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

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., Petitioner, vs. ADA COUNTY, Respondent.	Case No.: CV 01-19-16277 DECISION AND ORDER

The Idaho Press Club, Inc. is an association of working journalists from many different Idaho news outlets which brought this action seeking public records requested by four of its members from Ada County. Each request sought public records. None of the requests were responded to within the time periods required by the Idaho Public Records Act. Two of the requests were responded to with extensive claims of privilege and contained pages and pages of blacked out, heavily redacted material provided several months after the requests were made. The third request generated public records with information redacted. No specific statutory grounds for denial were provided in the letter advising the requesters of the denials. The final request was not responded to at all. The petitioner filed a timely petition for review of the denial of the requests as required by I.C. § 74-115. Ada County moved to dismiss the petition on the grounds of insufficiency of process, improper service and failure to state a claim upon which

relief can be granted. Ada County also provided the unredacted records for *in camera* review by the Court and filed a response. Because there was a verified petition and both sides have submitted declarations, the Court is required to treat the motion to dismiss as one for summary judgment. I.R.C.P. 12(d). The Court will address both the Motion to Dismiss and the Petition to Compel. The Court has concluded its *in camera* review of all documents. For the reasons stated in this Decision, the Motion to Dismiss is denied and the Petition to Compel is granted.

I.

The Framework of the Idaho Public Records Act

The right of the public to know, in depth, how its public servants handle the public's business is embodied in the Idaho Public Records Act. It gives the public broad access to the public records of Idaho government at every level, in every form—from state, to county, to city, to every type of commission and board. Public records are presumed to be open at all reasonable times for inspection by the public. I.C. § 74-102(1). The public's business is open to the public's view upon request with some specific detailed exceptions. The Act sets tight time lines for response. It places the burden on the governmental body to prove that a requested record is exempt from disclosure because it falls under the Idaho Public Records Act's express statutory exemptions. A "public agency" which is government at every level—state, county, city, commission, board or committee, or commission must comply with the public's right of access. I.C. § 74-101(4)(7)(8)(11)(15). The public's right is broad as to who may make a request. "Every person" has right to examine and copy any public record of the state at a reasonable time and place subject to certain exceptions. I.C. § 74-102(1). "Person" is defined broadly:

> "Person" means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity.

I.C. § 74-101(9).

When a request is made, there are tight time requirements for response by the public agency. The request to view a public record must be granted or denied within three working days from its receipt. I.C. § 74-103. If the public agency needs more time to "locate or retrieve" the record, it is required to notify the person who requested the public record in writing that it will provide the record no later than ten working days after the request. *Id.* If an "electronic record requested" has to be "converted to another electronic format by the agency or a third party" and it cannot be done within the ten working days, then the public agency must work out a "mutually agreed upon" extension. Id. If there is no mutual agreement, if the requested records are not provided within the ten additional working days, the request is deemed denied. The public agency may grant part of the request and deny the rest provided it does so in writing. *Id.* "The notice of denial or partial denial also shall 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." *Id.* When a request is denied or denied in part, the person who made the request is authorized to bring a proceeding in district court to make the record available for public inspection within 180 days. The deadline to file a petition runs from the date of mailing of the denial or partial denial. I.C. § 74-115.

The Idaho Public Records Act makes the first two hours of labor and 100 pages provided in response to a request free to the person requesting it. I.C. § 74-102(10)(a). Thereafter, the Act allows reasonable copying and labor costs, including certain attorney fee charges for redactions, provided that they are itemized. I.C. § 74-102(10)(e) and (g). The Act also allows for the waiver of all fees:

> The public agency or independent public body corporate and politic shall not charge any cost or fee for copies or labor when the requester demonstrates that the requester's examination and/or copying of public records:
>
> > (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(10)(f). The district court also has a tight time line imposed on it by the Act. I.C. § 74-116(1).

II.

Undisputed Facts

1. The Idaho Press Club is an Idaho non-profit corporation which is a statewide association of working journalists from all types of media. It is a voluntary membership trade association with the mission of promoting "excellence in journalism, freedom of expression, and freedom of information." Petition, pg. 2.

2. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller are Idaho journalists who are members of the Idaho Press Club. They each made specific requests for public records which were denied in full or in part and are the subject of this action. Each of the journalists who made a request for records under the Idaho Public Records Act in this case is a member of

the Idaho Press Club.

3. Cynthia Sewell, a reporter for the Idaho Statesman requested the following on February 15, 2019 through the Ada County Public Records Request Portal on the Ada County website asking for: "Any correspondence or documents pertaining to the lease of or purchase of Les Bois race track.[1] This request includes Expo Idaho and Ada County Board of Commissioners documents. The time period of this request is July 1, 2018 to present." Declaration of Judy Morris. Ada County's website allows a person requesting public records to designate whether the request routes to the Ada County Commissioners' Office, the Sheriff's Office or the Ada County Clerk. Ada County asks for the name of the requester, email address, and a description of the request which is to be as specific as possible. *Id.* Ada County replied in writing on February 20, 2019 that the request would take longer than three working days as specified in I.C. § 74-103 and that they would need the ten working day extension allowed for by the same statutory provision. *Id.* Ada County then notified Cynthia Sewell on March 4, 2019 that ten days would not be enough time and sent an additional email on March 19, 2019 saying that due to "unforeseen circumstances" it would take still more time to respond to the request. *Id.* It did not detail the "unforeseen circumstances." There was no "mutually agreed upon" extension.

