

NOTES

Telford: Casting Sunlight on Shadow Governments— Limits to the Delegation of Government Power to Associations of Officials and Agencies

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A government by secrecy benefits no one. It injures the people it seeks to serve, it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.¹

I. INTRODUCTION

The *Telford*² case, little known to the public, may turn out to be one of the most important cases in Washington State, protecting the fundamental right of the public to know about, and control the actions of, government officials and agencies.

Telford sheds light on, and begins to correct, the growing tendency of government agencies and officials to delegate power and transfer public money to associations of officials and agencies. These associations, acting as agents for government officials and other agencies, take actions officials themselves are not allowed to—in effect, becoming super agencies. These tax-funded associations, claiming to be free of public disclosure rules, antilobbying laws, open meeting law requirements, and one-person-one-vote constitutional restraints, have a sig-

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1. S. REP. NO. 89-813, at 10 (1965).

2. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), review denied, 138 Wash. 2d 1015, 989 P.2d 1143 (1999).

nificant, yet little noticed, potential to undermine basic democratic principles.

Increasingly, state government officials and agencies are delegating power to associations that set policies, pass resolutions, lobby, take legal positions in court, and use public funds in political campaigns and on ballot measures. The executive directors and others who run these associations are not elected by the public and are mostly unknown to the public. In many respects they now form an unaccountable, powerful, and mostly invisible new branch of government: shadow governments.

Representative democracy depends on the ability of the people to hold their elected officials accountable for governmental actions, but when officials give public funds and delegate state powers to unelected associations, it becomes extraordinarily difficult for voters to determine whom to hold accountable.

In Washington State, the Public Disclosure Act³ and the Open Public Meetings Act,⁴ which are sometimes collectively referred to as the Sunshine Laws,⁵ open government agencies to full public view and prohibit contributions to ballot measures and political campaigns by government agencies. The use of associations by state government officials and agencies for political purposes inevitably collides with the principles underlying the Sunshine Laws and similar limitations designed to protect representative democracy.⁶

In order to enforce the laws meant to protect public trust in government, the *Telford* court began to cast sunlight on these shadow governments. *Telford*, however, should be the start, not the end, of a principled review of how to bring associations of public officials and agencies "into the sunshine of public accountability."⁷

3. WASH. REV. CODE § 42.17 (1998). See generally *Servais v. Port of Bellingham*, 127 Wash. 2d 820, 826, 904 P.2d 1124, 1127 (1995) ("The Public Disclosure Act mandates disclosure in four areas of government, namely: campaign financing; lobbyist reporting; reporting of elected officials' financial affairs; and public records.").

4. WASH. REV. CODE § 42.30 (1998).

5. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("Sunlight is said to be the best of disinfectants; electric light, the most efficient policeman." (quoting L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933))); *Cathcart v. Andersen*, 85 Wash. 2d 102, 108, 530 P.2d 313, 316 (1975) (noting the appropriate dubbing by Florida of its open meeting act as a Sunshine Law).

6. See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the modern administrative state openly supports important structural precepts of the American constitutional order).

7. Plaintiff's Brief in Support of Motion for Summary Judgment at 17, *Telford v. Thurston County Bd. of Comm'rs*, No. 96-2-04116-2 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (on file with the *Seattle University Law Review*) [hereafter *Plaintiff's Summary Judgment Brief*].

This Note engages in three areas of analysis. Part II reviews the case of *Telford v. Thurston County Board of Commissioners*,⁸ which, for the first time in Washington State, confronted the issue of whether associations of state officials or agencies are the equivalent of agencies for purposes of the state Public Disclosure Act.

Part III examines the broader implications of *Telford*: (1) whether the principles in *Telford* should be applied to other state safeguards and restrictions on government agencies, such as the state Open Public Meetings Act, (2) whether the constitutional requirement of one-person-one-vote should be applied to associations of officials that pass resolutions, lobby, and spend tax funds on political causes,⁹ and (3) whether associations of officials and agencies are the equivalent of agencies, acting as "shadow governments,"¹⁰ doing indirectly what public agencies cannot do directly, and thereby avoiding public accountability.

Part IV discusses whether the legislature has allowed the delegation of too much power and whether it should (1) restrict associations of government officials or agencies to narrowly defined, nondiscretionary information activities, and (2) open these associations to more effective public disclosure requirements than those provided in existing law, such as a requirement that all association activity be placed on publicly available Internet sites—an Internet Sunshine Law.

II. THE TELFORD CASE

A. The Allegations

On November 21, 1996, Paul Telford, a retired engineer and private citizen, sued the Thurston County Board of Commissioners, the Washington State Association of Counties (WSAC), and the Washington Association of County Officials (WACO), alleging that they illegally used taxpayer money on two separate ballot measures, illegally contributed to political campaigns, and illegally refused to disclose information about their activities.¹¹ Specifically, Mr. Telford alleged that WACO spent \$17,000 to oppose Initiative I-559, a property-tax reduction initiative,¹² and that WSAC spent \$1,500 to sup-

8. 95 Wash. App. 149, 974 P.2d 886 (1999).

9. See *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990).

10. Rob Eure, *Appeals Court Sends Trade Groups for Counties Into an Identity Crisis*, WALL ST. J., June 16, 1999, at NW1 (quoting Shawn Newman, president of Citizens for Leaders with Ethics and Accountability NOW).

11. Plaintiff's Summary Judgment Brief, *supra* note 7, at 15-17.

12. *Id.* at 16. See also Eure, *supra* note 10, at NW1 ("Mr. Telford especially took issue

port a referendum to increase taxes on alcohol, tobacco, and soda syrup.¹³ He alleged that the staffs of WSAC and WACO worked on the ballot measures using association facilities.¹⁴ He further alleged that WSAC donated \$1,000 to the Senate Democratic Caucus, the House Democratic Caucus, the Senate Republican Caucus, and the House Republican Organizing committee.¹⁵

Mr. Telford requested a declaratory judgment and injunctive relief, asserting that the two associations were "agents of the Thurston County Commissioners and . . . therefore subject to the prohibitions on using public funds to promote or oppose a ballot issue or other political activities pursuant to [the Public Disclosure Act]."¹⁶ He maintained that the court should order WACO and WSAC to comply with (1) prohibitions on the use of funds or facilities in campaigns, (2) the Open Records Act, (3) the Open Public Meetings Act, and (4) state audits.¹⁷

Mr. Telford summarized his allegations as follows:

County officials have authorized, through WSAC and WACO, the use of public funds (and publicly paid-for facilities and staff) in campaigns. Defendants have exploited a loophole to eviscerate the intent of the state's Sunshine Laws. County Officials have used the Associations as alter egos to do indirectly what the officials cannot do directly.¹⁸

B. *The State Public Disclosure Act*

The Public Disclosure Act was enacted in 1972 as Initiative 276.¹⁹ This Washington State citizen's initiative was designed to keep citizens informed so they could maintain control over government and hold it accountable.²⁰ "It prohibits the contribution of public funds to political campaigns and lobbying efforts, mandates reports of public officials' financial affairs, and requires disclosure of public records."²¹

with the effort to defeat the property-tax measure: 'Here is a statewide initiative, placed on the ballot by voters who are trying to control government spending, and the governments are using tax dollars to try to defeat it.'").

13. Plaintiff's Summary Judgment Brief, *supra* note 7, at 15.

14. Telford v. Thurston County Bd. of Comm'rs, No. 96-2-04116-2, at 17 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.) (on file with the *Seattle University Law Review*).

15. *Id.* at 15.

16. *See id.* 1-2.

17. *Id.* at 17.

18. *Id.* at 16.

19. WASH. REV. CODE § 42.17.010 (1998).

20. WASH. REV. CODE § 42.17.251 (1998). *See* § 42.17.010(5) ("That public confidence in government at all levels is essential and must be promoted by all possible means.").

