No. 99415-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, a Washington nonprofit corporation,
Respondent,

v.

WASHINGTON COALITION FOR OPEN GOVERNMENT, a Washington nonprofit corporation,
Petitioner.

RESPONDENT WSAMA'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Washington Coalition for Open Government ("WCOG") disagrees with the Court of Appeals' opinion in this case, but fails to present any grounds for this Court's review. Respondent Washington State Association of Municipal Attorneys ("WSAMA") respectfully requests that this Court deny the petition.

Over the past 22 years, Washington courts have used the *Telford* test[1] to assess, on a case-by-case basis, whether a private entity is the functional equivalent of a public agency that should be subject to the Washington Public Records Act ("PRA"). In a detailed unpublished opinion, the Court of Appeals correctly applied the test to conclude that WSAMA, a private, non-profit organization, is not subject to the PRA.

WCOG gives no more than lip service to RAP 13.4(b)(1) and (b)(2), and fails to establish how those grounds are met here (and they are not). WCOG attempts to distinguish or analogize *Telford* and *Fortgang*, but does not identify any actual *conflict* between the Court of Appeals' holding and those cases. Nor could it. The Court of Appeals adhered to the established test to determine functional equivalency and then applied it to the pertinent facts. Unable to identify an actual conflict, WCOG relies on conclusory

[1] Named for *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999). This Court adopted the *Telford* test in *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 532, 387 P.3d 690 (2017).

policy assertions, misstates the record and the Court of Appeals' opinion, and ignores the settled considerations for applying the *Telford* test. This is insufficient to merit review. Further, WCOG's mere objection to the Court of Appeals' fact-specific application of the *Telford* test to WSAMA is not an "issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4). This Court should deny review.

II. IDENTITY OF RESPONDENT

Respondent is WSAMA, the Plaintiff below.

III. COUNTERSTATEMENT OF THE ISSUES

1. Should discretionary review be denied where the Court of Appeals' unpublished decision is consistent, rather than in conflict, with *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999) and *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017), and where the court applied the *Telford* test to WSAMA straightforwardly and in accordance with that precedent?

2. Should discretionary review be denied where the Court of Appeals' unpublished decision does not raise an issue of substantial public interest but maintains the status quo that WSAMA is not a public agency and that WCOG may seek the public records it desires from government entities?

IV. COUNTERSTATEMENT OF THE CASE

A. WSAMA—a private non-profit organization—offers social and educational opportunities for attorneys interested in municipal law.

A group of municipal attorneys meeting at an AWC convention founded WSAMA in 1957 as an independent association. Clerk's Papers ("CP") 104, 116. WSAMA's governing Constitution sets out its original purpose: to allow attorneys practicing municipal law to meet and foster "friendly and collaborative relationships" to hopefully result in "uniform opinions upon common municipal problems." *Id.* at 116-17. In 1986, WSAMA became a private non-profit, retaining its original mission while adding that its purpose "is primarily educational." *Id.* at 104, 388.

As of October 2018, approximately 34% of WSAMA's members worked for private law firms or non-profits, or were retired lawyers. *Id.* at 105. WSAMA has three membership tiers, each of which offer members opportunities to engage with and shape WSAMA's work. *Id*. at 384.[2] All members contribute to designing, running, and sponsoring WSAMA's conferences and directing WSAMA's amicus activities. *Id.* at 385-86.

[2] General members serve by election, appointment, employment or contract as an attorney or prosecutor for any Washington city or town; honorary members have served for 25 years or more as a city attorney or prosecutor or as an assistant or deputy city attorney or prosecutor; and associate members are attorneys or city officials who do not serve as an attorney for Washington cities. Associate members cannot serve on or vote with the Board but can join any WSAMA Committee. CP 384.

WSAMA's governing Board includes five officers and six members elected from the membership. *Id*. at 104. Board members serve in an independent volunteer capacity. *Id*. No city has a right to a Board seat or designated role; rather, municipal attorneys leave and join the Board year to year. *Id*. at 385. The Board includes attorneys from private firms doing municipal work. *Id.*[3] WSAMA does not maintain office space, directly employ staff, or participate in government benefit programs. *Id*. at 105.

