JAN M. BENNETTS
ADA COUNTY PROSECUTING ATTORNEY

JAMES K. DICKINSON
Senior Deputy Prosecuting Attorney
Civil Division
200 W. Front Street, Room 3191
Boise, ID 83702
Telephone: (208) 287-7700
Facsimile: (208) 287-7719
ISB No. 2798
Email: civilpafiles@adacounty.id.gov

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

THE IDAHO PRESS CLUB, INC.,	)	**Case No. CV01-19-16277**
	)	
Petitioner,	)	**MEMORANDUM IN OPPOSITION**
	)	**TO IDAHO PRESS CLUB'S**
vs.	)	**PETITION TO COMPEL**
	)	**DISCLOSURE OF PUBLIC**
ADA COUNTY,	)	**RECORDS AND FOR**
	)	**DECLARATORY JUDGMENT**
Respondent.	)	
_____	)	

COME NOW, the Board of Ada County Commissioners and the Ada County Sheriff, specially appearing[1] by and through their counsel, James K. Dickinson, Senior Deputy Ada County Prosecuting Attorney, and submit this Memorandum in Opposition to Idaho Press Club's Petition as follows:

[1] Because of the abbreviated time period in which this hearing was set, there is insufficient time to conduct a motion practice prior to substantively responding. Accordingly, all of the Board of Ada County Commissioners' the "Board") and Ada County Sheriff's Office's (the "ACSO") filings, including the Answer, this Memorandum, and all supporting documents are filed by special appearance pending the Court's determination of the Board's and ACSO's Motion to Dismiss. In the event the Court determines that the IPC Petition is properly brought, the Board and ACSO intend for all of its filed documents to be fully considered by the Court.

I. INTRODUCTION

The Idaho Press Club (the "IPC") filed this Verified Petition against "Ada County" after the Board of Ada County Commissioners the ("Board") located and culled through over 2,000 records and provided responsive documents—over 1,000 pages—to various media outlets. The Board redacted portions of those records pursuant to various privileges and exemptions, including, among others, citizens' privacy rights and the Board's attorney-client privilege. The IPC herein seeks disclosure of those redactions. The IPC also requests that the Ada County Sheriff's Office (the "ACSO") publicly release the transcript of an E911 emergency call for medical assistance, despite no public records request having been submitted. In its briefing and evidence, the Board and ACSO will show the Court that it followed applicable law and provided the requested information while redacting information as legally required to protect the rights and privileges of those who are mentioned in the records.

From February through July of this year, the Board received seven separate public records requests from employees of The Idaho Statesman, Idaho Public Television, Idaho Education News, Boise Dev, and the Idaho Press-Tribune seeking information regarding either Les Bois Park or the Board's responses to the media's public records requests. This action concerns only three of those requests.[2] The Board timely responded to all of the requests, except for one from The Idaho Statesman, where isolated issues in the Ada County Information Technology ("IT") Department, including a system maintenance upgrade, delayed the Board's response by approximately two weeks. From there, however, The Idaho Statesman refused to pay

[2] Idaho Code § 74-102(11) prohibits a requestor from aggregating related requests in a short time period in an attempt to avoid payment of fees.

the accompanying labor costs,[3] resulting in an additional delay of nearly four more months. After conversations with The Idaho Statesman, the Board waived costs and the documents were delivered.

In Idaho, requests for governmental records are generally analyzed pursuant to the Idaho Public Records Act (the "PRA"). The PRA provides that public records are available at reasonable times for inspection, except as otherwise expressly provided by statute.[4] Records are "public" when they pertain to the "conduct or administration of the public's business,"[5] but that is only part of the calculus. The next step is more difficult, as it entails a determination as to whether each specific "public" record is exempt from release for certain statutory reasons, which are often privacy related.[6] In essence, when reviewing public records requests, governments are being asked to make privacy "risk" decisions about releasing constituents' personal information.

A quick survey of the PRA since its 1986 inception reflects an exponential increase in concerns over releasing information, especially as personal information has become a commodity. In today's world, once personal information is made public, it is public forever, and may be quickly disseminated to those who would inflict not only financial, but personal harm. Underscoring these concerns, the Idaho Legislature has increased emphasis on record protection over the last 33 years, expanding protection to over 110 additional categories of records beyond those in the original PRA. During the same time period, federal and state criminal and civil court

[3] The Idaho Statesman argues that it should not have to pay any costs because its "newsroom budget" is too meager to afford the statutorily allowed fees. The Idaho Statesman is part of the Gannett Corporation, the largest newspaper publisher in the United States. Gannett's 2018 revenue was $2.9 billion.

[4] IDAHO CODE § 74-102(1).

[5] IDAHO CODE § 74-101(13).

[6] Release of a record pursuant to the PRA is a significant decision, and can neither be made in a vacuum nor determined based on the identity of the requestor. Releasing a record pursuant to the PRA is a governmental determination that the record is public and nonexempt and that the identical record must likely be released to any other requestor. A common misconception is that different requestors have greater rights to information – while true in certain instances, they are limited. This concept is regularly confused by requestors (especially members of the Bar), who often fail to appreciate this difference between PRA responses and discovery responses, since sensitive discovery responses can be protected by non-disclosure agreements between the litigants, but public records responses enjoy no such protection.

rules require that personal identifiers be scrubbed from court-filed documents, and that discovery responses be redacted. Victim information is now protected from criminal defendants and the public, and victims may take further steps to protect their identifying information from being shared. Idaho's courts have also developed Idaho Court Administrative Rule 32, which closely mirrors the balancing concepts in the PRA, and directs county clerks and judges to consider the tension between "governmental accountability"[7] and "protect[ing] individual privacy rights and interests" before releasing court documents.[8]

Nonetheless, thousands of records are still publicly available, and requestors receive public documents every day. In 2018, Ada County elected officials fielded over 26,000 public records requests,[9] amounting to over 100 each business day. When requested, the proper records must first be identified, then located and reviewed to make sure that information protected by federal and state law is not inadvertently released. This analysis may be straightforward or difficult, since protections are found in federal and/or state case law, federal and/or state statutory law, federal and/or state rules, PRA exemptions and/or court administrative rules, which are all designed to avert the potential for harm and/or exposure.

As will become apparent below, the information protections are much broader than they were in 1986, and every county elected official, including the Board and the ACSO, endeavor to follow current applicable law in analyzing every record request they receive, keeping in mind that such decisions are binary, and release of a record under the PRA is a determination that the

[7] ICAR 32(a)(3).
[8] *Id.*
[9] *See* McGrane Decl. ¶¶ 7-8, Pavelka Decl. ¶ 4, Ramsey Decl. ¶ 6.

record is "public" and "nonexempt," not just to that requestor, but to subsequent requestors of the same information.[10]

Governmental determinations in this subject matter area can be difficult, and reasonable minds may differ as to what should be released or withheld. Further, records that seem clearly releasable today may not be tomorrow. That is why the Board and ACSO welcome any opportunity to have a court review their decisions. To assist the Court in this instance, the Board and ACSO have filed several declarations with the Court, and have submitted a copy of the unredacted Bates stamped documents at issue,[11] along with the audio recording of the E911 telephone call,[12] for *In Camera Inspection*.

II. COUNTY GOVERNMENT AND THE PRA

The IPC's Petition identifies the respondent as the nonspecific "Ada County." In actuality, three PRA requests were made to the Board, and one email inquiry to the ACSO. This is important because each county elected official responds to different public record requests depending on records sought and the law applying to that record. It is probably obvious that the types of records maintained by each county official vary greatly, and each may require a different PRA analysis. For instance, most records maintained in a county clerk's office are public and non-exempt, and copies can be immediately shared. Likewise for the clerk's recording function. Simply spending a minute or two in the entry to a county clerk's office provides ample evidence of the number of documents being provided hourly (which does not

[10] "Thus, the district court may either order disclosure of the public record, or uphold the exemption and return the public record. The district court may not restrict the manner in which nonexempt public records are utilized." *Wade v. Taylor*, 156 Idaho 91, 102 (2014).