21. Telford v. Thurston County Bd. of Comm'rs, 95 Wash. App. 149, 158, 974 P.2d 886

Washington's Public Disclosure Act, known as the PDA, provides that the people, not government agencies, will decide what the public has the right to know.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.²²

Despite the inconvenience or embarrassment that disclosing information may create for a public agency, it is the policy behind the statute that open examination and disclosure of public records is in the interest of the public.²³ Under the PDA's strong policy in favor of disclosure, agencies must respond quickly to citizens, and the courts must fine agencies that have wrongfully denied information to citizens.²⁴ Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information."²⁵ Also, under the PDA, public agencies may not use public funds for campaigns,²⁶ use public facilities for political campaigns,²⁷ or engage in unregulated lobbying.²⁸

891 (1999).

22. WASH. REV. CODE § 42.17.251 (1998).

23. Julie E. Markley, *The Fox Guarding the Henhouse: Newman v. King County and Washington's Freedom of Information Law*, 73 WASH. L. REV. 1107, 1113 (1998) (citing WASH. REV. CODE § 42.17.340(3) (1998)). "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." *Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1*, 138 Wash. 2d 950, 957, 983 P.2d 635, 639 (1999) (citing WASH. REV. CODE § 42.17.340(3) and stating that to fulfill the statutory purpose, the Act's disclosure provisions will be liberally construed and the exemptions narrowly construed).

24. WASH. REV. CODE § 42.17.320 (1998) (requiring an agency to respond to requests for public records within five business days and if a request is denied, mandating agency review of the decision within two business days of denial).

25. WASH. REV. CODE § 42.17.290 (1998).

26. WASH. REV. CODE § 42.17.128 (1998). "Public funds, whether derived through taxes, fees, penalties, or any other source, shall not be used to finance political campaigns for state or local office." *Id.*

27. WASH. REV. CODE § 42.17.130 (1998). "No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition." *Id.* "Facilities of a public office or agency" may include use of stationery, postage, machines, vehicles, office space, employees during working hours, publications of the agency, and clientele lists. *Id.* The provisions in RCW 42.17.130 do not apply to activities that are part of the normal and regular conduct of the office or agency. *Id.*

28. WASH. REV. CODE § 42.17.190 (1998).

(3) Any agency, not otherwise expressly authorized by law, may expend public funds

In Washington State, an agency is generally defined as any state or local agency.

"State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local agency.²⁹

Most state laws define "agency" in broad terms, such as any state or other governmental entity performing a governmental function for the state or any one or more municipalities thereof.³⁰ Further, the Washington Administrative Code defines "agent" as used in RCW chapter 42.17 (the PDA) as:

a person, whether the authority or consent is direct or indirect, express or implied, oral or written who: (1) Is authorized by another to act on his or her behalf; or (2) Represents and acts for another with the authority or consent of the person represented; or (3) Acts for or in place of another by authority from him or her.³¹

These provisions of the PDA are liberally construed to cast as broad a net as possible in favor of disclosure.³²

In *Telford*, the question before the superior court and before the court of appeals was whether WSAC and WACO were "public agen-

for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency: PROVIDED, That public funds may not be expended as a direct or indirect gift or campaign contribution to any elected official or officer or employee of any agency. For the purposes of this subsection, the term "gift" means a voluntary transfer of any thing of value without consideration of equal or greater value, but does not include informational material transferred for the sole purpose of informing the recipient about matters pertaining to official agency business. This section does not permit the printing of a state publication, which has been otherwise prohibited by law.

§ 42.17.190(3).

29. WASH. REV. CODE § 42.17.020(1) (1998).

30. Various private and nonprofit entities with governmental affiliations, as well as certain independent authorities, though not without exception, have been held to constitute agencies subject to the provisions of the particular state's freedom of information law on the basis that such entities either acted on behalf of a governmental agency or were so involved in governmental functions that they fell within the scope of the act. Andrea G. Nadel, Annotation, *What Constitutes an Agency Subject to Application of State Freedom of Information Act*, 27 A.L.R. 4th 742, 746 (1984).

31. WASH. ADMIN. CODE § 390-05-190 (1999).

32. See Nadel, *supra* note 30, at 746; Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981).

cies" under the PDA. As is discussed in more detail below, both courts concluded that these associations were essentially "shadow governments" comprised of public officials conducting public business with public funds while claiming the right to refuse disclosure of their actions to the public and the right to refuse to be bound by the prohibitions on political activities that apply to government agencies.

C. Facts Not in Dispute

The superior court, in a 38-page opinion, reviewed the facts presented by Mr. Telford and the associations. Because both Telford and the associations moved for summary judgment, several facts were not in dispute, including the following:

(1) WSAC's members are solely the counties of the State of Washington; (2) WACO's members are solely elected or appointed county officials; (3) WSAC and WACO are funded almost entirely from public funds, which were raised through taxes and passed on to them in the form of dues paid by counties or county officials; (4) WACO contributed \$41,648.24 in cash and in-kind contributions to oppose Initiative 559 on the ballot in 1992; (5) WSAC contributed \$1,000 to political parties in 1993 and made campaign contributions of at least \$1,500 to support the passage of Referendum 43 on the ballot in 1994; and (6) WSAC used employees, staff, offices, and facilities to campaign for the passage of Referendum 43 on the ballot in 1994.³³

The court of appeals agreed that several key facts were not in dispute, including the following: (1) "Both WSAC and WACO are completely controlled by elected and appointed county officials."³⁴ (2) "Most of WSAC and WACO's income is derived from annual dues paid by its members. The dues are based upon each association's operating budget and a formula related to the population of each member county."³⁵ (3) WSAC and WACO contributed funds to ballot measures and used staff and facilities to defeat or support ballot measures.³⁶

33. *Telford*, No. 96-04116-2 at 16-17 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.). In a footnote, the court noted that at oral argument Mr. Telford believed the sum contributed to oppose Initiative 559 was \$16,800. *Id.* at 17. WACO disputed the finding of fact on appeal, arguing that it contributed only \$16,980.30 to the initiative and the remainder to other lobbying activities. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 166 n.25, 974 P.2d 886, 895 (1999).

34. *Telford*, 95 Wash. App. at 155, 974 P.2d at 890.

35. *Id.*

36. *Id.*

D. *The Legal Argument in Telford*

WSAC and WACO argued that they are private, nonprofit corporations, and thus should not be considered an "agency" under the PDA. They

argue[d] that WSAC and WACO are private corporations, and though recognized by the legislature are not created by it. They argue[d] that any funds they receive are simply for their services to counties or county officials and become their private funds upon receipt the same as any other private company who sells services to government.³⁷

No provisions in the PDA specifically speak to agencies that have the form of a private corporation or to whether the term "agency" is meant to encompass associations of officials or agencies. As a result, the legal issue in *Telford* involved legislative intent: are associations of agencies intended to be included within the term "agency" under the PDA?

Telford argued that WACO and WSAC, as associations of public officials, should be allowed to do only what an official is allowed to do under the PDA.³⁸ He argued that the intent of the PDA and its language as a whole mandates this result.³⁹ Therefore, these associations should not be allowed to directly or indirectly assist any election campaign, promote or oppose any ballot proposition,⁴⁰ use public funds to help finance political campaigns,⁴¹ or give public funds to any elected official, officer, or employee of any agency.⁴²

37. *Telford*, No. 96-04116-2 at 19 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.). See Washington State Association of County Commissioners 1939 Wash. Laws 188 (WSAC). The acts that empowered the several counties to pay public funds to WSAC and WACO identify the associations as coordinating agencies.

38. Respondent's Brief at 7, *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 974 P.2d 886 (1999) (No. 32559-5-II) (on file with the *Seattle University Law Review*). See WASH. REV. CODE § 42.17.130 (1998) ("No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition.") (emphasis added) ("Public funds, whether derived through taxes, fees, penalties, or any other source, shall not be used to finance political campaigns."); WASH. REV. CODE § 42.17.190(3) (1998) ("[p]ublic funds may not be expended as a direct or indirect gift or campaign contribution to any elected official or officer or employee of any agency."); WASH. REV. CODE § 42.17.128 (1998) (stating that facilities of a public office may or may not be used to support or oppose an initiative to the legislature); WASH. REV. CODE § 42.17.190(4) (1998) (defining facilities of a public office or agency as the same as in RCW 42.17.130).