To further its educational purpose, WSAMA provides continuing legal education ("CLE") programs at semi-annual conferences open to any Washington State licensed attorney. *Id.* at 105. These conferences make up WSAMA's primary revenue source, accounting for approximately 68% of its budget. *Id*. at 105, 134. Conference sponsorships and membership dues are other major revenue sources making up approximately 16% and 11% of the budget, respectively. *Id*. Beyond this, WSAMA has no other substantive revenue and possesses no assets. *See id*. at 105.

In addition to its educational activities, WSAMA submits amicus briefs pursuant to requests from municipal entities. *Id.* WSAMA's Amicus Committee assesses whether a legal issue in a request is of substantial interest to WSAMA's membership as a whole. *Id.* at 44-45. The Amicus

[3] *See* Board of Directors 2020-2021, WSAMA, https://wsama.org/ (last visited Mar. 3, 2021).

Committee then makes the decision regarding most requests. *Id.*[4]

B. WSAMA voluntarily responded to a records request and the superior court denied WSAMA's request for a declaration that it is not subject to the PRA.

In 2018, attorney and WCOG board member William Crittenden requested records under the PRA from WSAMA. *Id*. at 106, 136-38. WSAMA responded that it was not an "agency" subject to the PRA, but nonetheless voluntarily produced non-exempt materials and a log describing exemptions applied to a limited set of documents. *Id*. at 106-07, 140-42, 144-52, 154-59. Crittenden objected to the exemptions. *Id*. at 108, 161. WSAMA retained pro bono counsel, who offered to discuss the objections and to submit the records for prompt in camera review. *Id*. at 72, 77, 109. Crittenden did not respond. *Id*. at 72-73.

To avoid further cost and any potential future issues, WSAMA sought declaratory and injunctive relief regarding the exemptions and the PRA's applicability to WSAMA. *See id*. at 1-5. On August 30, 2019, the superior court issued a final order ruling that WSAMA was the functional equivalent of an agency. *Id*. at 456-67, 556, 560-61.[5] The court did so

[4] A limited set of cases in which a city or town may be an adverse party or that might create controversy among WSAMA members require Board approval. *Id.* at 45. Additionally, WCOG's broad assertion that WSAMA does not check for conflicts, Pet. at 5, is false. The need for conflict checks as WCOG describes would only arise from WSAMA's legal work on amicus briefs, and in those situations, WSAMA has a conflicts system in place. CP 46-47 (describing this system).

[5] The court did so after twice amending its order after WSAMA moved to clarify conflicting rulings and following a hearing during which the tenor of WCOG's attorney's

despite concluding that two of the *Telford* factors, function and creation, weighed against functional equivalency. *Id*. at 460-62, 464-65. The court also agreed the makeup of WSAMA's funding "suggest[s] that WSAMA is not an agency." *Id*. at 462. Nonetheless, the trial court concluded that factor and the government involvement factor weighed toward functional equivalency, relying on *Nissen*,[6] which is not part of the *Telford* test. *Id*. at 462-64. Rather than analyze Washington cases considering functional equivalency to balance the factors, the court again relied on *Nissen* and an unpublished out-of-state case to conclude that WSAMA should be subject to the PRA. *Id*. at 465-66. Subsequently, despite acknowledging that WSAMA complied with the PRA, the trial court concluded that to "support the policy of the PRA" it must award $75,240 in fees. *Id*. at 709.

C. The Court of Appeals reversed the superior court, and confirmed WSAMA is not subject to the PRA.

In an unpublished decision, the Court of Appeals reversed the superior court, applying the four-factor *Telford* test and the reasoning from its progeny, including *Fortgang*. Op. at 7-19. After a detailed analysis of each factor, the court concluded "WSAMA's activities do not serve a core governmental function and are not primarily government funded" and that

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argument lead the court to intervene several times, requesting "let's not raise our voice," and not to "throw rocks." *Id*. at 450-52, 456-67, 522, 553-54, 642-43, 555-66; Report of Proceedings ("RP") at 36, 60.

