 to have Respondent search each Feedback data field and remove personally identifying information therein.

[11] To the extent Mr. Watters suggested in his June 4 email to Ms. Dutton that she had made two separate public records request, seemingly in a bad faith effort to appear compliant with the timing provisions of the Act, the email is inconsistent with his May 4 email, wherein he obviously recognized from the beginning that Ms. Dutton was seeking responses to *all* of the data fields in the Feedback Form. It is also inconsistent with Respondent's Facebook post, which clearly recognized Ms. Dutton sought this information in her initial request.

responses did not comply with the Act for the same reasons the response to Ms. Dutton's request failed to comply.[12] Further, unlike with Ms. Dutton's request, Respondent never provided the redacted spreadsheet of data to Mr. Jones or Ms. Norimine.

Petitioner also faults Respondent for attempting to charge for the first two hours of redaction for Ms. Dutton's request and for failing to respond to Ms. Norimine's request for a fee waiver.[13] With regard to fees allowed to be charged by an agency, the Act makes the first two hours of labor and 100 pages of paper records provided in response to a request free to the requestor. I.C. § 14-102(10)(a). The Act also allows for a waiver of all fees to the extent the requester demonstrates that the request:

> (i) Is likely to contribute significantly to the public's understanding of the operations or activities of the government;
> (ii) Is not primarily in the individual interest of the requester including, but not limited to, the requester's interest in litigation in which the requester is or may become a party; and
> (iii) Will not occur if fees are charged because the requester has insufficient financial resources to pay such fees.

I.C. § 74-102(f).

Petitioner's first argument is inaccurate. In response to Ms. Dutton's request, Respondent estimated such work would take 30 seconds per form, which amounted to 30 hours. Respondent estimated a cost of "$560.00 (28 hours at $20/hour)." This quoted amount properly reflect two hours of free work.

As for failing to respond to Ms. Norimine's request for a fee waiver, Respondent did not violate the Act. Under the Act, it is the requester's burden to demonstrate all three elements necessary for a waiver under I.C. § 74-102(f)(i)-(iii). In her request, Ms. Normine simply stated, "I am a reporter for the Idaho Statesman, and this request is made as part of news gathering and not for commercial use[.]" Pet., Exh. J. While her statement may satisfy subsections (i) and (ii), she did not state that she was financially unable to pay as required by subsection (iii). Because

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[12] Mr. Watters' responses to the Jones and Norimine Requests were substantively the same to his May 4 response to the Dutton Request.

[13] Although Mr. Jones also requested a fee waiver which was not responded to, Petitioner did not raise the matter. Also, to the extent Petitioner argued in briefing that Respondent's attempt to collect charges from all three requesters for the redaction of the same information, that argument was withdrawn at the hearing.

Ms. Norimine did not make the requisite demonstration, Respondent was not required to waive fees.

In sum, considering the remarkably baseless exemptions cited by Respondent and her unreasonable failure to follow the relatively simply timing and notice provisions set forth in the Act, the Court finds Respondent acted frivolously, thus justifying an award of costs and attorney fees, insofar as they were dedicated to Petitioner's efforts to obtain the Feedback Form.[14]

D. A Civil Penalty is Warranted.

Pursuant to the Act, a civil penalty in an amount not to exceed $1000 may be assessed if the Court finds the public official has "deliberately and in bad faith improperly refused a legitimate request for inspection or copying[.]" I.C. § 74-117. A court's decision to award a statutory penalty is discretionary. *Donoval v. City of Sun Valley*, 2014 WL 3587369, at *6 (Idaho Ct. App. July 22, 2014), citing *Preston v. Idaho State Tax Comm'n,* 131 Idaho 502, 506–07, 960 P.2d 185, 189–90 (1998). Thus, the four-part *Lunneborg* test, *supra*, applies.

Bad faith is not defined in the Act, but it is generally defined as "dishonest of belief, purpose, or motive." Black's Law Dictionary, Bad Faith (11th ed. 2019). Likewise, "deliberate" in not statutorily defined, but is defined by Merriam-Webster as "1: characterized by or resulting from careful and thorough consideration; 2: characterized as awareness of the consequences."[15]

For the same reasons the Court finds Respondent acted frivolously with respect to the Feedback Forms, it also finds Respondent's conduct was deliberate and in bad faith. Based primarily on the plainly inapplicable, baseless exemptions proffered by Respondent in refusing disclosure, it appears to the Court that Respondent would stop at nothing, no matter how misguided, to shield public records from the public. This includes Respondent's attempt to shame the media through her June 4 Facebook post and subsequent tweet calling out Ms. Dutton's public records request. Respondent surmised in those posts that Ms. Dutton's employer, the Capital Sun, was intending to "release [personal information] and encourage employers and government agencies to retaliate against Idahoans who have expressed concerns about Idaho's education system." Ver. Pet., Exh. E. The disclosure of public records is prescribed by law, and fear mongering has no place in the calculus. If public officials were

[14] Consequently, any memorandum of fees and costs filed by Petitioner must segregate out those dedicated to the Engagement Letter.

[15] https://www.merriam-webster.com/dictionary/deliberate (last accessed Aug. 12, 2021).

required to disclose public records only to those, including media, they believe will support the government's actions, we will have shed the principles of our democracy and evolved into an autocratic state where criticism of public officials is not permitted.

Because the Feedback Form comprised three of the four requests and was the primary focus of the Petition, the Court finds that a civil penalty in the amount of $750 is warranted.

V. ORDER

Based on the foregoing, the Court orders that Respondent disclose to Petitioner the Feedback Forms in their unredacted state and the Engagement Letter with the fees unredacted. Respondent's motions to dismiss and strike are DENIED. Petitioner is entitled to an award of costs and attorney fees, and a civil penalty of $750 is imposed against Respondent to be paid into the general account.

IT IS SO ORDERED.

Dated this 26th day of August, 2021.

Steven Hippler
District Judge

CERTIFICATE OF MAILING

I hereby certify that on August 26, 2021, I mailed (served) a true and correct copy of the **MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTIONS TO STRIKE AND DISMISS AND ON PETITION** to:

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FOURTH JUDICIAL DISTRICT
ADA COUNTY, IDAHO

PHIL McGRANE
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By: Kari Maxwell
Deputy Clerk

CERTIFICATE OF SERVICE