39. Respondent's Brief, *supra* note 38 at 5.

40. See § 42.17.130.

41. See § 42.17.128.

42. See § 42.17.190(3).

The associations, WSAC and WACO, said the plain language rule should apply in interpreting the statute.⁴³ WSAC/WACO pointed to the rule in *Senate Republican Campaign Committee v. Public Disclosure Commission*,⁴⁴ stating that “[w]here the meaning of a statutory term adopted by initiative is clear, there is no need to glean the intent of the people from sources other than the statute itself.”⁴⁵ The associations argued that the specific definition of “agency” under the Public Disclosure Act does not encompass entities such as WSAC or WACO.⁴⁶ Further, because the statutory definition “controls its interpretation,”⁴⁷ there is no need to analyze the application of the term “agency” in the PDA as it applies to “hybrid entities” or to “quasi-public agencies.”⁴⁸

WSAC and WACO also maintained that the legislative history of the PDA supports its strict application.⁴⁹ The associations argued that the Legislature had two opportunities to amend the definition of “agency” within the PDA and opted not to do so. They claimed that the failure to amend the definition to encompass associations illustrates the legislature’s satisfaction with the narrow meaning of agency:⁵⁰ “This strong indication of legislative satisfaction with the plainly

43. Brief of Appellants at 12, *Telford v. Thurston County Bd. of Comm’rs*, 95 Wash. App. 149, 974 P.2d 886 (1999) (No. 23559-5-II) (on file with the *Seattle University Law Review*). “If the Legislature or the people wish to broaden the statute to include within the statute’s reach individuals who have not taken the steps outlined in the current statutory definition of candidate, that can easily be accomplished by amendment. It is not appropriate, however, for this court to broaden the statute beyond its plain terms.” *Senate Republican Campaign Comm. v. Public Disclosure Comm’n*, 133 Wash. 2d 229, 245, 943 P.2d 1358, 1366 (1997); *See also* *Associated Gen. Contractors of Wash. v. King County*, 124 Wash. 2d 855, 865, 881 P.2d 966, 1001 (1994) (“[C]ourts may not create legislation in the guise of interpreting it.”).

44. *Senate Republican Campaign Comm.*, 133 Wash. 2d 229, 943 P.2d. 1358 (1997).

45. Rebuttal of Respondent’s Brief, *Telford v. Thurston County Bd. of Comm’rs* at 6-7, 95 Wash. App. 149, 974 P.2d 886 (1999) (No. 23559-5-II) (on file with the *Seattle University Law Review*).

46. Brief of Appellants, *supra* note 43, at 11-12. (arguing that none of the terms of RCW 42.17.010 suggest that the policy of the PDA is to expand the definition of “agency” to reach entities other than those specifically referred to in RCW 42.17.020(1)).

47. *State v. Morris*, 77 Wash. App. 948, 950, 896 P.2d 81, 82 (1995) (citing *City of Seattle v. Shepherd*, 93 Wash. 2d 861, 866, 613 P.2d 1158 (1980)).

48. Rebuttal of Respondent’s Brief, *supra* note 45, at 1-3.

49. Brief of Appellants, *supra* note 43, at 13 (noting that the legislature has made precise references to organizations like WSAC and WACO elsewhere, for example, in RCW 41.40.010(1). Although the legislature has used the term “associations of political subdivisions” to refer to organizations such as WSAC and WACO in the past, those terms are conspicuously absent from RCW 42.17.020(1)). *Id.*

50. “Since 1972, when the PDA was adopted by the passage of Initiative 276, . . . the Legislature has amended the definition of ‘agency’ twice without expanding it to encompass associations of political subdivisions like WSAC and WACO.” Rebuttal of Respondent’s Brief, *supra* note 45, at 2-3.

narrow meaning of 'agency' should not be disturbed by judicial interpretation."⁵¹

E. The Superior Court Decision

The superior court, rejecting the associations' argument, found that regardless of any opportunity for the legislature to amend the definition of agency, the PDA attempted to include every possible entity of interest in the definition of "agency," and as such should be read broadly. "It is hard to imagine a broader definition since the statute is meant to encompass all agencies, state and local, including even quasi-municipal corporations."⁵² The superior court then looked to the overall purpose of the statute for guidance on whether associations such as WSAC and WACO were "agencies" under the PDA. The superior court held that the intent of the PDA is found within the statute's declaration of policy. That policy states that the representative form of government is founded on a belief that public officials have nothing to fear from full public disclosure of their business as long as they deal honestly and fairly with the people.⁵³

The PDA emphasizes that public confidence "is essential and must be protected by all possible means,"⁵⁴ and this confidence can be sustained by "assuring the people of the impartiality and honesty of the officials in all public transactions and decisions."⁵⁵ The superior court emphasized the PDA's declaration of policy, which states that "[t]he provisions of this chapter shall be liberally construed."⁵⁶

The superior court also examined a 1995 United States Supreme Court decision, *Lebron v. National Railroad Passenger Corporation*,⁵⁷ which held that Amtrak was an agency of the United States.⁵⁸ Summarizing the principles in *Lebron*, the superior court said, "Even with such express denial, however, some of these instrumentalities or agency corporations have been found to be agencies of the Government for certain purposes despite the Government's denial that there are such."⁵⁹ *Lebron* used the functional equivalency test, which simply

51. *Id.*

52. *Telford v. Thurston County Bd. of Comm'rs*, No. 96-2-04116-2, at 29 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.).

53. WASH. REV. CODE § 42.17.010 (1998).

54. § 42.17.010(5).

55. § 42.17.010(6) (emphasis added).

56. *Telford*, No. 96-04116-2 at 28 (quoting RCW § 42.17010).

57. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995).

58. *Id.* at 394.

59. *Telford*, No. 96-04116-2 at 21. See also, *Cherry Cotton Mills, Inc., v. United States*, 327 U.S. 536 (1946). The Court in *Cherry Cotton* found that the Reconstruction Funding Corporation was an agency selected by the government to accomplish purely governmental purposes.

means that no matter what an association or entity is called, the test will be based on what the association or entity does—its functions. If its functions are equivalent to those of a public agency, then the association or entity will be regulated by laws limiting public agencies.

F. The Court of Appeals Decision: When Are Associations of Officials and Agencies the Functional Equivalent of Government Agencies Under the Public Disclosure Act?

1. Introduction

The court of appeals reviewed the PDA's strong mandate for public accountability of public agencies⁶⁰ and considered when an association of government officials is the equivalent of an "agency" under the PDA.⁶¹ The *Telford* courts were the first Washington State courts to address this question.

Federal courts and courts in other states, answering similar questions, have developed a functional equivalency test that compares the amount of an entity's public activity to its private activity to determine whether the activities of an association are more public or private.⁶² When the activities tip toward the public side of the balance, the courts have found associations to be "agencies," and therefore, subject to the limitations that apply to regular public agencies.

In *Telford*, the court of appeals looked to the four factors of the functional equivalency test articulated in *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*.⁶³ "The major and discrete criteria which federal courts have utilized in employing a

"Its Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits if any go to the Government; its losses the government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is" *Id.* at 539.

60. *Telford*, 95 Wash. App. 149, 158-59, 974 P.2d 886, 891-92 (quoting RCW 42.17.010 that the Act's provisions are to be "liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records . . ."). See WASH.REV.CODE § 42.17.920 (1998).

61. *Telford*, 95 Wash. App. at 156-57, 974 P.2d at 890-91.

