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ER 408 COMMUNICATION – FOR SETTLEMENT PURPOSES ONLY

BY EMAIL to klester@omwlaw.com and ksand@omwlaw.com

Kari Lester
Ogden Murphy Wallace
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Seattle, WA 98164-2008

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Re: *Valderrama v. City of Sammamish, King County Superior Court*, No. 23-2-04283-2 SEA

Dear Kari and Kari:

Kari Lester’s September 8, 2023 letter requests “concrete demand numbers” from Plaintiff. This ER 408 communication provides these numbers after explaining the basis for them.

My letters dated August 9 and September 4 discuss relevant case law and describe some of the evidence that Plaintiff will present to the Court in the event this case goes to trial. The Court of Appeals in *Cantu v. Yakima School District No. 7*, 23 Wn. App. 2d 57, 104 (2022) summarized the Supreme Court’s analysis in *Yousoufian*: “overall agency culpability is the focus of the penalty determination due to an overarching concern for deterrence.”

In this case, overall City culpability is based on the actions of its former (and one current) Councilmembers and on the City’s failure as a corporate entity to fulfill its obligations under the Public Records Act. For example:

- The use of encrypted applications by a majority of the former Council to create and destroy public records; these actions of the City’s elected officials were actions of the City;
- The City’s failure to require that its Councilmembers turn over their public records to the City when they left office;
- The City’s failure to require timely, good faith declarations that satisfied the *Nissen* requirements in response to Mr. Valderrama’s PRRs:

- The City accepted declarations that were conclusory and lacked any detail about the nature of the purported searches;
- The City relied on such declarations after being presented with evidence that they were not being submitted in good faith;
- The City abetted Ms. Malchow's apparent contempt for the PRA by forwarding to Mr. Valderrama, as purported public records, the volumes of irrelevant material it received from her, including pictures of dogs;
- The City also allowed Ms. Malchow to self-redact transcripts and documents without identifying a basis in the PRA for the redactions, and the City accepted and forwarded these redacted transcripts and documents to Mr. Valderrama even after the plaintiff's attorney notified the City of the non-compliance;
- The City closed Mr. Valderrama's PRR without having received any declaration from former Councilmember Gamblin, and then closed it again despite being presented with evidence of the failure of many of the affidavits on which the City was relying to comply with *Nissen*;
- The City affirmatively told its former Councilmembers that the City would not require them to submit affidavits that satisfy *Nissen*'s requirements and adopted this decision not to comply with the PRA as official City Policy in AS-03.

The "overall City culpability" and the need for deterrence are more compelling in this case than in any reported decision. And the need for deterrence is heightened by the City's conduct in this litigation, which is to defend the indefensible rather than take responsibility for what has happened.

According to the Census Bureau, as reported in *The Seattle Times* on October 7, 2019, the City of Sammamish has the highest median household income of any city in the country, and our understanding is that the City of Sammamish has annual general fund unrestricted tax revenue of approximately \$44M. The penalty needed to create deterrence in Sammamish is necessarily higher than the penalty needed to create deterrence elsewhere. And since the City has released transcripts of the depositions as public records, and the facts of this case are becoming widely known, the penalty must be big enough to deter other jurisdictions and other public officials from similar conduct.

If this matter proceeds to trial, Plaintiff will seek the enormous penalty that the *Yousoufian* factors warrant, and the City will be responsible for the attorney fees that Mr. Valderrama incurs presenting the evidence to the Court. Relying on the importance of deterrence in the *Zink* case, the Court of Appeals upheld a penalty that exceeded the city's entire general fund, and the need for deterrence here is greater than in *Zink*. Mr. Valderrama is willing to settle this litigation for less than a court is likely to award, but only so long as the amount is big enough to demonstrate the City's recognition of the enormity of what has happened and to create the needed deterrence. At this time, Mr. Valderrama will settle for:

- Payment of \$10 million, which Mr. Valderrama will donate to one or more non-profits or charitable institutions of his choosing; and

- Payment of Mr. Valderrama’s attorney fees incurred until the date of settlement; these fees today exceed \$170,000.

In addition, settlement will require the City to issue a public statement acknowledging what has happened, in a form that Mr. Valderrama approves. And settlement will require the City to rescind Policy AS-03 and take the following steps in order to increase the likelihood of future compliance with the PRA:

- Implement or amend City policies to require “offboarding” procedures when elected officials and City employees depart the City that are (1) designed to ensure all City public records have been turned over to the City, including those located on personal devices and accounts and those located in the departing individual’s home or any other non-City location, and (2) involve execution of a *Nissen*-compliant affidavit that describes the individual’s historical use of personal devices or accounts for City business and swears under penalty of perjury that the individual has searched for any City public records located on their personal devices and accounts and provided all such records to the City for preservation and retention.
- Implement or amend City policies to prohibit the use of encrypted applications for any City business.
- Implement or amend City policies to provide clear instructions to elected officials and employees on how to properly preserve and turn over to the City any records that they may nevertheless receive or create on an unapproved device or account.
- Implement or amend City policies to provide clear instructions with respect to retention periods applicable to various types of City public records and to prohibit an individual’s use of any “auto-delete” functions that indiscriminately delete records.
- Provide training to all City employees and elected officials regarding the implementation of the above policies, the appropriate and inappropriate use of personal devices and accounts for City business, and regarding proper records retention and preservation.
- The City’s commitment, as documented in the parties’ settlement, to enforce the foregoing policy changes and practices to the best of its ability going forward.

Sincerely,

FOSTER GARVEY PC



Patrick J. Schneider
Principal