[11] The IPC's Petition omits approximately 265 pages of documents that the Board provided to Ms. Sewell on April 11, 2019 and approximately 22 pages that the Board provided to Ms. Davlin on April 11, 2019. Because the IPC does not appear to contest the redactions contained in those 287 pages, the Board has not provided a copy of the same for the Court's review.

[12] The Idaho Statesman requested a "transcript" of the call. Orr Decl. ¶ 10. Because no transcript exists, the ACSO shares the audio recording with the Court. *See* Orr Decl. ¶ 11.

include the large number supplied on websites). Many county treasurer records fall into the same category.

Similarly, Board records, such as public meeting minutes (as opposed to executive session minutes) and budgets, are public and nonexempt. However, communications by the Board with its staff to gather information when forming policy, as well as communicating with its attorneys, are protected from public sharing. County coroners, sheriffs, and prosecutors deal with records which, for obvious reasons, are very likely to be exempt from public disclosure.

As noted above, the various Ada County elected officials respond to thousands of record requests each year, in person or via websites. For context, requests from media representatives make up a small percentage of that total. While impossible to know the intent behind the thousands of requests (governments are precluded from inquiring), it is probable that some of the requests are made with impure motives.

Sometimes (as with a court file or a deed filed in a county recorder's office) the record may be easily accessed. Other requests take more time. Emails, for instance, cannot be quickly located, or even hand searched, as the process would take months or years without computer software. In these instances the Board's IT Department utilizes search terms and date ranges and identifies email boxes to narrow the requested documents from the millions of emails stored on its servers.

The process of instructing a binary-based computer to search for groups of words is imperfect at best, so when email searches are programmed they are written broadly in an attempt to capture every email sought. This search method results in the identification of a much larger

pool of emails than is actually requested, so county employees must next hand-review every captured email to narrow the pool to only those responsive to the request.[13]

After the above narrowing process is completed, a second hand-review takes place (when there are fewer documents, the above steps are generally combined), requiring the department to undertake a review very similar to that of a court.[14] The entity must next weigh the content of each requested document, apply applicable law and attempt to predict what a trial court and/or appellate court will decide (about the release itself). Another consideration is the outcome of a privacy right lawsuit against the entity for wrongly releasing information. Depending on the decision, the record may be released or retained, in whole or part. Another option is to withhold the document pending a judicial determination since a court order releasing the record immunizes the releaser from potential tort and/or 42 U.S.C. § 1983 liability exposure.[15]

III. FACTUAL BACKGROUND

The Board and ACSO rely upon the separately filed Statement of Facts, which is hereby adopted by this reference as if fully set forth herein.

IV. ARGUMENT

As noted in the contemporaneously filed Motion to Dismiss, the IPC's Petition fails for a number of reasons, not the least of which is that it jumbles together four discrete requests—assuming the ACSO email inquiry amounts to a request—that should be litigated individually.

[13] Idaho Code § 74-112 obligates governments to separate exempt and non-exempt material.

[14] As the Idaho Supreme Court has discussed:

> The district court, in reviewing a denial of a public records request, engages in the same analysis as the custodian when determining whether or not the records requested are exempt from disclosure. *See* I.C. § 9-343(1). As such, both the district court and the public agency in custody of the requested public record have a duty to examine the documents subject to the request and "separate the exempt and nonexempt material and make the nonexempt material available for examination." I.C. § 9-341. This obligation exists even if exempt material is contained in the same public record as nonexempt material; that which is nonexempt must be made available.

Wade, 156 Idaho at 101.

[15] Both the entity and the court perform the same screening function, but with an important distinction. If the Court releases a record that results in harm (physical, financial, or a privacy violation), it is immune. If a government errs, it can incur potentially catastrophic results, which must be borne by the taxpayer.

The IPC's approach is both procedurally and statutorily improper, and compounds the Board's and ACSO's task of addressing the varied allegations. Nonetheless, because of the shortened time frame in which this hearing was set, there is almost no ability for motion practice.[16] Accordingly, the Board and ACSO will respond, setting out the applicable law, and then applying that law to each of the separate and varied requests with arguments supported by declarations and the records themselves.[17]

A. BURDEN OF PROOF

Discussing the burden of proof, the IPC asserts that it is "well established that the burden of showing that information is privileged and therefore exempt from disclosure is on the party asserting the privilege."[18] The Petition continues, forwarding that Ada County made "no showing" that the "materials are in any way related to ongoing litigation, or contain the advice of counsel."[19]

The IPC misapplies Idaho law. When a governmental entity denies or partially denies a request, the PRA requires it to indicate "the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so."[20] In this instance, all of the Board response letters[21] set out the required statutory bases for partial and total denials, and explain the right to appeal those denials, as required by the PRA. The IPC

[16] The Board and ACSO posit that the language in Idaho § 74-115 stating: "[t]he time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing," requires that the court *set* the time for *responsive pleadings* and *hearings* within 28 calendar days from the date of filing to ensure the filing does not languish. The fact the statute utilizes the plural of "hearing" contemplates more than one hearing, which again suggests that the 28 day time period is not to *hold* hearings, but to *set* them.

[17] "[D]ocuments themselves were substantial and competent evidence to satisfy the AG's burden of persuasion." *Wade*, 156 Idaho at 100.

[18] IPC Petition, p. 8, ¶ 29.

[19] As explained later and as set forth in the Board's letter to IPTV, no records were withheld based upon the "discovery" prohibition, but clearly attorney-client communications were withheld.

[20] IDAHO CODE § 74-103(4).

[21] As explained later, the ACSO did not consider Ms. Moeller's inquiry to be a PRA request, so it did not respond pursuant to the statute.

conflates the statutory requirements for the response letter with the burden at the hearing following filing of a petition, discussed below.

The Idaho Supreme Court explained the burden of proof in a PRA hearing:

> As we held in *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002), "[t]he statutory scheme for disclosure of public records, and this Court's interpretation thereof, clearly envisions that, in responding to an order to show cause, the agency bears the burden of persuasion and must 'show cause,' or prove, that the documents fit within one of the narrowly-construed exemptions." *Id*. at 796, 53 P.3d at 1215. There, we held that the "documents themselves were substantial and competent evidence to satisfy the AG's burden of persuasion" and that "disclosure of the documents would clearly 'interfere with law enforcement proceedings' or 'disclose investigative techniques and procedures.'"[22]

Pursuant to Idaho law, the Board and ACSO now bear the burden of persuasion *to the Court*, since a Petition has been filed.

B. <u>PRIVACY</u>

To discharge their various functions, governments collect wide ranges of information about citizens. Sometimes applications require that an individual provide personal information (social security number, birthdate, driver's license number, physical address, phone number, cell phone number, email address) which is captured and stored. Other constituents share personal information when explaining the reason behind their communication with the governmental entity, not giving any thought that it could be made public. Other personal information is captured discreetly (e.g. email addresses) when an email is sent to the government. Personal information may also include images captured incident to a communication or by appearing on a government security camera or on-body video.

While not so long ago it was required to list social security numbers on court filed documents, and it was common to have social security number printed on checks, today's world

[22] *Wade*, 156 Idaho at 100.

is far different. In this age of hacking, spoofing, phishing, and vishing,[23] formally innocuous information has been pushed under the "private/protected" personal information heading.