62. See generally *Railway Labor Executive's Ass'n v. Consolidated Rail Corp.* 580 F. Supp. 777, 778-79 (D.D.C. 1984); *Connecticut Humane Soc'y v. Freedom of Info. Comm'n*, 591 A.2d 395, 396-97 (Conn. 1991); *Consolidated Edison Co. of New York v. Insurance Dept. of New York*, 532 N.Y.S.2d 186, 189 (N.Y. Sup. Ct. 1998).

63. 436 A.2d 266, 270-71 (Conn. 1980). In *Telford*, the court also noted that the state of Oregon recently extended the equivalency test set forth in *Woodstock Academy* by identifying six factors the court should take into consideration. However, the Oregon court states that these six factors are not intended to be exclusive. Any factor bearing on the character of the entity and that entity's relationship with government may be relevant.

functional equivalent test are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government."⁶⁴ Formalistic arguments that an entity is a nonprofit organization are usually rejected by the courts as nondeterminative. Rather, courts look at substance over form due to the existence of a myriad of organizational arrangements for accomplishing government business.⁶⁵ Therefore, the particular form chosen by an organization is never the test. The configuration of each factor in relationship to the overall context where the issue arises reveals the essential nature of the entity for that particular context. It is possible for the same agency to be private in one context and public in another.⁶⁶ Straining specific facts through the sieve of the functional equivalency test, the essential nature of the entities becomes more certain.

In addition to holding that all four parts of the functional equivalency test do not need be satisfied in order for an entity to fall under the public disclosure laws, courts have also held that private entities with government affiliations are subject to Sunshine Laws.⁶⁷ In several cases, notwithstanding the private character of the entities involved, courts have held that even private entities may constitute agencies subject to the provisions of the particular state's freedom of information act. In these cases, the courts required public disclosure of the entities' records on the grounds that such entities either acted on behalf of a governmental agency or were so involved in government functions that they came within the scope of disclosure acts.⁶⁸

64. *Woodstock Academy*, 436 A.2d at 270.

65. *Id.*

66. *Nadel*, *supra* note 30, at 754-57. Various private and nonprofit entities with governmental affiliations, as well as certain independent authorities, though not without exception, have been held to constitute agencies subject to the provisions of the particular state's freedom of information law on the basis that such entities either acted on behalf of a governmental agency or were so involved in governmental functions as to bring them within the scope of the act. *Id.* at 747.

67. *See, e.g., Weston v. Carolina Research and Dev. Found.*, 401 S.E.2d 161, 164 (S.C. 1991) (finding that a private foundation was a "public body" with respect to public access to records because the foundation received public funds).

68. *See, e.g., Schwartzman v. Merritt Island Volunteer Fire Dep't*, 352 So. 2d 1230, 1231-32 (Fla. Dist. Ct. App. 1977) (holding that a nonprofit volunteer fire department was an "agency" within the purview of the state public records act, pointing out that the volunteer fire department was at the very least acting on behalf of a public agency); *Fritz v. Norflor Constr. Co.* 386 So. 2d 899, 901 (Fla. Dist. Ct. App. 1980) (holding that an engineering corporation was an "agency" within the meaning of a statute requiring disclosure of public records because the corporation performed services for the city relating to the treatment plant); *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991) (holding that a city convention and visitors association, a private not-for-profit corporation that

2. The Washington State Attorney General Opinion

In a 1991 opinion, the Washington State Attorney General used the functional equivalency test to determine the definition of an "agency" under the Open Meetings Act and the Public Disclosure Act.⁶⁹ That opinion concluded that an organization is a state agency for purposes of both the Public Disclosure Act and the Open Public Meetings Act if it is the functional equivalent of a state agency.⁷⁰ The attorney general's office used a four-part analysis that examined⁷¹ (1) whether the entity was created by government, (2) the extent of government involvement or regulation, (3) the level of government funding, and (4) whether the organization performed a government function.⁷²

Despite this opinion, the Washington State Attorney General, relying more on form than substance, found WSAC to be a "private organization" and decided not to enforce the PDA against WSAC.⁷³ In a letter dated April 18, 1995, Senior Assistant Attorney General James Pharris informed Mr. Telford that a "prior AGO found WSAC to be a private corporation."⁷⁴ In a second letter dated January 4, 1996, Mr. Pharris acknowledged receipt of Mr. Telford's earlier letter and again declined to take any action to enforce the PDA against

received revenue from both public and private sources, was a "public agency" within the meaning of the Public Records Act where the association's admitted function was to generate revenue through the hotel-motel tax and attract conventions to the city convention center and the city stadium, therefore, providing benefits to public, and where the association was maintained and supported by a public agency that was subject to the Public Records Act, and where moneys paid by the agency to the association were public funds and were allocated monthly and not on fee-for-services basis).

69. 1991 Op. Wash. Att'y Gen. No. 5 (deciding whether the Small Business Export Finance Assistance Center (EAC) was an "agency" subject to both RCW 42.30 and RCW 42.17).

70. *Id.* at 4.

71. *Id.* at 6 (adopting the four-part test of *Woodstock Academy*, 436 A.2d at 270-71); Plaintiff's Brief in Support of Motion for Summary Judgment Brief, *supra* note 7, at 4. (citing *Candoo v. State of Washington*, No. 94-2-04017-8, at 9-10 (Wash. Supr. Ct. Thurston County), (applying the same functional equivalency test to an attorney retained by the Attorney General for a specific case. The Honorable Judge Hicks found that the activities of the attorney met all of the equivalency tests and he was in fact an agent of the state for purposes of public access to certain records. Judge Hicks stated that "To hold otherwise would create a window for Public agencies to avoid the Public Disclosure Act."))

72. The unavoidable fact is that each new arrangement must be examined anew and in its own context.

73. 1991 Op. Wash. Att'y Gen. No. 5 (citing *Public Citizen Health Research Group v. Department of Health, Education and Welfare*, 668 F.2d 537, 542 (D.C. Cir. 1981)).

74. *Telford v. Thurston County Bd. of Comm'rs*, No. 96-2-04116-2 at 6 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.).

WSAC.⁷⁵ The Attorney General's Office's decision to not apply the PDA to WSAC set the stage for a judicial review.

3. Applying the Functional Equivalency Test in *Telford*

Although WSAC and WACO argued that they are private, non-profit corporations,⁷⁶ the court of appeals found that WSAC and WACO were each the functional equivalent of a public agency.⁷⁷ Both associations were created and controlled by public officials to serve public purposes, and both are funded by public money.⁷⁸ The court of appeals based its conclusion on an examination of the four factors of the functional equivalency test.

a. Performance of Governmental Functions

WSAC and WACO are associations of elected officials created to assist each other in their duties and to coordinate their public duties.⁷⁹ WSAC and WACO were created by elected officials acting in their public capacity in order to implement public duties⁸⁰ that could not be delegated to the private sector.⁸¹

WSAC and WACO argued that they are private corporations, and relied on a 1969 informal memorandum from an Assistant Attorney General to the State Auditor, which opined that because counties were not compelled to belong to WSAC, it was private and thus could spend money without limit on political causes and campaigns.⁸²

75. *Id.* Ironically, on the same date, January 4, 1996, Telford received a letter from the executive directors of WSAC and WACO, Gary Lowe and Fred Seager, respectively, indicating that the revenue for their associations derives from county government. *Id.* at 9.

76. Brief of Appellants, *supra* note 43, at 11.

77. *Telford*, 95 Wash. App. at 165, 974 P.2d at 895.

78. *Id.*

79. The bylaws of the Washington State Association of Counties were adopted on June 19, 1992, of which Article 2.2.2. states: "The membership of the Association shall be all duly elected or appointed county commissioners, members of county councils, and county executives, or the equivalent office in any county operating under a home rule charter." Plaintiff's Summary Judgment Brief, *supra* note 7, at 7.