[6] *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 876, 357 P.3d 45 (2015).

"WSAMA is not governmental in origin, and on balance, the degree of governmental control over WSAMA does not establish that it is the functional equivalent of an agency for purposes of the PRA." *Id*. at 2. The court also rejected the superior court's fee award as "improper." *Id*. at 20.

V. ARGUMENT

Although it spends little more than one page analyzing them, WCOG cites three grounds for review under RAP 13.4(b)(1), (2) and (4). It contends that the Court of Appeals' decision conflicts with this Court's *Fortgang* decision and the Court of Appeals' *Telford* decision, and that the case involves an issue of substantial public interest. Pet. at 19-20. As WCOG's petition shows, review is unwarranted on any of these grounds.

A. The Court of Appeals' analysis accords with *Telford* and *Fortgang* presenting no conflict warranting review.

This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of the Court or with a published opinion of the Court of Appeals. RAP 13.4(b)(1),(2). WCOG claims a conflict with only two cases, *Telford* and *Fortgang*, but fails to identify any actual conflict between either case and the Court of Appeals' decision. Instead, WCOG's argument expresses dissatisfaction with how the court applied *Telford* and *Fortgang* from a policy perspective. Pet. at 10-13, 15, 19. And while it is true that the PRA has a broad overarching mandate in favor of *government* transparency, under the *Telford* test, courts

only extend the PRA to private entities in the limited instance where they "step into the shoes" of public agencies sufficiently to be treated as one. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 194, 181 P.3d 881 (2008). As explained below, that WCOG takes issue with the result of the Court of Appeals' application of that test does not change that it is a consistent application, particularly as *Fortgang* interpreted *Telford*.[7]

1. The Court of Appeals' government function analysis is consistent with *Telford* and *Fortgang*.

Courts evaluate the first *Telford* factor, whether an entity performs a government function, based on whether the entity's activities are "*core* government functions or functions that *could not* be delegated to the private sector." *Fortgang*, 187 Wn.2d at 524 (quotation and citations omitted) (emphasis added). The Court of Appeals relied on this standard and considered whether legislation "defines an activity as inherently public, prevents it from being delegated to the private sector, or obligates the entity at issue to perform a function." Op. at 8-9 (citing *Fortgang*, 187 Wn.2d at

[7] In *Fortgang*, this Court adopted the *Telford* balancing test. 187 Wn.2d at 523. Under this test, courts examine whether: (1) the entity performs a core, non-delegable government function; (2) government primarily funds the entity's activities; (3) government is significantly involved with or regulates the entity's day-to-day activities; and (4) government created the entity. *Id*. at 524-32. Given that *Fortgang* is the controlling authority regarding functional equivalency, if the Court of Appeals' determination is consistent with *Fortgang*, then it should be consistent with *Telford.*

524-25, *Clarke,* 144 Wn. App. at 192-94, and *Shavlik v. Dawson Place*, 11 Wn. App. 2d 250, 262-63, 452 P.3d 1241 (2019)).

Applying these considerations, the court accurately concluded "no legislation delegates authority to WSAMA" and "WSAMA's activity of hosting CLE conferences is a common educational activity taken by private entities and is not a uniquely government function." Op. at 8-9.[8] The court also rejected WCOG's contention that WSAMA's amicus activity addressing issues of interest to member cities and towns is a non-delegable government function when "a private party could be similarly concerned by these public issues and submit an amicus brief" regarding the same topics. *Id.* at 11.

WCOG ignores this analysis and its alignment with *Telford*, complaining that the court should not have assessed whether a private party could engage in the same amicus activity as WSAMA. Pet. at 12.[9] Yet this Court has expressly directed that courts should evaluate this factor based on whether an entity's function "could not be delegated to the private sector." *Fortgang*, 187 Wn.2d at 524.

[8] The superior court also concluded that WSAMA's functions of providing conferences and amicus briefs are not "under the government's unique purview." CP 460-62.

[9] WCOG raises no conflict with the Court of Appeals' conclusion regarding WSAMA's primary function of providing CLEs, nor does WCOG contest that serving as an amicus is a function that numerous private parties perform.