In the mid-1990's, cognizant of the dangers of a government sharing private information when releasing copies of accident reports, the ACSO redacted the names, addresses, birthdates, driver's license numbers, and the names of the insurers of individuals involved in automobile accidents (whether they were drivers, passengers, owners or witnesses). As a result of this practice, in 1995, a requestor filed an action similar to the IPC's Petition, asserting that the ACSO redactions were improper. He asked the court to force the ACSO to provide non-redacted accident reports, and additionally sought a mandatory and prohibitory injunction forcing the ACSO not to redact his future requests. The Court denied the injunction requests.[24]

The case was tried in the Fourth Judicial District. The Court determined:

> This involves the privacy rights of people mentioned in the reports, whether they were drivers, owners, passengers, or witnesses. In situations such as this, the court must weigh the interest of the individuals in maintaining their privacy against the public's need for disclosure. *Nix v. U.S.*, 572 F.2d 998 (4th Cir. 1978).
>
> Private citizens do not voluntarily involve themselves in accidents. Their privacy should be protected. The public concern relates to the right of the public to learn about incidents in general and to learn whether law enforcement officers acted appropriately. The public's right to obtain personal information from law enforcement investigatory records about unfortunate people involved in traffic accidents is of lesser consequence than the competing rights to privacy. The court concludes that the defendants acted properly in most instances by deleting identifying information.[25]

In 2003, the Idaho Supreme Court explained the right to privacy in Idaho:

> Because the right of privacy is measured by the reasonable person standard, "[t]he right of privacy is relative to the customs of the time and place, and is determined by the norm of the ordinary person." 62A Am Jur 2d, Privacy § 40 (1990). Thus, "in order to constitute an invasion of privacy, an act must be of such a nature as a

[23] *See* Buie Decl. ¶¶ 6-8.
[24] *Thomas B. Howe v. City of Boise*, Case No. 98224, Fourth District Court, State of Idaho, Judge George D. Carey, p.13 (1995).
[25] *Id*. at 10-11.

> reasonable person can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligences, situated in like circumstances as the plaintiff." Id. Further, it is not necessary to prove the presence of malice, 62A Am Jur 2d, Privacy § 47 (1990), and consent is a complete defense. 62A Am Jur 2d, Privacy § 59 (1990).[26]

In 2007, the Idaho Supreme Court heard a case involving the inadvertent release of personal information. The Court outlined privacy expectations vis-à-vis three corrections officers' home addresses, telephone numbers, marital status, birthdates, and social security numbers being disclosed through the criminal discovery process. The Court explained:

> We must first determine whether the corrections officers had a constitutional right to privacy. The constitutional right to a zone of privacy has been established in certain areas. *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510, 514 (1965). However, the exact contours of this right are uncertain even in the cases which may implicate a constitutional right against the *indiscriminate public* disclosure of social security numbers. *See In re Crawford,* 194 F.3d 954, 958 (9th Cir.1999). There is no clear constitutional consensus on whether the indiscriminate public disclosure of social security numbers when accompanied by names and addresses infringes the right to informational privacy. However, in this case we do not need to reach whether there is this constitutional right since there was no indiscriminate public disclosure. … Nonetheless, we recognize the serious potential for great harm when certain personal information is indiscriminately released to the public.[27]

The Court determined that there was no actionable constitutional civil rights privacy violation *only* because the disclosure was not *public* because the sharing was limited to a defense attorney and inmates. Had the personal information been released *publicly*, as the IPC requests in this instance, the outcome would have been different.

The Court next analyzed the potential tort action:

> Idaho recognizes the tort of invasion of privacy with four different categories, including public disclosure of private facts. *Jensen v. State*, 139 Idaho 57, 62, 72 P.3d 897, 902 (2003). In order to make out a claim for public disclosure of private facts "there must be a public disclosure [and] the facts disclosed must be entitled to be private." *Hoskins v. Howard*, 132 Idaho 311, 317, 971 P.2d 1135, 1141 (1998). Additionally, "the matter made public must be one which would be

[26] *Jensen v. State*, 139 Idaho 57, 63 (2003).
[27] *Nation v. State, Dep't of Corr.*, 144 Idaho 177, 187 (2007).

> offensive and objectionable to a reasonable man of ordinary sensibilities." *Baker v. Burlington N., Inc.*, 99 Idaho 688, 691, 587 P.2d 829, 832 (1978) (quoting *Peterson v. Idaho First Nat. Bank*, 83 Idaho 578, 583, 367 P.2d 284, 287 (1961)). There is no dispute that the unredacted worker's compensation forms contained private information and a reasonable person would not want those facts made public. It is left for this Court to decide, then, whether there was a public disclosure of these private facts.[28]

The Court ultimately determined that the release *was* a privacy violation. And had the disclosure been to the *public*, the Department of Corrections would have been liable to the Plaintiffs. In dicta, the Court advised Idaho's governmental entities:

> However, we also note that disclosing this type of identifying information is not the best practice. Rather, investigatory agencies should redact this type of information, and if it becomes evidence in a prosecution the attorneys should request in camera reviews of the evidence for authentication purposes.[29]

Finally, although in dissent from the Court's conclusion in part of the Opinion, Chief Justice Schroeder strongly admonished Idaho governments never to release private information, writing:

> I respectfully dissent from the Court's conclusion in part III, 3 that the Idaho Department of Correction is immune from liability because there was no indiscriminate public disclosure of its employees' private information. According to Webster's II New Riverside University Dictionary "indiscriminate" includes "not properly restrained." The degree of restraint necessary should be governed by the type of information disclosed, the steps taken to assure that the information does not pass into improper hands and the potential consequences to the employees if it does.
>
> The information in this case included the officers' home addresses, telephone numbers, marital status, birthdates and social security numbers. This is very personal and mostly irrelevant to the criminal investigation.
>
> …
>
> There is no showing the Department took any steps to assure that the information did not pass into improper hands. Reliance on somebody else doing the job of maintaining privacy does not excuse its default.
>
> …
>
> Against this background is total disregard by the Department of its employees' physical and financial safety.… Perhaps it is time for the legal splash of cold clear

[28] *Id*. at 188.
[29] *Id*. at 189.

> water in the Department's face to wake it up to the indecency of its conduct in the past, and as it assures us, its irresponsible conduct in the future.[30]

The above decision is twelve years old. Today, social security numbers, addresses, birthdates, cell phone numbers and email addresses have become a commodity. Scammers, phishers, vishers, and hackers are constantly trying to acquire personal information, including cell numbers and email addresses to contact potential victims, or impersonate them in an attempt to scam, phish, vish or hack others.[31]

Governments shoulder another responsibility when determining whether information may be released. Merely providing information is a determination that the record is public and nonexempt (*see* footnote 7, *supra*). If the media publishes a record or information it obtained from a government, it gains a legal defense against any privacy and/or libel allegations.

In *Uranga v. Federated Publications, d.b.a. The Idaho Statesman,*[32] The Idaho Statesman was sued for publishing private information. The Idaho Supreme Court noted that in these instances there is a "collision between claims of privacy and those of the free press, [and] the interests on both sides are plainly rooted in the traditional and significant concerns of our society."[33] The Idaho Statesman argued that the published information was obtained from court files. The Supreme Court noted that "there is nothing before us indicating who placed the Dir Statement in the court file or why it was placed there,"[34] commenting that, "Uranga has not pointed to any statute or case law that would exempt the Dir Statement from disclosure. Thus, in 1995 the Dir Statement was a court record open to the public."[35] The Court then quoted *Cox*: "At

[30] *Id.* at 194, 195.
[31] *See* Buie Decl. at ¶¶ 6-8.
[32] 138 Idaho 550 (2002).
[33] *Id.* at 34 (quoting from *Cox Broadcasting v. Cohn*, 420 U.S. 469, 489 (1975)).
[34] *Id.* at 33.
[35] *Id.*

the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."[36]

Uranga encourages reporters to seek information from government sources if there are privacy concerns. That way, if privacy litigation arises, the reporter's first line of defense is that any error in releasing the information is the government's fault, not the reporter's.

Uranga also intimates that had Uranga alleged that the county clerk improperly allowed The Idaho Statesman to access the private information, the clerk's conduct may have been actionable. When read in conjunction with the Supreme Court's excoriation of the Department of Corrections' information release in *Nation*, Idaho governments must proceed cautiously when making records publicly available.