4. No records were provided in response to the request by Cynthia Sewell for months following her request for public records.

5. On March 27, 2019, Cynthia Sewell sent an email pointing out the statutory deadlines, which had been substantially exceeded, and asking for the reasons for the delay. On April 3, 2019, an employee of Ada County sent an apologetic email to Cynthia Sewell, which read in pertinent part:

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[1] The Les Bois Racetrack and surrounding acreage is a significant tract of publicly owned property in Ada County.

"Cynthia:

We are sorry this is taking longer than normal. We still believe that we are in compliance with Idaho Law, and hope to get the records to you soon."

6. Also after the statutory deadline, a formal letter was sent from the Ada County Commissioner's Office on April 5, 2019 addressing its lack of compliance with the public records request and citing an unspecified "technological glitch" which delayed processing the public records request. The letter said that there were over 2,000 emails and that Ada County expected to need "an additional 16.5 hours" to review the "compiled records" to see what was responsive to the public records request. In the April 5, 2019 letter, the commissioner's representative said that they would charge $50.00 per hour for I.T. personnel to search and retrieve the emails, and $42.14 an hour for attorney time to review the located emails. The letter asked for $695.31(16.5 hours x $42.14) made payable to Ada County. The $42.14 per hour charge reflects attorney review time, not I.T. time. Verified Petition, Exhibit B.

7. On April 8, 2019, Melissa Davlin, on behalf of the Idaho Press Club made this public records request to Ada County:

> From: Melissa Davlin
> Sent: Monday, April 8, 2019 1:41 PM
> To: Judy Morris; BOCC
> Subject: [EXTERNAL] public records request
> Dear Ms. Morris:
> Pursuant to the state open records law Idaho Code Ann. Secs. 74-101 to 74-126 . I request access to and a copy of any and all written communications. including, but not limited to. e-mails and text messages, regarding the submission and pending fulfillment of Cynthia Sewell's Feb.15th public records request regarding Les Bois race track. This request includes any communications between you. the IT department, the commissioners' office staff, and the county commissioners.
>
> l agree to pay any reasonable copying and postage fees of not more than $30. If the cost would be greater than this amount, please notify me before processing the request. Please provide a receipt indicating the charges for each document.
> As provided by the open records law. I will expect your response within ten (10) business

days. See Idaho Code Ann. Sec. 74-1 03(1).
If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also. please provide all segregable portions of otherwise exempt material.
Thank you for your assistance.
Sincerely,
Melissa Davlin
Idaho Press Club
208-410-7239

Verified Petition, Exhibit H. Ada County responded to this public records request by stating that it had been forwarded to the Prosecuting Attorney's office. *Id.* On April 26, 2019, Ada County provided some documents and denied producing other documents broadly asserting "attorney work product and attorney-client communications." Most of the 172 pages provided were blacked out in their entirety. Ada County made a very vague reference to the heavy redactions as being due to "Idaho decisional law, rules, statutes (e.g. Idaho Code § 74-104(1)), and the Idaho State Bar's Rules of Professional Conduct...." Verified Petition, Exhibit I. Referring to the letter as a "Notice of Partial Denial," the letter advised the Idaho Press Club of the deadline of 180 days in which to file an action under the Idaho Public Records Act. *Id.*

8. A letter was sent on April 11, 2019 from Ada County to Cynthia Sewell, signed by each Ada County commissioner, which apologized for the delay in responding to the public records request and explained the general complexity of retrieving emails and referred to "some coincidental glitches including a technical issue which significantly delayed our I.T. department's ability to conduct the search and promptly respond to your request." This letter was much more informative. The letter recited the large number of emails sent by county and state employees which utilize the Ada County email system and then provided additional information about how the search was conducted and the search terms utilized. It stated that an attorney would need to review each "captured email and any attachments" to ensure that they are

public records and then to decide "whether it is exempt from disclosure, if it can be released in a redacted form, or if it can be released in its entirety." It also recited that an attorney had reviewed the request. It discounted the earlier fee request by 25% because of the delay. The letter somewhat inconsistently references an attorney review having already been conducted and one that would be conducted once the fee was paid. The letter then advised Ms. Sewell that she had "180 calendar days from the mailing of the notice" to file a petition under the Idaho Public Records Act. The letter was cc'd to Melissa Davlin, Idaho Press Club. Verified Petition, Exhibit C.

9. Cynthia Sewell responded on July 23, 2019 by email asking for waiver of the fees under I.C. § 74-102(10)(f) and, if the waiver request was denied, for more specific detail on the basis for the rates being charged and the reason for the amount of time necessary to respond to the request. Verified Petition, Exhibit D.

10. On July 26, 2019, in a letter signed by each of the three county commissioners, Ada County advised that the commissioners had agreed to a one time waiver of the fees for the Cynthia Sewell public records request as a "good faith gesture." The letter stated that an attorney would begin reviewing the emails. Verified Petition, Exhibit E.

11. Ada County's communications manager indicated that documents responsive to the Sewell public records request would be provided but contained redactions which were due to "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege Information." Documents, a substantial portion of which were heavily blacked out, were provided. Verified Petition, Exhibit F. On August 26, 2019, 511 pages of documents were provided to Cynthia Sewell in response to her request for public records made on February 15, 2019. Many of the records are blacked out. Ada County said that the records which were

blacked out and not made available were due to: "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege." *Id.* There was no citation whatsoever to any specific statutory ground for any denial as required by I.C. § 74-103(4).