Further, the Court of Appeals' conclusion that WSAMA's amicus activities are not core government functions, even if they may support government viewpoints, aligns with *Telford* and *Fortgang*. As *Fortgang* makes clear, acting as a government entity *could* act does not establish that an activity is a core government function under the *Telford* test. *See Fortgang,* 187 Wn.2d at 514, 526 (operating zoo not a government function despite fact that City operated same zoo for decades because a private entity could assume the role). The conclusion that a private party could perform an amicus function, and therefore weighing the factor "against finding that WSAMA is a public entity," Op. at 10, is consistent with case law.

2. The Court of Appeals properly assessed the level and nature of WSAMA's funding.

As to the "government funding" factor, the court again applied the framework from *Telford* and *Fortgang*, which considers percentage of funding and kind of government funding a private entity receives. Op. at 11-13 (citing 187 Wn.2d at 527-529; 95 Wn. App. at 165). As part of this analysis, the court correctly identified that under *Fortgang*, "a fee-for-service model weighs against" finding functional equivalency, and that under *Telford*, courts consider if an entity receives "in-kind support and other governmental benefits." Op. at 12 (citing 187 Wn.2d at 528-29; 95 Wn. App. at 165).

Applying these principles, the court accurately concluded that WSAMA's budget, over 91 percent of which comes from a fee-for-service model from its conferences, "does not suggest WSAMA is publicly funded." Op. at 12; CP 134. The court also determined that the record does not support WCOG's contention that WSAMA uses "large amounts" of city resources as in-kind support. *Id.* at 13. Accordingly, the court found that this factor weighs against functional equivalence. *Id*. at 14. WCOG does not identify a conflict with this determination, but instead makes several assertions unsupported by the law or the record.

First, WCOG is incorrect that the nature of public funding in WSAMA's budget is "largely irrelevant." *See* Pet. at 12. WCOG's approach is contrary to *Fortgang* and *Telford*. *See* 187 Wn.2d at 529 (observing, "no Washington case concludes that an entity's funding supports PRA coverage in the absence of majority public funding"); 95 Wn. App. at 165 (holding the entities were "mostly supported by public funds").

Second, WCOG attempts to manufacture a conflict based solely on the unquantified value of time and resources volunteers contribute to WSAMA. WCOG falsely asserts that it submitted "voluminous documentary evidence" that "proved" the "undisputed fact" that WSAMA members use "unlimited" and "substantial amounts of government

resources." Pet. at 4-5, 12, 14.[10] WSAMA, however, did dispute this contention and produced evidence regarding its direct funding and resources. CP 845-51, 385-86, 105-106, 400-02 (setting forth WSAMA's arguments and evidence, including regarding one publicly employed WSAMA member's time commitment and resources used to volunteer).[11] As the Court of Appeals correctly concluded based on the actual record, the "use of city e-mail" or fixed costs like use of a city computer come at either no or negligible public cost. Op. at 13. This is no different than many volunteer activities, such as bar association involvement, which public attorneys engage in as members of the profession. The Court of Appeals correctly rejected WCOG's arguments. *Id*. at 14.

Third, WCOG is incorrect that the Court of Appeals "erroneously shifted the burden of proof" and "should have required" WSAMA to submit additional evidence to refute WCOG's claims. Pet. at 14-15. In support,

[10] What WCOG actually submitted and relies on here is the following: (1) a letter offering one city attorney's personal opinion, (2) a handful of emails from WSAMA Amicus Committee members using public and private email addresses (some sent at close of business), (3) two memoranda in which the Amicus Committee Chair used his public letterhead, (4) sections of WSAMA amicus briefs on which volunteer amicus writers included their public employment titles, (5) the superior court's order, and (6) WSAMA's former Amicus Committee Chair's declaration, which nowhere states that WSAMA members use "substantial amounts of government resources" as WCOG asserts. Pet. at 4-6, 12-13 (citing CP 44-48, 270, 195-203, 331-72, 244-46, 459).