The Board's and ACSO's practices are informed by the Supreme Court's admonition to treat personal information, or any information that could involve potential for personal or financial harm if released, or information that "might and probably would cause mutual distress and injury,"[37] with great care.[38] As the Court instructed in *Nation*,[39] should there be any question, entities should protect privacy information until a court orders otherwise.

The PRA incorporates and adopts current privacy law into its application via the language found in Idaho Code § 74-104(1), which exempts "any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation." Governments must be vigilant protecting constituent privacy rights. When citizens utilize their computer to send a message, or to call an elected official, their email addresses and phone number are captured. That does not imply that the sender has given his or

[36] *Id.* at 34.
[37] *Jensen*, 139 Idaho at 62.
[38] *See, also* IDAHO CODE §§74-106(4),(8),(15),(20),(28),(33),(34)
[39] *See Nation*, s*upra* note 27.

her express or implied permission for their private personal email address or phone number to be made publicly available. This is true especially in today's world, where public disclosure may equate to that personal email account or phone being accessed. If a resident wishes to share this information, he or she may choose to do so. But because the Board's computers and phones automatically collect this data is not permission to publicly share it.

The Board has made a different determination for work and business telephone numbers/email addresses, as business accounts are often shared more freely by owners, and businesses are more likely to employ internet defenses than personal computers.[40]

C. THE PRA RECOGNIZES THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

Because the PRA integrates "any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation,"[41] and federal and Idaho law shield attorney-client privileged communications and work-product privileged documents from release, the Board redacts all attorney-client and work product privileged information from any publicly released documents. Both privileges are referred to and recognized in federal rules and case law.[42] Idaho recognizes the attorney-client privilege statutorily,[43] by rule of evidence,[44] and in its Rules of Professional Conduct.[45] Attorney work product is also recognized in Idaho case law, as well as the Idaho Rules of Civil Procedure.[46]

In *Kirk v. Ford Motor Company*, the Supreme Court cited I.R.E. 502, noting:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications made for the purpose of facilitating the rendition of professional legal services to the client* which were made (1) between

[40] *See e.g.* IDAHO CODE § 74-106(8).
[41] *See* IDAHO CODE § 74-104(1). The privileges are also acknowledged in Idaho Code § 74-107(11).
[42] *See* Federal Rules of Evidence 501, 502 and *Hickman v. Taylor*, 329 U.S. 495 (1947).
[43] IDAHO CODE § 9-203(2).
[44] Idaho Rule of Evidence 502.
[45] Idaho Rule of Professional Conduct 1.6.
[46] Idaho Rule of Civil Procedure 26(b)(3).

the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) *among clients, their representatives, their lawyers, or their lawyer's representatives, in any combination,* concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

I.R.E. 502(b)(2004)(emphasis added); *Star Phoenix Mining Co. v. Hecla Mining Co.*, 130 Idaho 223, 232, 939 P.2d 542, 551 (1997). A communication is confidential where it is not intended to be disclosed to third parties, other than those third parties who are furthering the rendition of professional legal services to the client or who are necessary to transmit the confidential communication. I.R.E. 502(a)(5)(2004).[47]

Although in a criminal case, in 2018 the Idaho Supreme Court noted:

The Legislature's codification of the attorney-client privilege provides that "[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); *State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984). The privilege is further defined under Idaho Rule of Evidence 502, which states:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made ... between the client or the client's representative and the client's lawyer or the lawyer's representative.

I.R.E. 502(b). The privilege set forth by Rule 502 applies in "all actions, cases and proceedings in the courts of the State of Idaho and all actions, cases and proceedings to which rules of evidence are applicable." I.R.E. 101(b). For the privilege to apply, "the communication must be confidential within the meaning of the rule and made between persons described in the rule for the purposes of rendering legal advice." *Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996).[48]

[47] *Kirk v. Ford Motor Co.*, 141 Idaho 697, 704 (2005) (Emphasis in original).
[48] *State v. Robins*, 164 Idaho 425, 430 (2018).

The Board and the prosecutor enjoy a client-attorney relationship by virtue of Idaho law mandating that county prosecutors provide legal advice to all county elected officials.[49] Per the Board's Declarations,[50] it claims a number of protections, including attorney-client privilege protections. The attorney-client and work product privileges are also asserted per the Declaration of Heather McCarthy, noting that certain of the documents were either redacted or withheld based upon the applicable provisions,[51] and therefore are exempt from production.

D. THE PRA PROTECTS PERSONNEL DISCUSSIONS AND INFORMATION

The PRA exempts:

> [A]ll personnel records … other than … public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, including bonuses, … status, workplace and employing agency. All other personnel information relating to a public employee or applicant including, but not limited to, information regarding sex, race, marital status, birth date, home address and telephone number, social security number, driver's license number, applications, testing and scoring materials, grievances, correspondence and performance evaluations, shall not be disclosed to the public without the employee's or applicant's written consent.[52]

Except for specific and very limited public, non-exempt information, this section carves from release any information evidencing discussions about any Ada County elected official's employee and/or protected information from an employee's file.

E. THE PRA INCORPORATES THE DELIBERATIVE PROCESS PRIVILEGE

As explained above, the PRA protects "any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation."[53] Based upon common law,[54] federal law shields information protected by the

[49] IDAHO CODE § 31-2604(3).
[50] *See* Lachiondo Decl., Visser Decl., and Kenyon Decl.
[51] *See* McCarthy Decl.
[52] IDAHO CODE § 74-106(1).
[53] IDAHO CODE § 74-104(1).
[54] That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear, S. Rep. No. 813, p. 9; H.R. Rep. No. 1497, p. 10; *EPA v. Mink*, supra, at 86, 93 S.Ct., at 835. The precise contours of

deliberative process privilege from release, so by virtue of this PRA provision, information falling within the parameters of this privilege is also protected from public disclosure.

In 2001, the U.S. Supreme Court explained the deliberative process privilege, writing:

> So far as they might matter here, those privileges include the privilege for attorney work-product and what is sometimes called the "deliberative process" privilege. Work product protects "mental processes of the attorney," *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), while deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S., at 150, 95 S.Ct. 1504 (internal quotation marks omitted). The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," *id.*, at 151, 95 S.Ct. 1504, by protecting open and frank discussion among those who make them within the Government, see *EPA v. Mink*, 410 U.S. 73, 86-87, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); see also *Weber Aircraft Corp., supra*, at 802, 104 S.Ct. 1488.[55]

Earlier this month, the Ninth Circuit Court of Appeals explained:

> The "deliberative process privilege" is well-defined by the Supreme Court and in the Ninth Circuit. The deliberative process privilege protects the decision-making processes of government agencies. To that end, the privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks omitted).[56]

While the Board is unable to find an Idaho case discussing the deliberative process privilege, the PRA exemption section above adopts federal law *or* state law as an exemption so

---

the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies,' *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (CA6 1972); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.C.1966); see also *EPA v. Mink*, 410 U.S., at 86-87, 93 S.Ct., at 835-836; *International Paper Co. v. FPC*, 438 F.2d 1349, 1358-1359 (CA2 1971); *Kaiser Aluminum & Chemical Corp. v. United States*, supra, 157 F.Supp., at 946, 141 Ct.Ct., at 49; and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, supra, 40 F.R.D., at 324.

[55] *Department of the Interior v. Klamath Water Users*, 532 U.S. 1, 8-9; 121 S. Ct. 1060, 1065-1066 (2001).

[56] *Jane Doe 1, et al. v. Kevin K. Mcaleenan, et al.* USDC ND Cal. 2019 WL 4235344, 3 (Sept. 6, 2019).

federal recognition of this privilege provides protection. Additionally, several states have adopted the privilege.