12. On July 11, 2019, Jennifer Swindell, a member of the Idaho Press Club and editor of the Idaho Education News, made a public records request for all public records requests made to Ada County in 2019. The request was limited to only the actual requests and the county's responses, not the documents themselves. On July 25, 2019, Ada County produced the requests but blacked out the addresses, phone numbers and emails of all the people who had made public records requests on the basis that personal contact information was exempt from disclosure but it cited no authority for that proposition. Verified Petition, Exhibit J.

13. On August 1, 2019, Katy Moeller, a reporter for the Idaho Statesman and also a member of the Idaho Press Club, made a request by email to Patrick Orr, the Public Information Officer of the Ada County Sheriff's Office, for a recording of 911 calls reporting injuries sustained in a scooter accident in Boise on July 26, 2019. Mr. Orr replied by email that if it was still under investigation, the request would be denied. If not, the same email advised that Ms. Moeller would need to get permission from the individuals who placed the 911 calls before the calls would be released but, if she got permission, he would "pull" them. Verified Petition, Exhibit K. This was a catch-22 since the names of the callers were unavailable. Although Mr. Orr does act as a media contact and provides information to reporters, he is not actually one of the two people in the Ada County Sheriff's Office who handles formal public records requests. There is no record of a formal public records request for the 911 calls.

14. The Idaho Press Club is a voluntary membership trade association. Betsy Russell is the current President of the Idaho Press Club. Melissa Davlin is the Vice President and First

Amendment Committee Chairwoman of the Idaho Press Club. The Idaho Press Club has had to spend its funds on the costs and expenses of this case and divert them from other aspects of the Idaho Press Club's mission. Cynthia Sewell, Jennifer Swindell and Katy Moeller are also Idaho journalists and members of the Idaho Press Club.

15. A petition under the Idaho Public Records Act was filed on September 3, 2019 by the Idaho Press Club on behalf of itself and its members. The unredacted documents were provided to this Court prior to the hearing on October 2, 2019[2] which was the hearing required under I.C. § 74-116(1).

III.

Ada County's Motion to Dismiss

A. Standards.

When a motion to dismiss is supported with factual allegations outside of the pleadings, the motion is treated as one for summary judgment. I.R.C.P. 12(d); *Paslay v. A & B Irrigation District* 162 Idaho 866, 868–69, 406 P.3d 878, 880–81 (2017). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). The moving party has the burden of establishing that there is no genuine issue of material fact. I.R.C.P. 56(c)(1); *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 317, 246 P.3d 961, 970 (2010). A verified pleading is treated as an affidavit if it satisfies the requirement of I.R.C.P. 56(c)(4), that is: it is made on personal knowledge, sets forth facts admissible in evidence and is made by one who is competent to testify to those facts. *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 918, 188

[2] The hearing was initially set for September 25, 2019 as required by I.C. § 74-115 (1) but was continued to October 2, 2019 at the request of the parties.

P.3d 854, 860 (2008); *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984). Ada County has filed a number of declarations. The Idaho Press Club also filed a declaration. The verified petition from the individuals with personal knowledge about those facts and provides facts which are admissible in evidence.

Ada County contends that this action should be dismissed because of insufficiency of process or service of process and failure to state a claim upon which relief can be granted pursuant to I.R.C.P. 12(b)(4), (5) and (6). It challenges the designation of "Ada County" as the named defendant and its service. As far as its failure to state a claim argument, Ada County asserts that the Idaho Press Club lacks standing to bring this action on behalf of its members who made the requests which were denied or denied in part.

B. Insufficiency of Process/Service of Process

Ada County moves for dismissal under Rule 12(b)(4) and (5), insufficiency of process and insufficiency of service of process, because the Idaho Press Club failed to name the Ada County Board of Commissioners and the Ada County Sheriff's Office as parties, instead only naming and serving Ada County as the defendant. The argument is without merit. The Act does not require that a sub-part of a public agency be named as the respondent. If a request is denied, then the "public agency" is the respondent. I.C. § 74-115 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. The petition contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic. In cases in which the records requested are claimed as exempt pursuant to section 74-107(1) or (24), Idaho Code, the petitioner shall be required to name as a party and serve the person or entity that filed or provided such documents to the agency, and such person or entity shall have standing to oppose the request for disclosure and to support the decision of the agency to

> deny the request. The 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.

(emphasis added). A "'[p]ublic agency' means any state or local agency as defined in this section." I.C. § 74-101(11). A county is a local agency under the Idaho Public Records Act and therefore also a "public agency." I.C. § 74-101(8) and (11). Exemptions pursuant to I.C. § 74-107 (1) and (24)[3]are not applicable in this situation, therefore it is unnecessary that the person or entity that provided such documents to the agency be named as a party and served. Ada County is properly named as the respondent.

C. Standing

Melissa Davlin's request was made on behalf of the Idaho Press Club. Each of the requesters of public records in this case is a member of the Idaho Press Club which is a voluntary membership organization of Idaho journalists. Under the Idaho Public Records Act, any "person" may seek to inspect a public record. "Person" is defined broadly as "any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity. I.C. § 74-101(9). An association whose members, as well as the association itself, which made a public records request is a proper party to bring an action under the Idaho Public Records Act when there is a denial. I.C. § 74-115. Every time "person" is referred to in the Act, it is necessary to circle back to the broad statutory definition of that word. Each of the reporters who made a request for a public record which was denied could have filed a separate action. If they had filed separate actions, the preferred course of action would have been to consolidate them into one proceeding since it is the most reasonable and efficient use of

[3] 74-107(1) exempts certain trade secrets and 74-107(24) exempts certain records relating to property tax assessments.

judicial and party resources at both the trial and appellate level.