[11] Contrary to WCOG's assertion that a WSAMA member's declaration "speciously compared WSAMA to the Kiwanis Club," Pet. at 13, the declaration quoted from a City of Auburn Resolution authorizing reimbursement for its employees' membership in professional organizations or civic or service organizations, like WSAMA. CP at 401, 406.

WCOG cites only inapposite authority without analysis. Pet. at 14.[12] Additionally, the Court of Appeals made no determination "erroneously blaming WCOG", Pet. at 13, for not producing evidence—let alone any determination regarding burden of proof at all.[13] It simply held that the evidence of record did not entitle WCOG to relief.

Further, the Court of Appeals' approach to the record accords with *Fortgang*. In *Fortgang*, a records requester asserted that the zoo's public funding should include the value of city land that the zoo sits on for free—without providing any evidence of the property's actual value. *Fortgang*, 187 Wn.2d at 527. Declining to analyze facts not in the record, this Court held the relevant inquiry should be on the fact that the zoo "receives a majority of its funding from private sources." *Id.* This Court did not remand

[12] WCOG cites RCW 42.56.550(4), which addresses PRA fee awards. RCW 42.56.550(1) addresses burden of proof, but for government agencies refusing to produce records on grounds of exemption. That is not at issue here, especially after WCOG conceded WSAMA properly produced and withheld limited materials (despite not being subject to the PRA). CP 747, 565. WCOG also cites *State v. Blair*, 117 Wn.2d 479, 485, 816 P.2d 718 (1991), which analyzes whether prosecutors may comment on failure to call a witness that it "is clear the defendant was able to produce" in a criminal case. *Id.* at 487. *Blair* establishes that this "missing witness inference" applies only in specific circumstances not at issue here. *See id.* at 488-91 (discussing the relevant considerations).

[13] Notably, WCOG was the moving party regarding whether WSAMA members were acting in their scope of employment and purportedly generating public costs from engaging with WSAMA, and sought declaratory relief in part, on that basis. CP 722. Thus, WCOG bore the ultimate burden of proof on this issue. *See Singer v. Metz Co*., 107 Wash. 562, 569, 182 P. 614 (1919) (concluding burden remained on party claiming scope of employment until end of trial). Moreover, because WCOG's argument regarding these costs was substantially speculative, WSAMA was not required to disprove it. *Jacobsen v. State*, 89 Wn.2d 104, 110-11, 569 P.2d 1152 (1977) (stating when moving party fails to sustain initial burden of proof, it is unnecessary for nonmovant to submit counter evidence).

to compel the zoo to assess and submit evidence regarding the value of the land to refute the claims that it was a functional equivalent—yet that is exactly what WCOG advocates should have happened here.

Finally, WCOG's erroneous focus on cities' PRA compliance requirements, Pet. at 7, 15, is equally unavailing. Cities regularly process records requests of all kinds, and there is no greater burden when they do so related to WSAMA than in any other context.[14] That WCOG is able to obtain all relevant public records from cities cuts against its argument that WSAMA is their functional equivalent. Additionally, the Court of Appeals only *acknowledged* that records WSAMA members create in the scope of their public employment would be subject to requests to their public employers. Op. at 19. The court then plainly cautioned that this concept was "*not* itself a factor that determines the characterization of an organization" under *Telford*. *Id.* (emphasis added). The Court of Appeals' analysis in this regard presents no conflict.

[14] Tellingly, not a single city WCOG attempted to implead in this matter raised any objection about the "burden" of responding to these requests. CP at 73; 23-34; RP 17-30. Indeed, given how many requests cities address regularly, WCOG's requests to the cities in this matter were hardly a "substantial burden." *See Performance Audit: The Effect of Public Records Requests on State and Local Governments*, Washington State Auditor's Office, (August 29, 2016), https://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1017396&isFinding=false&sp=false (last visited Mar. 3, 2021) (stating public agencies responded to *at least* 285,000 PRA requests in 2016 and that number of requests increases each year). WCOG's reliance on a public attorney's voicemail regarding ensuring consistent PRA compliance practices in the face of WCOG's numerous requests also fails to establish such a burden.