Colorado judicially adopted the deliberative process privilege as an exemption to Colorado's open records laws:

> We granted certiorari in this case to consider whether the governmental deliberative process privilege exists in Colorado. We hold that such a privilege does exist. We hold further that materials falling within the ambit of the deliberative process privilege are not subject to disclosure in the context of a request for public records under the Colorado open records laws….[57]

Four months ago, in a matter involving Las Vegas Review-Journal's public record request to the City of Henderson, the Nevada Supreme Court determined that the privilege protects government records from public record requests:

> In Nevada, the deliberative process privilege is not statute based; instead, it is a creature of common law.… Below, the district court did not make this consideration, or consider the difference between documents redacted or withheld pursuant to the statute-based attorney-client privilege and those redacted or withheld pursuant to the common-law-based deliberative process privilege. Accordingly, we conclude that the district court abused its discretion in failing to consider the balancing test for these documents, and we reverse and remand for the district court to do so.[58]

And, seven months ago, the Michigan Court of Appeals wrote:

> The privilege applies to interagency documents involving part of a "deliberative or evaluative process." (citation omitted) The deliberative-process privilege:
>
> > [A]llows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Although this privilege is most commonly encountered in Freedom of Information Act ... litigation, it originated as a common law privilege.[59]

In 2018, the Alaska Supreme Court determined:

---

[57] *Springs v. White*, 967 P.2d 1042, 1045 (Co. 1998).
[58] *Las Vegas Review Journal v. Henderson*, 2019 WL 2252868, *4 (Nev. May 24, 2019).
[59] *Bauer v. Hammon*, 2019 WL 573060, *7-8 (Mich. Ct. App. Feb. 12, 2019).

> The deliberative process privilege is one of the judicially recognized 'state law' exceptions under [the Public Records Act]. Public officials may assert this privilege and withhold documents when public disclosure would deter the open exchange of opinions and recommendations between government officials.[60]

Here, certain of the information requested from the Board is protected by the deliberative process privilege, which exists "to enhance the quality of agency decisions."

F. THE THREE SPECIFIC REQUESTS TO THE BOARD

As stated above, the IPC's Petition contains allegations regarding three specific public records requests made to the Board, and an inquiry made to the ACSO. The legal analysis provided above applies equally to the Board and the ACSO. There are further arguments, however, that relate specifically to the ACSO request that are detailed later in the ACSO section.

The IPC forwards that the Board's and ACSO's responses were inconsistent with applicable law. Below, the Board and ACSO will show how the IPC's assertions are incorrect.

1. The Idaho Statesman/Sewell PRR

Ms. Sewell is a reporter with The Idaho Statesman. She requested eight months of "correspondence or documents pertaining to the lease or purchase of the Les Bois race track."[61] As explained above, because the request encompassed emails to or from the Board, it was necessary to search the millions of emails stored on Ada County's servers.

The length of time it took the Board to process The Idaho Statesman's request is an anomaly. Here, The Idaho Statesman's request was masked in the IT Department (by another request) for two weeks. When that was discovered, the email archive system was undergoing routine maintenance, which prevented email searches for another week.[62] The search was then conducted and approximately 2,000 emails were extracted from the millions stored on Ada

[60] *Griswold v. Homer City Council*, 428 P. 3d 180, 186 (Ala. 2018).
[61] IPC Petition, p. 3, ¶ 2.
[62] O'Meara Decl.

County's servers. The Idaho Statesman was then informed that the Board was ready to process the responsive documents.[63] From there, for nearly four months, the Idaho Statesman languished in determining whether to continue pursuing the request based on the accompanying labor costs.[64] After those nearly four months, The Idaho Statesman requested a fee waiver; the Board granted the waiver and delivered the documents.

Because the system stores millions of emails,[65] hand-searching is not feasible. Importantly, The Idaho Statesman was constantly updated on the work, and apprised that there had been a glitch. After conversations labor costs were waived and the documents provided.[66]

a. Labor Costs

The IPC asserts that the *waived* fee was "theoretically" misapplied and that the Board "hides" the *statutory* fee waiver from the public.[67]

As explained below, the statute allows governments to charge for labor to prevent a cost-shift from records requestors to taxpayers, and it was properly applied in this instance (albeit waived to The Idaho Statesman's benefit). Contrary to the IPC's contention that the hourly charge for Ada County's attorney-review time is too high, it is the lowest attorney salary in the Ada County Prosecutor's Office.

Pursuant to Idaho Code § 74–102, governments may charge requestors for certain labor costs associated with producing records. Section 74–102(10)(a) provides that "except for fees" otherwise authorized, no fee is to be charged "for the first two (2) hours of labor … or for

[63] This entire process took 34 business days, which was only 24 days longer than the statutory timeframe.
[64] The Idaho Statesman argues that it should not have to pay any costs because its "newsroom budget" is too meager afford the statutorily allowed fees. The Idaho Statesman is owned by the Gannett Corporation, the largest newspaper publisher in the United States. Gannett's 2018 revenues were $2.9 billion.
[65] O'Meara Decl. ¶ 5.
[66] Subsequent to being apprised the documents were located, the next three and one-half month delay is solely attributable to The Idaho Statesman's refusal to pay labor costs. Morris Decl. ¶¶ 23-27, Ex. I-K.
[67] IPC Petition, p. 3, ¶ 5.

copying the first 100 pages of paper records."[68] Idaho Code § 74–102(10)(b) allows governments to recover "actual labor and copying costs" where the request exceeds 100 pages, the request is for records from which information must be deleted, or where labor associated with responding exceeds two hours. As explained earlier, the Board does not (and did not here) charge for labor until it has expended over 2 hours of labor responding to a request, and only charges copy fees after the first 100 paper copies are supplied.

Idaho Code § 74–102(10)(g) requires that a government explain the basis for its charges:

> Statements of fees by a public agency or independent public body corporate and politic shall be itemized to show the per page costs for copies, and hourly rates of employees and attorneys involved in responding to the request, and the actual time spent on the public records request. No lump sum costs shall be assigned to any public records request.

The Board's estimate properly informed The Idaho Statesman of the itemized costs for providing the requested records, as directed by this section.[69] Idaho Code § 74–102(12) allows a custodian to "require advance payment of fees," which the Board did.

The IPC challenges the amount the Board charges, despite the Board following Idaho Code § 74–102(10)(e):

> If a request requires redactions to be made by an attorney who is employed by the public agency or independent public body corporate and politic, the rate charged shall be no more than the per hour rate of the lowest paid attorney within the public agency or independent public body corporate and politic who is necessary and qualified to process the public records request.

First, the Board's cost calculation quoted the IT Department's hourly charge, but did not charge for IT time here, so that is not at issue. The Board did not charge for staff time, so that is not at issue. Instead, the Board only included in its quote the itemized hourly attorney cost of

[68] As noted above, the fee issue is moot since the fees were waived, but the Board's fee policy is attached to Phil McGrane's Declaration.
[69] Morris Decl. ¶ 19, Ex. G.

$42.14 an hour. As explained in the attached declaration,[70] the per hour rate the Board charges for attorney labor is a loaded per hour pay rate, meaning the actual hourly rate the County pays the attorney, including benefits, for an entry level attorney in the Prosecuting Attorney's Office, or literally, the lowest attorney salary.

Ms. Sewell requested a fee waiver pursuant to the PRA.[71] The waiver section requires that a requestor demonstrate 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.

In an email to the Board, Ms. Sewell stated that The Idaho Statesman's "newsroom budget" does not provide for paying "such high fees."[72] The fact that The Idaho Statesman does not elect to pay government labor costs, nor properly fund the "newsroom budget," seems more reflective of a business decision than proof of indigency or "insufficient financial resources."

The Idaho Statesman is owned by Gannett Co. Inc. Gannett's 2018 Annual Report includes a letter to shareholders revealing that one of Gannett's 2018 "highlights" was earning "$2.9 billion in revenue."[73] Given the resources of Gannett/Idaho Statesman, Ms. Sewell's assertions do not accurately reflect The Idaho Statesman's financial resources.

[70] Glick Decl.
[71] IDAHO CODE §74-102(10)(f).
[72] Morris Decl. ¶ 38, Ex. L.
[73] https://investors.gannett.com/annual-reports, page 2, Letter to Shareholders.