There are a cluster of doctrines designed to ensure that the disputes brought before the court system are thoroughly developed and advanced by those with a driving interest in the just resolution of a real dispute. The doctrine of standing is designed to insure that a person advancing a legal theory is so directly concerned about the issues involved in a particular case that they will develop the facts and the law as strenuously as possible. Courts are not designed to resolve academic debates or to serve as commentators or talk show hosts. Courts are designed to resolve real disputes between parties who have a direct stake in the outcome of the case. Real litigants involved in real disputes have every motive to flesh out the case factually and legally with the goal of arriving at the most just and reasonable resolution of a controversy. "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.'" *Employers Res. Mgmt. Co. v. Ronk*, 162 Idaho 774, 779, 405 P.3d 33, 38 (2017) (internal citations omitted).

Each of the reporters who made a request which was denied had standing to bring a separate action. Melissa Davlin specifically made her request on behalf of the Idaho Press Club. The Idaho Press Club also has associational standing. In its Verified Petition, the Idaho Press Club describes 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. Cynthia Sewell, Melissa Davlin, Jennifer Swindell and Katy Moeller 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.

The United States Supreme Court in *Hunt v. Washington Apple Advertising Com'n* 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) held that where a state agency also acted as a traditional trade association which promoted the Washington apple industry, it was entitled to standing in an action challenging another state's restrictions on advertising the source and grading of apples shipped to the other state. The *Hunt* Court held that an association had standing to bring a suit on behalf of its members if:

> (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., 432 U.S. at 344, 97 S. Ct. at 2442. The three part test in *Hunt* was adopted in Idaho in *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). In *Beach Lateral*, a case involving confirming a ditch easement, associational standing was found for injunctive relief but not for quieting title, as requested in the action, because it required the participation of the individual landowning members in the lawsuit.

In this case, each of members of the Idaho Press Club would have standing to sue in their own right. They are each members of the Idaho Press Club. The interests that the Idaho Press Club seeks to protect—freedom of expression and freedom of information are central to its purpose. The Idaho Press Club has a central interest in providing information to the general public about how elected officials and public employees handle public matters and perform their duties. The first and second prongs are present as Ada County concedes. The relief sought in this case is the compelling of public records. The Idaho Supreme Court in *Beach Lateral* provided the following guidance:

> The question of associational standing often turns on the nature of the relief sought. When an association seeks some form of prospective relief, such as a declaration or an 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. *Hunt,* 432 U.S. at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394. "Indeed," wrote the United States Supreme Court in *Hunt,* "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Id.* (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213, 45 L.Ed.2d at 364).

142 Idaho 600, 603–04, 130 P.3d 1138, 1141–42. Generally, if an injunction is requested, then it serves the purpose of all the members equally and the third prong is met. The compelling of disclosure of public records which were the subject of a proper public record request is in the nature of injunctive relief. The relief sought in this case is the release of public records to the public. Since there is a presumption under the Idaho Public Records Act that all records maintained by a public agency are available to the public, Ada County bears the burden to show that an exemption applies. If Ada County does not, the public records are released. Because of the kind of relief sought, which is identical to injunctive relief, associational standing is proper. That being the case, it is unnecessary to address the Idaho Press Club's argument regarding organizational standing.

The Idaho Press Club has a genuine stake in how the government responds to public records requests by its members. It has every motive to flesh out the case factually and legally. It has the personal stake in the outcome of the controversy and "the concrete adversariness which sharpens the presentation" upon which a court depends for the just resolution of disputes. The Idaho Press Club has standing to file this Petition.

D. Relief under the Idaho Public Records Act and Declaratory Judgment

The petition was brought under I.C. § 74-115 which allows the person whose request for the disclosure of public records to bring an action in district court in the county where the records are located. Nothing in the Idaho Public Records Act prohibits the joinder of similar claims. When it appears that a public record has been improperly withheld, the official who

withheld it must justify the non-disclosure. The Court can, as it has here, examine the records *in camera*, and order the disclosure of improperly withheld records. I.C. § 74-116. The process requires the court to scrutinize the reason for non-disclosure to determine if the public agency has the statutory authority for the denial. I.C. § 74-103(4). The statute creates a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute. The public agency bears the burden of proving that a document not disclosed fits within one of the "narrowly construed exemptions" *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002) citing *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). The Idaho Public Records Act requires the court to examine the requests, the basis for the denials and declare the rights of the parties. In every case involving the application of a statute, the court is declaring the rights of the parties.

The coupling of the statutorily authorized right to petition the courts when a record is claimed to be exempt with a request for declaratory relief does not warrant dismissal of the action even though it may be redundant. A declaratory judgment action is authorized:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

I.C. § 10-1201. The Declaratory Judgment Act is remedial and designed to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered. I.C. § 10-1212. The additional request for declaratory relief in addition to relief under I.C. § 74-115 and I.C. § 74-116 is not grounds for dismissal. In any event, this case already requires the Court to consider Ada County's compliance with the statute and the rights of the parties directly involved in this case.