80. The Act (Washington State Association of County Commissioners, 1939 Wash. Laws 188) "recognizes the *public necessity* of coordinating certain administrative functions of the several counties, for the benefit of the individual counties and the state generally." *State ex rel. Cruikshank v. Baker*, 2 Wash. 2d, 145, 153, 97 P.2d 638, 641 (1940) (emphasis added). The law enacting WACO stated that: "It shall be the duty of the assessor, auditor, clerk, coroner, sheriff, superintendent of schools, treasurer, prosecuting attorney of each county in the state to take such action as they jointly deem necessary to effect the coordination of the administrative programs of each county . . ." Counties - Coordination of Administrative Procedures, 1959 Wash. Laws ch. 130 § 2, (codified as amended at WASH. REV. CODE § 36.32.340).

81. *Telford*, 95 Wash. App. at 164, 974 P.2d at 894.

82. Brief of Appellants, *supra* note 43, at 28, (citing Memorandum to State Auditor, Robert V. Graham, from Assistant Attorney General Robert F. Hauth, dated August 28, 1969. This

WSAC and WACO asserted that because they do not directly regulate or govern, and because they are simply service providers, they are not the functional equivalent of an agency. Direct regulation, however, is not the only method by which public agencies make public policy. Public policy is also made by public agencies adopting resolutions, lobbying for legislation, influencing other agencies, litigating in court, donating staff time and money to defeat or support ballot measures, publishing position papers, or endorsing political causes. The court of appeals noted that WSAC and WACO are different from contracted service providers because dues are paid to WASC and WACO in lump sums at the beginning of the year before any services are rendered.⁸³ The character of the "services" are also of a political, and thus governmental, nature. In short, the associations acted as agents for government officials and public policy issues.

b. The Level of Government Funding

Both WSAC and WACO charge their members dues or fees based on each association's operating budget and on a formula related to the population of each member county.⁸⁴ The member counties pay their dues with public funds.⁸⁵ Over ninety-five percent of WSAC's and WACO's funds come from membership dues and fees.⁸⁶ Each association, however, has some income from the sale of its joint directory and some income from conference and seminar registrations.⁸⁷

WACO and WSAC consider that, once received, all county dues become their private funds and are deposited into private bank accounts.⁸⁸ Therefore, they argue, the use of these funds is not restricted. This argument would create a loophole that could be exploited to launder public funds for unauthorized purposes. The court did not support WSAC and WACO on this point: "[t]o allow counties to allocate a block of public funds to be spent entirely at the discretion of the associations as if the funds were private violates the clear intent of the statutes."⁸⁹ These entities are completely controlled by public officials acting in their public capacities. Since they are also

memorandum was not a formal published Attorney General Opinion).

83. *Telford*, 95 Wash. App. at 164, 974 P.2d at 894-95.

84. *Telford*, 95 Wash. App. at 155, 974 P.2d at 890.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 156, 974 P.2d at 890. The associations do not use governmental financing methods such as municipal bonds and they do not use the State Treasurer's investment pool for deposit of their funds. Brief of Appellants *supra* note 43, at 8.

89. *Telford*, 95 Wash. App. at 164, 974 P.2d at 895.

completely funded by public tax dollars,⁹⁰ these public officials controlled public-funded activities and should be accountable as to how those tax dollars are spent.

Similarly, the court of appeals considered and rejected as unavailing the associations' argument that they issue their own checks for payment of debts and use private accounting firms to review their financial management methods and prepare their tax returns.⁹¹ "This argument ignores that the dues are based upon an annual operating budget and are paid before services are rendered."⁹² Furthermore, the court of appeals found that the funding system employed by WSAC/WACO contravenes the statutes allowing them to receive public funds in the first instance.⁹³

c. *The Extent of Governmental Control*

Because the associations are controlled by county officials without private sector involvement, the court of appeals held that the degree of governmental control was sufficient to satisfy the third part of the four-part-test:⁹⁴ "[T]he associations themselves are completely controlled by elected and appointed county officials."⁹⁵

d. *Whether the Entity Was Created by Government*

WSAC and WACO were not directly created by the legislature. They were created, however, by government officials to carry out public sector business and are recognized by the legislature as "coordinating agencies."⁹⁶ In addition to WSAC's and WACO's enabling statutes, the associations are mentioned in thirty-five statutes, which impose additional "public" duties on them—none of which can be delegated to the private sector.⁹⁷ The additional duties include "con-

90. See Brief of Appellants, *supra* note 43, at 28 (citing Memorandum of Assistant Attorney General, Robert F. Hauth to State Auditor Robert V. Graham (August 28, 1969) 6-7 and its reference to State *ex rel.* Cruishank v. Baker, which recognized that WSAC was a long-existing private organization that counties were authorized, but not compelled, to designate as a coordinating agency and pay with the counties' public funds). See also *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (quoting *Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940)) (The *Inland* Court found, similar to the holding in *Lebron*, that the government is not able to evade the "most solemn obligations in the constitution by simply resorting to the corporate form.").

91. *Telford*, 95 Wash. App. at 164, 974 P.2d at 894 (noting that WACO, however, is audited by the State Auditor pursuant to RCW 36.47.060.).

92. *Id.*

93. *Id.* at 165, 974 P.2d at 895.

94. *Id.*, 974 P.2d at 895.

95. *Id.*

96. *Id.*

97. *Id.* at 163-64 n.18, 974 P.2d at 894.

sulting with state and county officials, appointing persons to state and county boards and committees, and participating in various state boards and commissions.”⁹⁸

G. *The Conclusion in Telford*

The court of appeals concluded,

Although WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency.⁹⁹ They serve a public purpose, are publicly funded, are run by government officials, and were created by government officials.¹⁰⁰

Applying the PDA to these facts, the court said, “[a]nalyzing these factors in the context of the intent of the PDA and the other relevant statutes reinforces the conclusion that the associations are public. The PDA is to be construed broadly to promote disclosure and accountability.”¹⁰¹ Allowing WSAC and WACO to use public funds to support private political agendas would contravene both policies.¹⁰² Therefore, the court of appeals held that the trial court correctly ruled that WSAC and WACO are “agencies” for purposes of the PDA.¹⁰³

III. THE IMPLICATIONS OF *TELFORD*

A. *Introduction*

The implications of the *Telford* decision extend well beyond the immediate question of whether two specific associations of government officials are “agencies” for the purpose of the Public Disclosure Act. *Telford* sheds light on, and begins to correct, the increasing tendency of government officials and agencies to create associations that then claim immunity from the rigorous constitutional and statutory controls designed to protect the citizens’ rights in a representative democracy.

98. *Id.*

99. See also *Dawson v. Daly*, 120 Wash. 2d 782, 789, 845 P.2d 995, 999 (1993) (finding the Snohomish County prosecutor’s office an agency subject to the PDA); *Overlake Fund v. City of Bellevue*, 60 Wash. App. 787, 810 P.2d 507 (1991) (finding a city’s design and development department a “local agency” for purposes of the public disclosure act).

100. *Telford*, 95 Wash. App. at 165, 974 P.2d at 895.

101. *Id.*

102. *Id.* at 166, 974 P.2d at 895.