3. The Court of Appeals' assessment of the government control factor accords with *Telford* and *Fortgang*.

As this Court has stated, the key to the government control *Telford* factor is whether the government controls "day-to-day operations." *Fortgang*, 187 Wn.2d at 530. Pursuant to *Telford*, also relevant is whether "there is *no* private sector involvement or membership." 95 Wn. App. at 165 (emphasis added). The Court of Appeals relied directly on these standards to assess this factor. Op. at 14-15.

As the court observed, no government entity controls or directs WSAMA either in its day-to-day activities or in its overall activities. Op. at 15; CP 104-105. Specifically, no single city, nor even all cities collectively, have any authority to control WSAMA operations, including dissolution. RCW 24.03.220. Cities do not have a designated position, Board seat, or membership space with WSAMA. CP 385. And as the court acknowledged, unlike the *Telford* entities, whose membership consisted *exclusively* of public employees or officials, WSAMA has both private membership and board members. Op. at 15; CP 105, 385. Moreover, the court properly determined that "unlike in *Telford*, private citizens often have significant control over WSAMA's day-to-day affairs by serving on its committees." Op. at 15-16 (also citing *Fortgang*). The record supports this, detailing the significant involvement and input from non-government employed

WSAMA members in contrast to the *Telford* entities, which had no such private sector guidance or participation. *See* CP 385-86; 95 Wn. App. at 165.

Ignoring that the record supports the distinctions the court made between WSAMA and the *Telford* entities, WCOG simply asserts that WSAMA's "governing structure" is "indistinguishable" from those entities. Pet. at 17. WCOG fails to buttress this assertion with any record citation or analysis from *Telford*. And unlike WSAMA, the entities in *Telford* operated as directed by the 35 statutes mentioning them (including their enabling legislation) and did so entirely based on direct county funding. 95 Wn. App. at 163-64.

Moreover, WCOG's approach, based on a scope of employment analysis, would create a conflict with existing case law by effectively supplanting the *Telford* test. Pet. at 16-17.[15] WCOG relied almost entirely on the scope of employment test from *Nissen v. Pierce County*, 183 Wn.2d 863, 876, 357 P.3d 45 (2015), before the superior court. CP 741-46. When confronted with black-letter law that *Nissen* does not govern functional

[15] Contrary to WCOG's assertion and the superior court's incorrect finding, WSAMA did address whether its Board members act in the scope of their employment when volunteering for WSAMA. CP 838-40, 850-51, 385-86 (setting forth WSAMA's arguments and evidence). In addition, WSAMA never "mischaracterized its own governing structure" or membership tiers. Pet. at 8, 16. These structures are plain from WSAMA's website and WSAMA underscored them for the record after WCOG made the same false accusation to the superior court. *See* CP 722, 384-85; WSAMA, https://wsama.org/ (last visited Mar. 3, 2021).

equivalence,[16] WCOG attempted to shift to a more general tort concept of scope of employment on appeal. Brief of Respondent at 29-30. In its Petition, WCOG once again asks this court to superimpose a scope of employment test onto the *Telford* test. But the Court of Appeals' adherence to the established test over adopting WCOG's new one, presents no conflict and no issue for review.[17]

4. The Court of Appeals correctly assessed WSAMA's origin in contrast to the *Telford* entities.

Regarding the fourth factor, the entity's "creation," courts consider whether "special legislation" or public officials "acting in their official capacities in the furtherance" of public business incorporated the entity. *Fortgang*, 187 Wn.2d at 531-32; *Telford*, 95 Wn. App. at 165. Following these rules, the Court of Appeals assessed WSAMA's origins compared to those of the *Telford* entities, using the same considerations *Telford* used. Op. at 17-18 (citing 165 Wn. App. at 152-54, 165). Based on these considerations, the court concluded that in contrast to the *Telford* entities, no legislation created WSAMA nor was it "created to enable municipal