CONCLUSION

The Idaho Press Club has standing to bring this petition since it reflects public records act requests made by its members. There is no basis to dismiss the Petition. The motion is denied.

IV.

Idaho Press Club's Petition to Compel Disclosure

A. Introduction.

Whenever a public records request is expressly denied or deemed denied when it is not responded to within the timelines set forth by the Idaho Public Records Act, those requesting the records are authorized to file a petition in the district court of the county where the records are located to compel their production. I.C. § 74-115. The district court is then directed to set a hearing at the "earliest possible time" or not later than twenty-eight days from the filing of the petition. *Id.* The petition was timely filed. The issues which were asserted in the Motion to Dismiss are resolved. The Court has reviewed the records *in camera.*

Ada County failed to comply with the Idaho Public Records Act. Idaho law makes all public records available for public inspection at all reasonable times. I.C. § 74-102. The burden is on the public agency to justify any denial by pointing to the statutory authority for the denial. I.C. § 74-103(4). Any exemptions are narrowly construed. *Bolger v. Lance*, 137 Idaho 792, 796, 53 P.3d 1211, 1215 (2002); *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). Ada County has the burden of establishing that any documents not disclosed fit within one of the "narrowly-construed exemptions." *Id.*

Ada County did not timely respond to the requests. It did not follow the mandatory statutory timelines nor did it even seek a "mutually agreed upon" extension for any request.

When it did respond, it did not specify the specific statutory authority for any of its denials. Moreover, it has not met its burden in this Court of proving that the documents requested fit within one of the statutory exemptions. Ada County has not met its responsibilities under the Idaho Public Records Act. While it can be difficult to reply within the timelines established by the Legislature because of the number of public records being sought and the process needed to locate them, Ada County should have communicated with the requesters, been transparent about the challenges and worked on the statutorily required "mutual" exension. Ada County did not adequately detail its costs for production of the public records. Most seriously, the vague denials for: "Attorney-Client Privilege, Personnel Information, Privacy, and Deliberative Process Privilege" do not satisfy Ada County's burden under the Idaho Public Records Act.

1. **Timeliness.** None of the records requested in this case were timely supplied nor is there any evidence that there was ever any formal "mutually agreed upon extension" as specified by the Idaho Public Records Act. No record was supplied within three business days nor were any records provided within ten working days after Ada County's written notice that three days was insufficient time. If there is not a mutually agreed upon extension, then the request is deemed denied and the person who made it may bring an action in district court. In this case, Cynthia Sewell, Melissa Davlin and Jennifer Swindell did receive heavily redacted documents as well as documents redacted in their entirety but substantially after the timelines required by the Idaho Public Records Act.

2. **Fees.** There is no charge for the first two hours of labor or for copying the first one hundred pages of public records. I.C. § 74-102(10).[4] Thereafter, a fee may be charged which does not exceed the actual cost to the public agency of the copy, or the cost of conversion of electronic

[4] The Ada County website for public records request did not contain accurate information on costs since it neglected to advise that the first two hours of labor and first 100 pages copied were free.

records to another electronic form. I.C. § 74-102(10)(d). Reasonable labor costs, after the first two free hours, may be charged at the rate of the lowest paid administrative staff and if redactions are required, by the per hour rate of the lowest paid attorney within the public agency or the usual and customary rate of attorneys retained for that purpose if the public agency does not have an attorney on staff. Statements of fees are required to be itemized to show per page costs for copies and the hourly rate of employees and attorneys involved in responding to the request and the actual time spent on the records request. I.C. § 74-102(10)(g). Lump sum costs cannot be assigned to any public records request. *Id.*

Cynthia Sewell's public records request was made on February 15, 2019. The first response for the request for public records about the possible sale of the Les Bois racetrack came on April 3, 2019. By letter dated April 5, 2019, Ada County did provide the information that there were a number of emails to review and that the free two hours of labor provided by statute had been exhausted. In the letter, Ada County estimated that 16.5 additional hours of work would be required with charges for an unspecified number of hours for IT professionals at $50.00 per hour and for lawyer assistance at $42.14. There was no cost breakdown beyond the hourly charges and the overall estimate for time required for the work. Ada County asked for payment of $695.31 before the documents would be handed over. The letter indicated that the attorneys had "reviewed the request and the files." Petition, Exhibit B. On April 11, 2019, Ada County sent another letter, this time reducing the fee to be charged to $521.48. Petition, Exhibit C. The April 11th letter did provide more detailed information about the work required to answer the request although, oddly, in light of the April 5, 2019 letter it refers to "beginning the review" and "finishing the review" of the requested documents and that a lawyer would look at the documents but it would be on top of the lawyer's regular duties. The clear implication of the

letter is that holding one's breath for a response could be fatal. The letter ended with the advice on the appeal period if Ms. Sewell viewed it as a denial.

A public agency is entitled to charge a fee up front for responding to a public record request that exceeds the free labor and page amounts provided by law. I.C. § 74-102(10)(e) and (12). The Idaho Public Records Act expressly requires that the costs be itemized and bars lump sum costs. I.C. § 74-102(g). The lump sum figure provided in the April 5th and 11th does not meet the statutory requirements. Cynthia Sewell did not treat the letters as denials and did not file a petition to compel the response to the request. On July 23, 2019, she asked for a waiver or a more specific breakdown of the rates, time required, and which staff would be performing charged services. On July 26, 2019, Ada County waived all fees in a "one-time waiver."