103. *Id.*

The public policy rationale of *Telford* extends to administrative agencies that form associations of agencies in order to adopt positions, lobby legislatures, and take positions in court. In particular, if agencies can join with other public agencies to create and finance a new agency with public money, but then call it an exempt association, they have effectively delegated significant government power to an entity insulated from public accountability. Associations of agencies have been formed at the local, state, and national levels. While Congress and state legislatures may delegate certain government functions and powers to administrative agencies, there are important constitutional and statutory limits to that delegation.¹⁰⁴

B. The Context: The Rise of the Administrative State and Responses to Agency Power

Administrative agencies have long been subject to the criticism that they are a political hazard to representational democracy, and therefore must be subject to constant and careful legislative control and supervision.¹⁰⁵ Constitutional purists opposed the idea that the legislature could create administrative agencies, arguing that it would be a dangerous and unconstitutional delegation of legislative power to allow agencies to create and enforce government policies and administrative rules. Concern over the delegation of power to administrative agencies increased in the 1930s, when administrative agencies became so widespread that they became known as the new "fourth branch" of government.¹⁰⁶

Under President Franklin D. Roosevelt's New Deal administration of the 1930s and 1940s, administrative agencies were created at an accelerated pace and were charged with the task of implementing vast new economic and social programs.¹⁰⁷ The New Deal era saw a dra-

104. See WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 31-32 (3d ed. 1997).

105. See generally Lawson, *supra* note 6.

106. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW, 1-4 (1992). See also Linda Greenhouse, *Court Question: Is Congress Forsaking Authority?*, N.Y. TIMES, May 14, 2000, at L28. Since 1935, the nondelegation doctrine

has appeared little more than a historical footnote. It lingered as a quaint reminder of a formalistic approach to the constitutional separation of powers, even as the modern administrative state, with powerful regulatory agencies engaging in what often looks very much like law-making, grew up around it. But while it disappeared from public view . . . academics, lawyers for regulated industries, as well as the occasional judge, who found a disturbing lack of political accountability in Congress's penchant for shifting important policy choices to administrative agencies.

Id.

107. See FOX, *supra* note 104, at 34. See also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 51-72 (1965); ERNST HAWLEY, THE NEW DEAL AND THE

matic shift in the American structure of governmental power, and the number of federal agencies increased exponentially.¹⁰⁸ The rise of the administrative state prompted Justice Jackson to warn that administrative agencies "[had] become a veritable fourth branch of the Government, which has deranged our three-branch legal theories."¹⁰⁹

In 1946, in partial response to concerns over agency power, Congress enacted the Administrative Procedure Act (APA) to govern the procedures of agencies and set guidelines for and restrictions on agency power.¹¹⁰ In 1966, the federal Freedom of Information Act was added to the APA to provide public access to information held by agencies.¹¹¹ In 1976, the APA was again amended by the Sunshine Act, further limiting agency power by opening agency actions to public view.¹¹²

As discussed above, in 1972, the citizens of Washington State enacted the Public Disclosure Act, which applies to all agencies.¹¹³

C. Extension of Telford Beyond the Public Disclosure Act

The holding in *Telford* is limited to the Public Disclosure Act.¹¹⁴ Although application of the Open Public Meeting Act to WSAC and

PROBLEM OF MONOPOLY 19-34 (1966); AMAN & MAYTON, *supra* note 106, at 2-3 ("These new agencies were largely involved in market regulation, (e.g., the Securities and Exchange Commission) and in providing a new measure of personal economic security (e.g., the Social Security Administration).").

108. AMAN & MAYTON, *supra* note 106, at 3 (citing *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 386, (1995)).

109. *Id.* at 3 n.9 (citing *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952)). See also LAWSON, *supra* note 6, at 1233 ("Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Art. III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.").

110. This Act is codified at 5 U.S.C. §§ 551-59, 561-83, 701-06, 1305, 3105, 3344, 5372, 7521 (1946).

111. AMAN & MAYTON, *supra* note 106, at 6.

112. Some, like the Federal Records Act, 44 U.S.C. §§ 29-33, define the kinds of records that agencies must create and maintain. Disclosure statutes, like the Freedom of Information Act, 5 U.S.C. § 552, specify the circumstances under which members of the public may inspect those records, while 'confidentiality' statutes, such as the Privacy Act, 5 U.S.C. § 552a, or the Trade Secrets Act, 18 U.S.C. § 1905, specifically forbid disclosure of certain kinds of records or information. Finally, there are 'open meeting' laws, like the picturesquely titled Government in the Sunshine Act, 5 U.S.C. § 552b, that require certain administrative business to be carried on in public sessions.

RONALD A. CASS ET AL., ADMINISTRATIVE LAW 1129 (3d ed. 1998).

113. See discussion *infra* Part II.B.

114. *Telford*, 95 Wash. App. at 149, 974 P.2d at 886.

WACO was not directly addressed in the decision, *Telford* should be extended to laws similar to the PDA.

The Open Public Meetings Act of 1971,¹¹⁵ like the Public Disclosure Act, was created for the purpose of securing public accountability¹¹⁶ and it is to be liberally construed.¹¹⁷ The Open Public Meeting Act requires all public agency meetings and deliberations be held in public¹¹⁸ and broadly defines "public agency" as any sub-agency, policy group, or governing body.¹¹⁹ Public agencies must give public notice of the time and place of their meetings in the state Regis-

115. WASH. REV. CODE § 42.30 (1998).

116. WASH. REV. CODE § 42.30.010 (1998).

It is the intent of this chapter that [public agency] actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Id.

117. WASH. REV. CODE § 42.30.910 (1998). "The purposes of this chapter are hereby declared remedial and shall be liberally construed." *Id.*

118. WASH. REV. CODE § 42.30.030 (1971). "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." *Id.*

119. WASH. REV. CODE § 42.30.020 (1998).

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

Id.

trar and must give 20 days notice of any change in such scheduled time or place.¹²⁰

Any rule, regulation, order, or ordinance adopted in secret or in violation of The Public Open Meeting Act is considered null and void.¹²¹ Any member who participates in a secret meeting will be held personally liable, subject to a civil fine.¹²² Furthermore, citizens may

120. WASH. REV. CODE § 42.30.075 (1998).

State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date.

For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule.

Id. The time and place for meetings normally and in times of emergency is codified in RCW 42.30.070.

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. If, by reason of fire, flood, earthquake, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency. It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: PROVIDED, That they take no action as defined in this chapter.

WASH. REV. CODE § 42.30.070 (1998).

121. WASH. REV. CODE § 42.30.060 (1998).

(1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

(2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

Id. See *Mason County v. Public Employment Relations Comm'n, Teamsters Union, Local No. 378*, 54 Wash. App. 36, 771 P.2d 1185 (1989) (holding that the Open Public Meetings Act applies to the collective bargaining sessions in which decision-making representatives participate and that the public agency may not notify an agreement reached at meetings conducted in violation of the Act because the decision and agreement are void).

122. WASH. REV. CODE § 42.30.120 (1) (1998).

Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars.

attempt to enjoin¹²³ the public agency and, if successful, will be awarded all costs and attorneys fees.¹²⁴

While WSAC and WACO do not adopt rules or regulations, they do pass resolutions, vote to participate in political campaigns, vote to take positions in court, and otherwise influence government affairs and spend taxpayer funds. Thus, WSAC and WACO should give public notice of their meetings so that the public can participate in the decision-making. Proceedings affecting the expenditures of public funds that are closed to the public are not favored. If the activities of WSAC and WACO are made public, they can be discussed and evaluated by the public.

Examples where public scrutiny may have caused agencies to reconsider their decisions include recent actions taken by the Mercer Island School district and the Blaine School district. In February 2000, the Mercer Island School district agreed to pay former superintendent Paula Butterfield \$194,000, or about 21 months salary, after her termination.¹²⁵ Neither Butterfield nor the School Board gave reasons for the agreement, and, when asked by The Seattle Times and the Mercer Island Reporter for public information regarding the agreement, instead of complying with the PDA, the School District sued the two newspapers. The "[s]chool district's suit was a costly attempt to thwart the people's right to know,"¹²⁶ totaling over \$10,000 for just the Times case.¹²⁷

The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

Id.

123. WASH. REV. CODE § 42.30.130 (1998). "Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body." *Id.*

124. WASH. REV. CODE § 42.30.120 (2) (1998).

Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause.

Id.

125. Michael R. Fisher, *School District's Suit Was Costly Attempt to Thwart the People's Right to Know*, SEATTLE TIMES, Mar. 26, 2000.

126. *Id.*

127. *Id.* King County Superior Court Judge Steven Scott determined the district must release documents that the Mercer Island Reporter required under the Washington Open Public Records Act.