The IPC Petition also forwards that the Ada County website "does not disclose that requestors may be legally entitled to a waiver of costs."[74] However, there is no requirement, statutory or otherwise, that any governmental entity place such language on its website.

The IPC also argues that 511 pages of the Board's actual 776 page production to The Idaho Statesman[75] was "heavily redacted."[76] Putting this allegation into context, of the 776 pages provided, over 535 pages of the response contained no redactions, approximately 110 pages were partially redacted, and approximately 125 pages were totally redacted.[77] The redactions are indicia that the Board complied with the PRA, reviewing each document and publicly sharing all of the non-exempt information it legally could.

b. Unredacted Documents Submitted for In Camera Inspection

The unredacted Bates stamped documents responsive to The Idaho Statesman's request are submitted for *In Camera Inspection*. To expedite the Court's review, the Board has developed a color coding system as follows:

- Board documents with no colored highlighting were previously released to The Idaho Statesman. Documents redacted or partially redacted pursuant to the attorney-client privilege are outlined in yellow highlighter. Documents redacted or partially redacted pursuant to the work product privilege are outlined in green highlighter. The name of the Prosecutor's Office employee (attorney and/or legal assistant) contained in the above category of documents is highlighted in purple highlighter.

- Documents redacted or partially redacted pursuant to privacy law are highlighted in pink. Documents redacted or partially redacted pursuant to the deliberative privilege process are outlined in orange. Documents redacted or partially redacted pursuant to personnel exemptions are outlined in blue. Where Board employees

[74] IPC Petition p. 6, ¶ 17.
[75] The IPC claims that "[o]n August 26, 2019, Ada County finally released some documents, responsive to her February 15, 2019 request, [which] 511 page response is heavily redacted." IPC Petition p. 6, ¶ 20. This statement is misleading. The IPC's Petition fails to mention that prior to providing the 511-page response, the Board had already provided Ms. Sewell 265 pages of responsive records.
[76] *Id*, p. 6, ¶ 20.
[77] As the Court will see in the unredacted documents submitted for *in camera* review, the Board only redacted full pages when protecting the attorney-client privilege or work product doctrine. The Board did not redact full pages for any of the claimed privileges or exemptions.

are the subject of the personnel or deliberative privilege process privilege, their names are underlined in black.

2. The Idaho Public Television/Davlin PRR

On April 8, 2019, a reporter for Idaho Public Television ("IPTV"), Melissa Davlin, emailed the Board expressing her concerns over the Board's response to The Idaho Statesman. The email suggested that the Board reconsider charging costs for labor when responding to PRA requests, intimating that a "lawsuit" for "not complying" with the Idaho Code would be more expensive.[78]

The same day, IPTV submitted a separate PRA, requesting emails and text messages concerning The Idaho Statesman's request to the Board from Ms. Sewell. The Board responded the same day, indicating that it would start work on the request. Three days later, the first responsive batch was sent, consisting of 22 documents.[79] An email from the Board informed IPTV that the remainder of the potentially responsive 725 documents would require review and redaction, for which the charge would be one hour of attorney time, or $42.14.

With no response from IPTV, on April 18, 2019, the Board sent a follow-up email to see if IPTV was still interested in pursuing the request. On the 23rd, Ms. Davlin delivered a check. On the 26th IPTV received 173 additional responsive documents. Because The Idaho Statesman/Ms. Sewell had previously notified the Board that it was in contact with an attorney[80] with regard to its earlier PRA request, and given that that IPTV's emails referred to Ms. Sewell's Idaho Statesman request, the response to Ms. Davlin included language alerting IPTV to the

[78] Morris Decl. ¶41, Ex. O.
[79] Another media request was so similar that the Board had already produced the same documents. The IPC omitted the 22 pages from its Petition in this case.
[80] Ms. Sewell's April 19, 2019 email to Ms. Morris noted, "We are still reviewing our options with the Idaho Press Club and an attorney." Morris Decl. ¶ 26, Ex. K.

PRA's section prohibiting utilization of the Act for discovery purposes.[81] The letter did not indicate redactions on that basis, nor were any redactions made on that basis.

IPTV then sent an email to the Board, claiming that the Board's reason to redact "the vast majority of the public records request you [sent] to me," was due to The Idaho Statesman's consultations with an attorney. IPTV continued, "I find it hard to believe it truly cost the county $42 to come to that conclusion….Charging me $42 dollars for my own emails and dozens of blank pages is absurd.…I hope Ada County reconsiders how it handles public records in the future."[82]

The Board's work on IPTV's response did take longer than three days to process. 725 documents had to be harvested from the millions of electronic records with which they were stored. Again, there was very little work required on the first 22 pages, as they had already been provided to another requestor.[83] Next, the 725 documents had to be reviewed because computer search results are overly broad, then they had to be read and reviewed, one by one, and analyzed pursuant to applicable law.[84] Of the total documents, 195 were provided to IPTV.

By way of explanation, the "blank" pages that IPTV received are actually blacked-out redacted pages. They are provided to show the requestor that the document was responsive to the request, but after being read and reviewed it was determined that the contents were exempt from production. If the Board did not deliver "blank pages," a requestor might be misled into thinking the 173 pages they received were the total of all of the responsive pages.

Further, it is no surprise that copies of the IPTV's own emails were included and provided, since after they came into the Board computers, they were captured and now

[81] Idaho Code § 74 – 115(3) prohibits utilizing the PRA to supplant or augment discovery.
[82] Morris Decl. ¶ 47, Ex. T.
[83] Morris Decl. ¶ 42, Ex. P.
[84] Idaho Code § 74-112 requires public agencies to separate exempt and non-exempt material.

considered to be responsive "Board" records. Additionally, because Ms. Davlin's email address appeared to be a personal address, it was redacted before being publicly released.[85]

IPTV asserted that the "vast majority" of the responses were redacted because The Idaho Statesman consulted with an attorney. That is a misreading of the Board's letter, which set out the basis for redaction, explaining, "There is attorney-client conversations which have been redacted from the documents produced. Idaho decisional law, rules, statutes (e.g. Idaho Code § 74-104(1)) and the Idaho Rules of Professional Conduct protect information of this nature from public dissemination."[86]

As explained in the letter to IPTV, the discovery exemption was not utilized. The reference only alerted the IPTV to the existence of the section. Had the discovery prohibition been utilized, IPTV would have received *no* documents, since the discovery prohibition results in a total denial of a request.

3. The Idaho Education News/Swindell PRR

In July of 2019, Idaho Education News ("IEN") requested (from the Ada County Clerk) all public records requests made to "Ada County" since January 1, 2019. After an inquiry from the Clerk, the IEN clarified its request, narrowing it to only requests made to the Board, rather than every Ada County elected official.[87]

A response to IEN's request was provided within 10 days, consisting of 143 pages of responsive documents. The accompanying letter apprised the IEN that personal addresses, phone numbers, and email addresses had been redacted to protect the privacy of subject individuals.[88]

[85] If Ms. Davlin wishes to release her email address to the public, she has that option, but based upon privacy concerns, and as informed by Idaho Code § 74-106(8), personal emails and business emails are treated differently. Ms. Davlin's email address was withheld because the domain name did not appear to be IPTV related.
[86] Morris Decl. ¶ 46, Ex. S.
[87] McGrane Decl.
[88] Duncan Decl. ¶ 4, Ex. B.

As explained above, the Board protects private contact information, but releases business contact information.[89]

4. Summary – The Idaho Statesman/IPTV/IEN Requests

As asserted above, the Board's responses followed statutory instructions; the PRA and applicable law provide exemptions for personnel information, privacy, and the deliberative process privilege, as well as the attorney-client and work product privileges. At this juncture the burden is on the Board to show the Court why documents were withheld, and the Board has done that via this briefing, the accompanying facts, declarations, and the contents of the documents themselves.