The costs related to the Sewell request were not itemized as required by Idaho law. The costs bill did not contain the itemization of who would perform the work, what their rate was and how many hours the particular employee would be required to spend to do it. The Idaho Public Records Act does not have any statutory exemption for attorney review whenever the attorney gets around to it. The Idaho Public Records Act imposes tight deadlines. If the deadlines cannot be met, then there is supposed to be a mutually agreed upon timeline, not a unilateral one. However, since the fees were eventually waived, the cost issue on the Sewell request is moot.

3. Procedure to make a Public Records Request. A public agency may designate a custodian or custodians for agency's records. I.C. § 74-102(16). The custodian includes any public official who has authorized access to public records and their delegates or representatives. *Id.* The public agency may require that requests be made in writing, including by email. I.C. § 74-102(4). The Sewell, Davlin and Swindell requests were made in accordance with the procedure set out on the Ada County website. The request for the 911 calls on the scooter accident was

made to the public information officer, Patrick Orr, but was not made under the formal procedure set out by Ada County. Unless the procedure for a public records request established by a public agency is followed, a petition to compel the disclosure of public records is premature.

4. Procedure for denial. If a public record is not provided because there is a specific statutory basis for an exemption, the Idaho Public Records Act requires the public agency to specify the statutory basis. I.C. § 74-103(4) states: ...[T]he notice of denial or partial denial also shall 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." None of the denials or partial denials in this case indicated any statutory basis for the denial or partial denial.

5. Non-statutory denials.

a. Privacy. The Idaho Public Records Act has a number of specific statutory exemptions which address privacy concerns. For example, juvenile records are largely exempt, I.C. § 74-105(2). Records of the Idaho department of juvenile corrections "including records containing the names, addresses and written statements of victims and family members of juveniles, shall be exempt from public disclosure" pursuant to I.C. § 20-533A and I.C. § 74-105(3). Records collected as part of the presentence process are exempt from disclosure. I.C. § 74-105(4)(a)(iv). Many Department of Corrections records are exempt from disclosure. *Id.* Public employee personnel records are exempt from disclosure except for employment history, classification, pay grade, salary etc. I.C. § 74-106 (1). The home address and telephone number of current and retired public employees is exempt from disclosure without the employee's consent. I.C. § 74-106(1) and (2). Voter registration information which includes the voter's physical address, while generally available except for driver's license numbers and date of birth, can be withheld for crime victims or law enforcement officers. I.C. § 74-106 (25) and (30). Victims of stalkers or

domestic violence can have protection under the Idaho Public Records Act from disclosure of their home address. I.C. § 74-106(27) and I.C. § 19-5701 et. seq. Trade secrets and production records are exempt from disclosure along with archeological site locations, records of the books a patron has checked out of a library just to list a few. I.C. §§ 74-107, 108. While Ada County argues that privacy protections are important, it is abundantly clear that the Legislature is also aware of the need for privacy protection and has created specific statutory exemptions to maintain the privacy of many types of records. The concern that Ada County expresses that it might be subject to legal liability for disclosing private information is not persuasive since it has immunity under I.C. § 74-118. There is no basis for this Court to adopt the amorphous privacy exemption argued for by Ada County. The Idaho Public Records Act and the cases interpreting it have recognized that the Legislature has created specific exemptions which are to be narrowly construed. The broad "Privacy" basis for not providing public records information requested as argued by Ada County has no basis in any specific exemption or anywhere else in Idaho law. Ada County's interpretation of I.C. § 74-104(1) which provides that: "[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" justifies its vague and unstructured right to exclude whatever information it deems as private is not supportable. First, if there is a specific state or federal law which precludes disclosure of a public record, then Ada County must cite to it. Secondly, such a broad, standard-less interpretation of I.C. § 74-104(1) would negate the entire Act. The policy of the Act is that records of the public's business are open to examination by the public. No public agency has a right to create exemptions in addition to that already provided for by the Legislature. When the Legislature has chosen to create numerous specific statutory exemptions, it is a clear indication that they have created what they meant to create. *Bolger v.*

Lance, supra.; *Federated Publications, Inc. v. Boise City,* supra. Whether it would be a good idea to expand the law to include greater privacy protections is an argument which should be made to the Legislature.

Ada County's generic claim of "Privacy" without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." For that reason alone, all documents in response to each request which was denied because of "Privacy" must be provided. Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. The Idaho Public Records Act does not exempt the email or street addresses and names of people who submit public records requests, or ask for interviews with Ada County Commissioners or generally correspond with them. All information requested and gathered in response to Jennifer Swindell's public records request must be provided. All information redacted for "Privacy" alone must be provided to Cynthia Sewell and Melissa Davlin. Ada County's approach to this particular issue where it even deleted the reporter's own email address and emails asking about the status of their public records request because of "Privacy" is so lacking in good faith that it is striking. Whether those redactions were meant humorously, they are improper and not justified by any statutory exemption.

b. Redactions for "Personnel". Ada County's generic claim of "Personnel" as a basis for non-disclosure without reference to a specific statutory exception is a violation of I.C. § 74-103(4) which requires that the "notice of denial or partial denial also shall indicate the statutory authority for the denial." I.C. § 74-106(1) does authorize the non-disclosure of the names of public employees or their positions. None of the personnel information involved "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." Ada County has not met its burden to prove that there is a narrowly based statutory exemption for the information generally withheld for that purpose. While it cited a statutory exception which related to personnel and there are specific personnel information exclusions, none of them apply.