Similarly, the Blaine school district spent \$58,575 in taxpayer dollars on a suit against the ACLU's request for information on the district's 1995 suspensions.¹²⁸ The school district steadfastly refused to mail 13 pages of public records.¹²⁹ The amount spent in litigation costs would have been enough to "hire a teacher for a year and buy a car for student drivers."¹³⁰

If WSAC and WACO act as agents of officials, spending public money for public policy purposes, their actions are the type of matter open public meeting laws are intended to limit.

D. Should Telford Extend to Other Associations of Government Officials or Agencies?

The immediate holding in *Telford* applies to just two associations, WSAC and WACO. Should the rationale of *Telford* apply to other, similar associations? Should all associations of counties, cities, ports, public hospitals, public utility districts, and administrative agencies comply with the same laws that govern the officials and agencies that create them?¹³¹ When government officials or agencies form an association comprised of public officials and funded by public monies, should the association be considered an extension—an agent of the public entities it represents?

Other associations of agencies in Washington State were concerned that the principles established in *Telford* would apply to them. The Association of Washington Cities (AWC) intervened in *Telford* and argued that the AWC engages in sensitive compensation research for local governments in labor-contract negotiations.¹³² The AWC apparently hoped to avoid PDA disclosure requirements for this research, even though the research is paid for by public funds and is used for public purposes.

WSAC and WACO implied that if Sunshine Laws apply to them, or to similar associations, the law may affect their ability to compete with private corporations.¹³³ Even if this is true, the legisla-

128. Scott Sunde, *District's ACLU Tiff Costs It \$58,000*, SEATTLE POST-INTELLIGENCER, Mar. 3, 2000, at A1. The amount paid is nearly \$20,000 more than the average salary for the district's teachers, librarians, and counselors, according to the Washington Education Association. *Id.* at A4.

129. *Id.*

130. *Id.*

131. See Eure, *supra* note 10, at NW1 (presenting the opinion of Shawn Newman, president of Citizens for Leaders with Ethics and Accountability Now).

132. *Id.*

133. *Id.* Stan Finkelstein, executive director of the Association of Washington Cities said, "If we are a public agency, it would constrain our ability to be advocates to the same extent that major corporations or business groups or labor unions are free to advocate." Mr. Lowe, executive

ture should determine whether government agencies should compete with private corporations. Full disclosure under the PDA is required so that citizens can discover and debate the wisdom of a government agency entering into competition with private sector businesses.¹³⁴

Washington State has had experience with state agencies, public utility districts, and municipalities entering into the business of building nuclear power plants and failing, creating the largest municipal bond default in United States history.¹³⁵ That association, once called the Washington Public Power Supply System (WPPSS) has changed its name but not its basic structure, which is governed by a collection of state agencies.¹³⁶ In another recent example, the Washington Association of Sheriff and Police Officers recently embarked on a side business of electronic home monitoring. This once private industry is now owned and operated by the association. When asked to provide information regarding the basic structure of the business, the association denied the request, stating that it was not a public agency. Upon learning this, Paul Telford remarked, "these associations take up attributes of both public and private—whatever suits them at the moment."¹³⁷

Numerous associations and councils in Washington State are potentially subject to the rationale of the *Telford* decision.¹³⁸ These associations of government officials and agencies should not resist the principle of full disclosure, open meeting law requirements, and prohibitions on involvement in political activities.

director of WSAC stated that "the strength of this organization is in the political strength of its membership." *Id.* at NW3.

134. See *Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wash. 2d 874, 691 P.2d 524 (1984) (affirming that these public utility districts and municipalities had no authority to enter into the bond contracts they made).

135. See D. VICTOR ANDERSON, *ILLUSIONS OF POWER: A HISTORY OF THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS)* (1985).

136. See Northwest Energy (formerly WPPSS) <<http://www.whp2.com/default.htm>>.

137. Telephone Interview with Paul Telford (Mar. 13, 2000).

138. For example, those potentially affected include Washington State Bar Association, Washington Association of Cities, Washington City Management Association, Association of District and Municipal Court Judges, Washington State Hospital Association, Washington State Law Enforcement Association, Northwest Public Power Association, Washington Public Ports Association, Washington State Association of Prosecuting Attorneys, Washington Association of Public Utility Districts, Washington Association of School Administrators, and Washington State School Director's Association.

*E. Constitutional Implications of Telford—the
One-Person-One-Vote Issue*

"[T]he right to choose a representative is every man's portion of sovereign power."¹³⁹

The one-person-one-vote principle of the Equal Protection Clause of the Fourteenth Amendment is a basic principle of representative government.¹⁴⁰ "The fundamental premise of the federal voting rights law is that democratic government is government by the consent of the governed."¹⁴¹ Therefore, votes of citizens are to be given equal weight: "[n]o person's vote may be reduced in value, compared to the votes of others, because of where he or she happens to live in the electoral district."¹⁴²

Thirty-two years ago, the Supreme Court extended the one-person-one-vote requirement to local governments in *Avery v. Midland County*.¹⁴³ The *Avery* court rejected the argument that localities are mere administrative arms of the state and not autonomous governments.¹⁴⁴ The *Avery* Court also rejected the argument that the county commissioners court's legislative functions were negligible and therefore distinguishable from those of a state legislature.¹⁴⁵ Like *Telford*, the *Avery* Court looked to the commissioners court's function and power. The Court determined that the commissioners court had the authority "to make a large number of decisions having a broad range of impacts,"¹⁴⁶ and therefore, it must comply with the one-person-one-vote principle.¹⁴⁷

Since *Avery*, a number of lawsuits based on the one-person-one-vote principle have changed the structure of local governments.¹⁴⁸ These suits, stemming from claims of over- or under-representation, have raised the issue of fair representation and have invalidated New York City's Board of Estimate,¹⁴⁹ Chicago's school decentralization plan,¹⁵⁰ the funding mechanism for Southern California's rapid transit

139. *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 888 (W.D. Wash. 1990) (citing *Luther v. Borden*, 48 U.S. (7 How.) 1, 30 (1849) (statement of counsel, Daniel Webster)).

140. *Id.*

141. Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 342 (1993).

142. *Cunningham*, 751 F. Supp. at 887.

143. 390 U.S. 474 (1968).

144. *Id.* at 482-83.

145. *Id.* at 483.

146. *Id.*

147. *Id.* at 484-85.

148. Briffault, *supra* note 141, at 405.

149. *Board of Estimate of N.Y. v. Morris*, 489 U.S. 688 (1989).

150. *Fumarolo v. Chicago Bd. of Ed.*, 566 N.E.2d 1283 (Ill. 1990).

system,¹⁵¹ and the regional government of the Seattle metropolitan area.¹⁵²

In *Cunningham v. Municipality of Metropolitan Seattle*,¹⁵³ the plaintiffs, registered voters in King County Washington, challenged the constitutionality of the method by which the governing council of the Municipality of Metropolitan Seattle (Metro) was selected.¹⁵⁴ United States District Court Judge William Dwyer held that Metro was subject to the constitutional one-person-one-vote principle and that its selection process was illegal.¹⁵⁵

The one-person-one-vote principle applied in *Cunningham* should apply to associations of government officials or agencies as discussed in *Telford*. In *Telford*, WSAC and WACO collected dues from member counties based on their population.¹⁵⁶ There is, however, no discussion in the *Telford* case files as to whether the decisions made by WSAC and WACO on how to spend those public funds were made by county officials in votes based on the same population ratios as the counties they represented. If a taxpayer citizen in one county can have his or her taxes used in ways that do not reflect one-person-one-vote principles, does this raise a constitutional question? At what level of spending does the one-person-one-vote principle apply? Should the principle apply whenever dues are based on population? What if dues are spent on lobbying matters those citizens oppose? Does this raise First Amendment concerns as well? How can WSAC use taxpayer funds to oppose a citizens' initiative without violating First Amendment rights, particularly if one-person-one-vote principles are not in place?