There is no requirement, as IPTV asserts, to provide the IPTV with the identity of any attorney(s) who may have been involved in reviewing any of the exempt documents. Further, the parties, dates, and topics with regard to privileged communications are also exempt from public disclosure, as is the information contained therein. Additionally, there is no statutory requirement that governments produce a privilege index to a requestor in a PRA response or action. To the extent IPTV wishes to challenge the Board's assertions, its remedy is a procedurally proper petition to have a court review the Board's determinations.

G. ACSO INQUIRY

In its Petition, the IPC forwards that the ACSO failed to respond to a PRA request from The Idaho Statesman's reporter Katy Moeller. The ACSO sees this differently.[90]

[89] This determination is informed by Idaho Code § 74-106(8).

[90] The IPC Petition attaches an email exchange between ACSO Public Information Officer Patrick Orr, and Ms. Moeller, marked as Exhibit K. Because it is not reflective of the full email conversation, the ACSO provides the entirety of the exchange attached to Mr. Orr's Declaration as Exhibit A.

1. The Idaho Statesman Inquiry was not a Public Records Request

The Public Information staff at the ACSO has an interactive relationship with the media. Often, information and/or explanations are provided quickly in deference to the tight timelines under which members of the media work.[91] Patrick Orr, a former Idaho Statesman reporter who knows Ms. Moeller, interpreted her request to be an informal inquiry. He told Ms. Moeller that without knowing the status of the investigation or permission from the E911 caller involved, the ACSO could not publicly release the audio recording[92] (even though she asked about a transcript).

Either that day or the next day, after locating and listening to the E911 call, Mr. Orr telephoned Ms. Moeller intending to provide an update. He planned on telling her that she should file a PRA request if she still wished to obtain a copy of the audio recording. She did not answer, nor did she file a PRA request, leaving the ACSO to surmise that The Idaho Statesman had abandoned this inquiry.[93]

The ACSO's belief that this was a simple inquiry is not without basis. Over the last two years, The Idaho Statesman has filed (via the ACSO's online portal) 38 public records requests.[94] Ms. Moeller has filed seven of those requests.[95] A search of the ACSO database for a request in this instance shows no PRA request filed by Ms. Moeller for the E911 audio.[96]

Because this was not actually a PRA request, the Court should dismiss this claim. To the extent the Court wishes to consider the claim, the ACSO's analysis is set out below.

[91] Orr Decl.
[92] *Id.*
[93] *Id.*
[94] Ramsey Decl.
[95] *Id.*
[96] *Id.*

2. ACSO Dispatch

The ACSO receives and records E911 calls and dispatches medical, law enforcement, and/or fire personnel in response. Many of the calls come from individuals experiencing or having witnessed an upsetting experience. Importantly, the E911 system is the only option to seek emergency help.

E911 dispatchers are trained to collect information necessary to locate the caller, define the emergency, and send the necessary response personnel. Callers answer those questions, and may volunteer further medical and/or personal information during the call. It is safe to say that the furthest thing from a caller's mind when speaking to a 911 dispatcher is whether he/she is granting permission to the public to access the contents of the call.

Not only are E911 calls protected by general privacy concerns, they often contain information about the caller and/or other individuals. In these instances, the caller cannot consent for those about whom he or she has called. Additionally, if the call is about medical matters, in addition to general privacy concerns, there are state and federal[97] statutes that protect disclosure of personal health information.

3. The PRA Prevents Disclosure of the E911 Transcript or Audio

The PRA exempts the production of law enforcement records that would:

> (a) Interfere with enforcement proceedings;
> (b) Deprive a person of a right to a fair trial or an impartial adjudication;
> (c) Constitute an unwarranted invasion of personal privacy;
> (d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;
> (e) Disclose investigative techniques and procedures;
> (f) Endanger the life or physical safety of law enforcement personnel; or
> (g) Disclose the identity of a reporting party maintained by any law enforcement entity or the department of health and welfare relating to the investigation of child

[97] Privacy violations or other concerns informed by the Health Insurance Portability and Accountability Act standards and case law.

> abuse, neglect or abandonment unless the reporting party consents in writing to the disclosure or the disclosure of the reporting party's identity is required in any administrative or judicial proceeding.[98]

Per the statute, whether an investigation is active or inactive, the same privacy exemption applies, as explained in the *Howe* case:

> The requested records are law enforcement investigatory records. It is not clear whether the records involve active or inactive investigations. Whether they are active or inactive, however, is immaterial, because both are exempt from mandatory disclosure to the extent disclosure would constitute an unwarranted invasion of personal privacy.[99]

Had the request had been properly submitted as a public record request for the transcript or audio, it would have been denied based upon privacy concerns.[100] To the extent either is a public record about the public's business,[101] it is very similar to the *Howe* case, only here the E911 caller steps into the shoes of the *Howe* car crash victim:

> Private citizens do not voluntarily involve themselves in accident. Their privacy should be protected. The public concern relates to the right of the public to learn about incidents in general and to learn whether law enforcement officers acted appropriately. The public's right to obtain personal information from law enforcement investigatory records about unfortunate people involved in traffic accidents is of lesser consequence than the competing rights to privacy. The court concludes that the defendant's acted properly in most instances by deleting identifying information.[102]

People who find themselves calling E911 do not place themselves in that situation voluntarily. They suddenly find themselves or others in need of emergency assistance. As such, the Court may consider the content of the E911 dispatch tape provided under seal, as the Supreme Court has held that the "documents themselves were substantial and competent

---

[98] IDAHO CODE § 74-124(1).
[99] *Thomas B. Howe v. City of Boise, County of Ada, Vaughn Killeen, Pam Babbit, Ted Argyle, and Larry Richards*, Case No. 98224, Fourth District Court, State of Idaho, Judge George D. Carey, p. 10 (1995).
[100] IDAHO CODE § 74-124(1)(c)
[101] The contents are very focused on the subject matter which prompted the call.
[102] *Howe*, S*upra* at 10, 11.

evidence to satisfy the AG's burden of persuasion."[103] Here the ACSO heeded the Idaho Supreme Court's teaching: "In this case, the district court concluded that the entire investigatory record was nonexempt and ordered disclosure. Even a cursory examination of the records reflects that this was error."[104]

Given the nature of this call, the record (whether a law enforcement record or not) is subject to the privacy rights of the caller and/or anyone else involved, and the contents should be protected from public dissemination. The best evidence for the Court to make a determination is the actual E911 audio recording provided, for review, under seal.

H. IPC IS NOT ENTITLED TO ATTORNEY FEES AND CIVIL PENALTY

The IPC asserts that access to records was "unlawfully" and "wrongly" denied and access to documents was "obstruct[ed]." In actuality, documents were provided to every requestor, and labor costs were either not charged or waived (save for a one hour charge to IPTV). Every response was timely except for one that was delayed twenty-four days.

The IPC seeks to dictate non-statutory additions to Board's website, require non-statutory responses to PRA requests, impose privilege indexing, change the statutorily-prescribed methodology to calculate per-hour labor costs, and seeks release of exempt, privileged and protected information, then asks for "[a]ttorney fees and costs under the Idaho Public Records Act and all other applicable law, decision or custom,"[105] and "civil penalties under the Idaho Code § 74-117 against any public official found to have improperly refused a request."[106]

The Board has shown that the released documents were identified, collected, hand-reviewed, and redacted where appropriate based upon recognized and clearly established

[103] *Wade*, 156 Idaho at 100.
[104] *Id*.
[105] IPC Petition, Prayer for Relief, ¶ 6.
[106] *Id*. ¶ 7.

privacy, privilege, and other protections found in federal and state law. The Board submits that it kept every requestor fully apprised as it fulfilled the requests, met with the IPC to consider its concerns about this matter, and waived costs. Further, the ACSO forwards that the IPC appealed an "inquiry," not a public records request.