[16] *SEIU Local 925 v. Univ. of Wash.*, 193 Wn.2d 860, 869-70, 447 P.3d 534 (2019).
[17] WCOG's passing reference to *Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 137 P.3d 120 (2006) and *Shavlik*, 11 Wn. App. 2d 250 also fails to create a conflict. Just as the Court of Appeals did here, in *Spokane Research* and *Shavlik*, the courts assessed facts specific to the entities at issue to determine there was no "day-to-day government control." 133 Wn. App. at 605 (observing City was not involved in "day-to-day operations"); 11 Wn. App. 2d at 268 (weighing factor against functional equivalency even where entity had publicly-employed board members).

attorneys to do their job." *Id*. at 17. Rather, WSAMA was "incorporated under bylaws that state the organization is primarily educational." *Id*. Thus, the court concluded that WSAMA's origin is not "governmental in nature." *Id*. at 18.[18]

As with the other factors, WCOG fails to establish a conflict with this determination and *Telford* or *Fortgang*. Initially, the Opinion itself directly belies WCOG's assertion that the Court of Appeals "mischaracterized" AWC's role in acceding to WSAMA's formation. Pet. at 17-18; Op. at 2 (acknowledging WSAMA formed "with AWC's blessing"). Further, although municipal attorneys formed WSAMA at an AWC conference, CP 116, as the Court of Appeals correctly identified, "it is not sufficient that government employees were involved in an entity's creation for this factor to weigh toward functional equivalence," Op. at 16 (citing *Shavlik*, 11 Wn. App. 2d at 268-69).

Moreover, the Court of Appeals properly relied on the facts that the legislature did not direct WSAMA to form and that some municipal attorneys are not WSAMA members. *See* Pet. at 18 (challenging the same). *Telford* made plain that these *are* relevant considerations to assessing the creation factor. 95 Wn. App. at 165 (holding this factor weighed toward

[18] The superior court also concluded this factor weighed against functional equivalence because municipal attorneys formed WSAMA as an independent association and it operated as a private non-profit, undirected by statute. CP 464-65.

finding functional equivalency where the legislature formally recognized the entities as agencies to carry out state policy and where all county officials were members that could "hardly carry out their statutory duties in any other way" besides being members).

Fortgang also supports the Court of Appeals' determination regarding this factor. Municipal attorneys formed WSAMA as an independent association, and WSAMA so operated until incorporation as a private nonprofit. CP 116-17. *Fortgang* supports the conclusion that even where government is involved in developing an entity, its origin may still weigh against functional equivalency where the entity goes on to operate independently. *See* 187 Wn.2d at 531-32 (holding even where city started and ran zoo at issue, the origin factor weighed against applying the PRA because private individuals then formed a private non-profit to run it).

In sum, the Court of Appeals' adhered to the authority of this court and the earlier *Telford* decision, and WCOG fails to show any "conflict" justifying this Court's discretionary review. *See* RAP 13.4(b)(1), (2).

B. The straightforward application of the *Telford* test to one entity is not an issue of substantial public interest.

WCOG also fails to raise an "issue of substantial public interest" meriting this Court's review. RAP 13.4(b)(4). Despite referencing RAP 13.4(b)(4), WCOG never states what alleged "issue of substantial public

interest" is involved here. The Court of Appeals, however, did no more than maintain the status quo. It applied the proper test. As to any impact on cities, they must respond to all PRA requests regardless of whether WSAMA is subject to the PRA. And whether it is more or less efficient for a requestor to receive records from a nongovernmental entity is not a basis to disregard the *Telford* test.

Finally, WCOG raises other "'W' organization[s]," and requests that this Court create precedent to apply to organizations WCOG feels are akin to WSAMA. Pet. at 19-20. This request ignores the *Telford* test's purpose, as this Court stated in *Fortgang*: to assess if the "particular" "entity at hand," should be subject to the PRA. 187 Wn.2d at 524. WCOG's desire to create precedent to assess other, theoretical organizations is not an "issue of substantial public interest."

VI. CONCLUSION

WCOG has demonstrated no basis under RAP 13.4(b) for this Court to accept review. The court's decision is consistent with the fact-specific analysis from *Telford* and *Fortgang*. WSAMA respectfully requests that this Court deny WCOG's Petition.

RESPECTFULLY SUBMITTED this 3rd day of March, 2021.

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