c. Deliberative Process Privilege. A considerable number of records were withheld because of Ada County's assertion of a "Deliberative Process Privilege." Nowhere in the Idaho Public Records Act is there a "Deliberative Process Privilege." The Idaho Public Records Act does protect some of the Legislature's own deliberative processes from public disclosure. Draft legislation and documents relating to it and research requests submitted to Idaho's legislative services office by a member of the Legislature are exempt from disclosure. I.C. § 74-109(1). However, there is no broad Idaho "Deliberative Process Privilege" even though the Legislature was presumably also aware of federal law which recognizes such a privilege. The federal Freedom of Information Act has had a specific exemption for the deliberative process privilege since its enactment in 1988. The purpose of the federal deliberative process privilege is to allow frank debate of options, "suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" or represent views that are being tossed around but are not the final policy of a federal agency. See, *e.g., Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000, 1015 (9th Cir. 2019)(petition for writ of certiori filed October 25, 2019). The deliberative process privilege has been the subject of considerable litigation. The federal FOIA also establishes a policy of open access to public records with exceptions narrowly construed. The debate in the federal cases over the tension

between FOIA's general principles mandating public access to information and the exclusion of records because of the application of the "deliberative process privilege" reflects considerable concern over the risk of the exception devouring the principle of public access. As Judge Winmill discussed in *Andrus v. United States Dep't of Energy*, 200 F. Supp. 3d 1093, 1105 (D. Idaho 2016), the purpose of the deliberative process privilege is to allow the exploration of possibilities, to engage in debate and explore ideas without fear, at the earliest stages of a policy discussion, that public scrutiny will dampen the discussion. Since the deliberative process privilege has been a part of the federal Freedom of Information Act since 1988, the Legislature's decision not to include it in the Idaho Public Records Act is significant. Had they wanted to include the privilege, they could have done so. Instead, they carved out a narrower exemption for drafts of proposed legislation and communication with the legislative services office. There is no deliberative process privilege in the Idaho Public Records Act. This Court declines the invitation to make one up. Idaho has opted for greater transparency. The decision to narrow the range of public records open to the public belongs to the Legislature.

d. Attorney-Client Privilege. The Idaho Public Records Act provides broad access to all public records. Because government at every level in 2019 maintains all sorts of records on many subjects, the Legislature carved out a number of specific areas where records that governmental entities maintain are not available to the general public. Those are the specific statutory exclusions which a governmental body is required to cite to justify non-disclosure.

The attorney-client privilege and the attorney work product privilege are not specifically protected in any statutory exclusion although they are long-standing privileges in Idaho law. They are referenced in the Idaho Public Records Act in two separate sections: I.C. § 74-105(18) and I.C. § 74-107(11). I.C. § 74-107(11) states that: "nothing in this subsection is intended to

limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic" which seems to imply that the attorney-client privilege and attorney work product privilege do protect public records that fall within their proper focus.

The United States Supreme Court has described the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390, 101 S.Ct. at 683. The privilege exists to "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389, 101 S.Ct. at 682.

In Idaho, the attorney-client privilege was first discussed in *Ex Parte Niday*, 15 Idaho 559, 98 P.845 (1908). The Supreme Court recognized that an attorney cannot, without the consent of his or her client, be examined as to any communication made by the client to the lawyer to obtain legal advice or to the lawyer's legal advice to the client. Letters disclosed to a third party and not written with respect to the employment of the lawyer nor for the purpose of obtaining legal advice, were not privileged. The Court said:

> The rule is intended to promote justice and protect persons who are obliged to disclose their private business affairs to an attorney in order to be advised of their legal rights and duties. It is defensive, and not offensive. It is intended as a shield, and not a sword. The communication must have been confidential and so understood and intended. Weeks on Attorneys, § 153; Sharon v. Sharon, 79 Cal. 678, 22 Pac. 26, 131; Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; 10 Ency. of Ev. 270; State v. Kidd, 89 Iowa, 54, 56 N. W. 263.

Id., 15 Idaho 559, 98 P. at 847–48. 2. An attorney cannot, without the consent of his or her

client, be examined as to any communication made by the client to the lawyer or to the lawyer's advice given in the course of the professional employment. I.C. § 9-203. Communications not solely between the attorney and client are not privileged. What matters as to whether a particular communication is privileged under the attorney-client privilege is to whom the statements are made, whether they were confidential and whether they involve the providing of legal advice. Communications by a client or the lawyer about non-legal matters do not fall within the scope of the privilege. See, generally, *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980); *T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.,* 164 Idaho 738, 435 P.3d 518 (2019); 24 Federal Practice and Procedure § 5478 (Wright & Miller). The name of the attorney is not privileged. Wright & Miller have observed that lawyers employed by the public as public officers such as prosecutors owe their duty to the public at large and the "right of the public to know how the public business is conducted may override the policy the privilege is thought to serve." *Id.* at 6 citing *Coastal Corporation v. Duncan*, 86 F.R.D. 514 (D.C. Del. 1980).