The IPC also asks for a civil penalty to be imposed in this matter, and misstates Idaho law with regard to the applicable statute. The IPC requests that the Court impose a civil penalty because an official "improperly refused a request." First, there was no refusal. Second, the exemptions and redactions were proper. Third, the penalty statute is only applicable where "the court finds that a public official has *deliberately and in bad faith* improperly refused a legitimate request."[107] As shown above, the Board and ACSO both followed applicable law and there is no basis for any finding that any action was deliberate and in bad faith.

There is no basis upon which to impose fees or a civil remedy against either the Board or the ACSO. Based upon the facts shown above, and the law explained below, both the Board and the ACSO ask the Court to consider awarding *their* attorney fees based upon the PRA.[108]

I. THE BOARD AND ACSO REQUEST FOR ATTORNEY FEES

The Idaho Supreme Court explained PRA attorney fees in *Henry v. Taylor*, writing:

> Idaho Code section 9–344(2) sets forth the standard for awarding reasonable costs and attorney fees in actions pursuant to the Public Records Act … and [i]n any such action, the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued." I.C. § 9–344(2).[109]

In *Hymas I*, the Idaho Court of Appeals expanded the above interpretation:

> An award of attorney fees and costs under I.C. § 9–344(2) requires a two-part showing that the requesting party is a prevailing party and that the request for or refusal to provide records was frivolously pursued….The prevailing party

[107] IDAHO CODE §74-117 (emphasis added).
[108] IDAHO CODE §§ 74-116(2) and 74-124(4).
[109] *Henry v. Taylor*, 152 Idaho 155, 161-162; 267 P.3d 1270, 1276-1277 (2012).

question is examined and determined from an overall view of who prevailed in the action, not a claim-by-claim analysis.

. . . .

Before the district court can make a reasoned decision as to whether there is a prevailing party under I.C. § 9–344(2), it must determine whether the agency was justified in initially withholding the requested documents. The district court has a duty to determine whether an agency was justified in asserting that disclosure of the investigative records would result in one of the harms identified in Section 9–335(1)(a)–(f) in light of the records before it. I.C. § 9–335(4); *Wade,* 156 Idaho at 99, 320 P.3d at 1258. … This determination should be based on a thorough review of the investigatory records and consideration of the likelihood that the harms identified in Section 9–335(1)(a)–(f) will be realized. *Wade*, 156 Idaho at 99–100, 320 P.3d at 1258–59. Thus, the district court engages in the same analysis and has the same duty as the public agency to examine the documents subject to a public records request and separate the exempt and nonexempt material when determining whether the agency was justified in claiming exemption for active investigatory records. *See* I.C. §§ 9–343(1) and 9–335(4); *Wade,* 156 Idaho at 101, 320 P.3d at 1260.[110]

In *Hymas II,* the Idaho Court of Appeals added:

Neither *Henry* nor its progeny intended to foreclose a party from seeking an award of costs and attorney fees based on a statute within the Public Records Act. Here, appellants could have sought an award of costs and attorney fees under two separate statutes within the Public Records Act. The first, discussed above, is I.C. § 74–116(2). The second statute, I.C. § 74–124(4), pertains specifically to investigatory records and allows a court, in its discretion, to award costs and attorney fees to the prevailing party, regardless of whether the denial was frivolous.

The *Hymas II* Court continued:

Appellants are not entitled to attorney fees solely because respondent was unjustified in withholding the documents. Before awarding costs and attorney fees, we must determine whether respondent's position was frivolously asserted. The district court found that respondent's failure to disclose the requested public records was not frivolous. We agree.

A court shall award reasonable costs and attorney fees to the prevailing party if it finds that the request or refusal to provide records was frivolously pursued. I.C. § 74–116(2). Under a separate title, the Idaho Code defines frivolous as conduct "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."

[110] *Hymas v. Meridian Police Dept*. 156 Idaho 739, 746-747; 330 P.3d 1097, 1104-1105 (2014).

> I.C. § 12–123(1)(b)(ii); *see also* Black's Law Dictionary 451 (8th ed.2004) (defining a "frivolous defense" as one that has no basis in law or fact). However, a party's position is not frivolous simply because the district court concludes that it fails as a matter of law. *Garner v. Povey*, 151 Idaho 462, 468, 259 P.3d 608, 614 (2011).
>
> . . . .
>
> Therefore, we examine whether respondent ignored plain and unambiguous statutory language or whether it acted reasonably in the face of statutory ambiguity. As set forth in the Idaho Code, there is a presumption that all public records are open for inspection. I.C. § 74–102. If a requested record is an investigatory record, the agency may refuse to disclose the record if it fits within one of the exemptions set forth in I.C. § 74–124.[4] The agency must, "upon receipt of a request for disclosure, separate the exempt and nonexempt material and make the nonexempt material available for examination." I.C. § 74–112. Further, the agency must "show cause" that exempt records fit within one of the narrowly construed exemptions. *Bolger*, 137 Idaho at 796, 53 P.3d at 1215.[111]

Per the Court, when attorney fees are requested relative to non-law enforcement records, fees will not be granted unless the party seeking the fees order shows that the withholding or the request was frivolous. Where the subject records are law enforcement related, there is no "frivolous" finding required. The *Hymas II* Court expressed concern that the entity appeared to have inconsistent release procedures. As noted above, the Board and ACSO strive for consistency no matter the identity of the requestor. The Board and ACSO evidenced bases for every exemption, protected privacy rights per applicable law, and made consistent decisions, exhibiting reliance on the Court's instructions as outlined herein.

1. The Board Requests Fees

The Board has set out how all of its actions were consistent with applicable law. Conversely, as explained above, the IPC's Petition asks the Board to ignore well-recognized federal and state law protections, privacy right protections, the attorney-client privilege, the work-product privilege, the deliberative process privilege, and obvious PRA exemptions to provide it records. The IPC also seeks to dictate unrequired additions to the Board's website

[111] *Id* at 602- 603; 303-304.

content, and challenges Ada County's utilization of the statutorily-prescribed methodology to calculate per-hour labor costs.

Based upon the above, the Board asks the Court to enter an order awarding attorney fees it had to expend defending against the IPC Petition pursuant to Idaho Code § 74-116(2).

2. The ACSO Requests Fees

The ACSO has defended against a PRA allegation where no PRA request was filed. The Public Information Division of the ACSO has an ongoing relationship with the media, and was a model of assistance to The Idaho Statesman, investigating The Statesman's inquiry and making a call in an attempt to explain the matter. When The Idaho Statesman neither followed up nor made a record request, it seemed it had abandoned its inquiry, especially in light of the fact the newspaper has utilized the ACSO public record request system regularly, and the same reporter has utilized the system seven times.

Based on the above, the ACSO asks that the Court consider awarding it attorney fees under both Idaho Code §§74-116(2) and 74-124(4).

V. CONCLUSION

The IPC filed this Petition pursuant to the PRA, forwarding that the Board and ACSO failed to comply with Idaho law by improperly withholding information. As shown above, the IPC's allegations are incorrect. The Board and the ACSO stay abreast of applicable federal and Idaho law and apply it meticulously to every request, carefully balancing all competing interests, including protecting the privacy rights of individuals inherent in many of its records.

The Board and ACSO ask the Court to determine that they prevailed in this matter, complied with applicable law, and that the single tardy response was not improper, frivolous, or unjustified, and request the Court award attorney fees to the Board and ACSO.

DATED this 25th day of September, 2019.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: /s/ James K. Dickinson
James K. Dickinson
Senior Deputy Prosecuting Attorney
Standards & Practices Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2019, I served a true and correct copy of the MEMORANDUM IN OPPOSITION TO IDAHO PRESS CLUB'S PETITION TO COMPEL DISCLOSURE OF PUBLIC RECORDS AND FOR DECLARATORY JUDGMENT to the following person(s) by the following method:

Deborah A. Ferguson — x File & Serve
Craig H. Durham
Ferguson Durham, PLLC
223 N. 6th Street, Suite 325
Boise, ID 83702
daf@fergusondurham.com
chd@fergusondurham.com

/s/ Chyvonne Tiedemann
Chyvonne Tiedemann, Legal Assistant