In sum, it cannot be determined from the record in the *Telford* case how the county officials who control WSAC and WACO determined to spend taxpayer funds. This lack of open public information demonstrates the inability of the public to hold these associations of public officials accountable for their decisions, thus undermining representative democracy. If citizens disagree with the activities of associations, who do they hold accountable in the next election, and will their votes be equally weighed?

151. *Southern California Rapid Transit Dist. v. Bolen*, 269 Cal. Rptr. 147 (Cal. Ct. App. 1990), *rev'd*, 3 Cal. Rptr. 2d 843 (Cal. 1992).

152. *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885.

153. *Id.*

154. *Id.* at 887.

155. *Id.* at 895.

156. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 155, 974 P.2d 886, 890 (1999).

IV. LEGISLATIVE RESPONSE

This section will briefly examine whether the Washington State Legislature has delegated too much power to associations of officials and agencies. The legislature has already attempted to statutorily reform WASC and WACO;¹⁵⁷ WSAC and WACO have ignored these actions.¹⁵⁸ This response raises substantial questions about the delegation of government power and money to associations who act and argue as if they are immune from public control. Therefore, the question becomes whether the legislature has allowed a delegation of too much of its power and whether it should (1) restrict associations of government officials or agencies to narrowly defined, nondiscretionary information activities, and (2) open these associations to more effective public disclosure requirements such as could be provided in an Internet sunshine in government act.

A. *Legislative Restrictions*

In 1996, Paul Telford attempted to pass a bill in the Washington State Legislature restricting associations like WSAC and WACO. The proposed bill rendered any public association receiving twenty-five percent or more of its revenue from dues subject to the PDA. The house eventually dropped the bill. However, Senator McCaslin introduced the bill to the Senate,¹⁵⁹ and it passed in 1997. While the bill was being deliberated in the Senate, Mr. Telford tried for two months to meet with the Governor to discuss the bill. Ironically, Mr. Telford was invited to speak with a representative of the Governor the same day the Governor vetoed the Senate Bill.¹⁶⁰

Alternatively, the state legislature could prohibit all associations controlled by government officials or agencies from spending any funds on lobbying of any type, expressly subjecting those public associations to the Open Records portion of the PDA and Open Public Meetings Act and imposing fines on public associations that violate

157. WASH. REV. CODE § 36.47.070 (1998).

It is the desire of the legislature that the Washington State Association of County Officials, as set forth in chapter 36.47 RCW and the Washington State Association of Counties, as set forth in RCW 36.32.350, shall merge into one association of elected county officers. Only one association shall carry out the duties imposed by RCW 36.32.335 through 36.32.360 and RCW 36.47.020 through 36.47.060.

Id.

158. Telford v. Thurston County Bd. of Comm'rs, No. 96-2-04116-2, at 27, n.71 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.). (In 1977, the Legislature directed WSAC and WACO to merge into one organization pursuant to RCW § 36.47.070 "Merger of state association of county officials with state association of counties.").

159. S.B. 5460, 55th Leg., Reg. Sess. (1997).

160. Telephone interview with Paul Telford (Mar. 13, 2000).

the statutes. The state legislature should initiate oversight hearings to explore the extent of association activities and require annual reports and state audits that would be fully open to public inspection.

Another proposed legislative restriction is the establishment of a "Legislative Responsibility Act." This act, similar to the Congressional Responsibility Act, proposed by New York Law School's Professor David Schoenbrod, would prohibit the legislature (or Congress) from drafting vaguely worded laws, and would hold the legislature accountable for the results of its laws rather than permitting the legislature to pass the buck (and the accountability) to an agency.¹⁶¹

B. *The Internet Sunshine in Government Proposal*

With current technology, people are able to stay informed and connected with the click of a mouse button. The Internet provides a cheap, fast, and reliable way to access information on any topic from anywhere in the world. The creation of an Internet Sunshine Act would be a useful tool in effectuating the existing Sunshine Laws of the Public Disclosure Act and Open Meeting Law.

All government organizations and most public associations are already equipped with homepages detailing their organizations. It would be a relatively simple matter to post meeting agendas, minutes of meetings, voting records of members, budgets, and other information on the Internet. Information request links should be set up on homepages to ensure that every citizen has immediate access to information regarding how his or her tax money is spent.

V. CONCLUSION

Associations of government officials and agencies should be subject to the same laws and constitutional constraints as individual officials and agencies. This will ensure public accountability. If associations are controlled by the public sector and affect public policy, they are agents of the government. Associations such as WSAC and WACO act as agents and must be subject to the scrutiny of the public and must remain accountable to the public. The *Telford* decision, while focusing specifically on Washington State's Public Disclosure Act, should be read broadly, subjecting shadow governments, or *Tel-*

161. John J. Fialka, *Professor Wants Congress to Clean Up Its Act*, WALL ST. J., May 20, 1999, at B14. Congress's vaguely worded delegations, Mr. Schoenbrod now believes, "have turned environmental laws into mass wishing" that actually endangers the environment because it invites delays and leaves Congress unaccountable for results." *Id.* David Schoenbrod claims that Congress uses delegation precisely for the purpose of avoiding responsibility for hard choices. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L. J. 1399, 1406 (2000).

ford-type public associations, to the sunlight of public accountability. Holding *Telford*-type associations accountable to all Sunshine Laws and creating new tools to effectuate those laws (Internet sunshine law) will ensure public accountability, which is the foundation for public trust and confidence—the bedrock of our republican system of representative government.

VI. EPILOGUE

Five years ago Paul Telford requested the Washington State Attorney General to help him enforce the state's Public Disclosure Act against two associations of state government officials—The Washington State Association of Counties and the Washington Association of County Officials.

Four years ago, having been turned down by the State Attorney General's office, Mr. Telford sued the associations to enforce the Public Disclosure Act himself. He prevailed on summary judgment in superior court.

The associations of government officials continued to resist Mr. Telford and appealed. After another two years, Mr. Telford again prevailed in a unanimous decision in the Washington State Court of Appeals.

The court of appeals found that WSAC and WACO "serve a public purpose, are publicly funded, are run by government officials, and were created by government officials."¹⁶² All in all, "their essential functions and attributes are those of a public agency."¹⁶³ They act as agents for government officials, using taxpayer funds.

In 2000, Mr. Telford filed a Public Disclosure Act request to find out how much of the public's money was spent to resist his efforts to enforce the Public Disclosure Act against WSAC and WACO.¹⁶⁴ WSAC and WACO spent significant amounts of taxpayer funds to oppose the application of the PDA to its actions. The use of such money is itself subject to the criticism that the public needs more control over such associations. WACO refused Mr. Telford's request, stating that "the Public Disclosure Act does not apply to WACO."¹⁶⁵ WSAC refused with the same conclusion.¹⁶⁶ Mr. Telford stated, "This will all lead back to court; I'm discouraged."¹⁶⁷

162. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 165, 974 P.2d 886, 895 (1999).

163. *Id.* at 163-64, 974 P.2d at 894.

164. Telephone interview with Paul Telford, (Mar. 16, 2000).

165. *Id.*

166. *Id.*

167. *Id.* Letter from Paul Telford to author (March 19, 2000) (on file with the *Seattle*

University Law Review). Mr. Telford has filed suit against WSAC/WACO for refusing to comply with the PDA. The file number of the lawsuit is Thurston County No. 00-2-01122 6. Mr. Telford wrote:

I received a letter from WSAC. It has the usual disclaimer that the PDA doesn't apply but also says they spent \$13,722.41 in attorney fees 'from Superior Court but I wouldn't put it past them to twist the wording. This seems a little low to me considering all the briefing, hearings and motions. Plus \$7500 to me. One can safely assume that that WACO put up the same amount. So, total WSAC and WACO litigation costs would be \$42,444 (at least). Thurston County also spent Dep. Prosecutors time on their part. I would doubt if they keep track of man hours spent on this case. And, it is still in litigation. Paul Telford.