The attorney-client privilege applies to confidential communications between the public attorney and the public agency client for the purpose of giving or receiving legal advice. Public agencies enter into contracts, assess their legal positions in connection with various types of litigation against the public agency and have the same need as private parties for frank disclosure of all of the relevant facts by the "client" in order to receive sound legal advice. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). However, in light of the strong policy of Idaho law requiring public disclosure to the public of the records of the public's business, the attorney-client privilege and attorney work product

privilege should be narrowly construed in the context of public agencies. Moreover, where an attorney is just responding to a public records request and is acting in an administrative or clerical capacity and there is neither a confidential communication nor any provision of legal advice, the attorney-client privilege and attorney work product privilege do not come into play. The attorney-client privilege attaches only when the attorney acts in that capacity, not in some other role. See, *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). Simply having an attorney act as the point person to gather a public records request does not convert everything he or she touches to a communication covered by the attorney-client privilege or to attorney work product. The privileges applies to confidential communications made for the purpose of seeking and providing legal advice, not to clerical or administrative functions performed by a public employee who is a lawyer.

Sewell Request/ In-Camera Review. Emails and correspondence from the Special Assistant to the Ada County Commissioners which refer to a prosecutor's name or general subject matter which the deputy prosecutor might be working on do not fall within attorney-client privilege. The fact that legal matters are referred to as being areas of interest or that there are funding needs does not fall within attorney-client privilege. Multiple copies provided to various public employees of Cynthia Sewell's public records request are in no way covered by the attorney-client privilege or work product privilege even though they may have been forwarded by someone working in the Ada County Prosecutor's legal department to another public employee. None of the emails and correspondence Bates stamped 000453-467 fall within any attorney-client privilege nor are they exempt under any other permissible basis. Drafts of letters from legal counsel to the Ada County Commissioners do fall within attorney-client/ attorney work product. Bates stamped documents 000468-000471 are exempt from disclosure. Bates stamped

document 000499 is not attorney-client or attorney work product and must be disclosed. Cover letter and draft legal documents fall within attorney client privilege thus Bates stamped documents 000543-000547 are not subject to disclosure. Legal documents disclosed to third parties lose the protection of the privilege. Bates stamped documents 000567-000572 must be disclosed. Bates stamped document 000619 is not covered by attorney client privilege or work product. Bates stamped document 000620-626 are copies of Cynthia Sewell's public records request and are not covered by the attorney client privilege. Bates stamped document 000627-000633 are not covered by the attorney client privilege or work product privilege. Except for the documents expressly found to be attorney-client or attorney work product, all other documents must be provided since there is no legal basis for their non-disclosure.

Davlin Request/ In-Camera Review. The Court has reviewed all documents in non-redacted form gathered in response to Melissa Davlin's request. Attorney names are not confidential. The body of Bates stamped documents 000023—000025; and 000035 are exempt from disclosure. Bates stamped documents 000043-48 do not fall within the attorney-client privilege and must be disclosed. It is absolutely remarkable that Ada County would claim a privilege for the name of an attorney and the stock confidentiality notice. Bates stamped document 000060 must be disclosed since it does not fall within the privilege. Bates stamped document 000062-67 falls within the attorney client privilege and will not be disclosed. Bates stamped document 000070-74 falls within the attorney client privilege and will not be disclosed. Correspondence about the retrieval efforts to respond to the public records request of Melissa Davlin are not confidential communications related to the provision of legal advice even though a lawyer may have corresponded with the IT expert. The search parameters are not in reference to the provision of legal advice but to the response to the public records requests and are not privileged.

Conclusion

The Idaho Public Records Act mandates broad, timely access to the records of the public's business upon request. A public record can only be withheld if there is a clear and statutorily-grounded justification. I.C. § 74-101(13). The Idaho Press Club has associational standing to bring this petition on behalf of the members of the association who made requests which were denied. Ada County is the properly named party-defendant. There is no basis to dismiss this petition.

Ada County's approach to handling the Idaho Public Records Act requests in this case was troubling. The Act favors timeliness, narrow exclusions and openness; Ada County's approach emphasized delay, unsupportable interpretations of privilege and secrecy. Ada County not only did not follow the Idaho Public Records Act, it acted as though a different Act had been enacted—a reverse image of Idaho law. No public agency is free to create its own Public Records Act. Vague, over-reaching denials for "Personnel" or "Privacy" without citing the Act's specific personnel or privacy protections is not permissible. There is no "Deliberative Process" privilege in Idaho law. While the attorney-client privilege can be asserted for confidential communications between a lawyer and the client for the purpose of legal advice, delegating the administrative/clerical function of gathering public records to a lawyer does not make everything the lawyer touches or copies other employees subject to the protection of the privilege. Ada County's refusal to provide records was frivolous and it has frivolously pursued its positions in this case. See *Hymas v. Meridian Police Dep't*, 156 Idaho 739, 747, 330 P.3d 1097, 1105 (Ct. App. 2014). With the exception of a few records, no privilege applies.

The Idaho Legislature has determined that, in this State, government business must

largely be conducted in public view with quick access to public records. The Legislature did not choose to create any "deliberative process privilege" even though that has long been a component of the federal government's Freedom of Information Act. With the exception of the request for the 911 call which needed the formal public records request which the Act allows public agencies to require, the Court finds that the evidence is overwhelming that public records were improperly and frivolously withheld. The Idaho Press Club is the prevailing party and is entitled to its attorney fees and costs. The Petition to Compel is granted. The documents must be supplied forthwith.

It is so ordered.

Dated this 12th day of December, 2019.

Deborah A. Bail

Deborah A. Bail
District Judge