

No. 39366-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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Arthur West,

Appellant,

v.

Washington State Association of Counties, et.al.

Respondents

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BRIEF OF RESPONDENT WASHINGTON ASSOCIATION OF  
COUNTY OFFICIALS

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Jeffrey S. Myers, WSBA #16390  
Law, Lyman, Daniel, Kamerrer &  
Bogdanovich, P.S.  
Attorneys for Respondent  
Washington Association of County  
Officials (WACO)

Mailing Address:  
P.O. Box 11880  
Olympia, WA 98508-1880

Street Address:  
2674 R.W. Johnson Blvd.  
Tumwater, WA 98501

Tel: (360) 754-3480  
Fax: (360) 357-3511

ORIGINAL

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## I. INTRODUCTION

This case presents the issue of whether an incorporated association of county officers constitutes a “public agency” under the Open Public Meetings Act (“OPMA”). Because the definitions in the OPMA are distinct and different from those in the Public Disclosure Act, the trial court correctly dismissed plaintiff’s OPMA claims against the Washington Association of County Officials (“WACO”).

## II. STATEMENT OF CASE

### A. **WACO IS FORMED AS A NON-PROFIT, INCORPORATED, VOLUNTARY ASSOCIATION OF COUNTY OFFICIALS.**

WACO was created by the combined action of county officials throughout the state of Washington, acting in their individual capacities, rather than in their official capacities as assessors, auditors, clerks, coroners, prosecuting attorneys, sheriffs or treasurers. CP 99. All such officials are eligible for membership in WACO, but membership is not compulsory. CP 100. The association was originally created under the name “Washington State Association of Elected County Officials” in 1953. CP 99.

After creation of the Washington State Association of Elected County Officials, the 1955 legislature considered legislation that would have recognized the association in statute. That legislation did not pass. CP 99-100. In 1959, legislation passed recognizing that county officials may use

the association as a coordinating agency. See RCW 36.47.030. The legislation, however, did not create WACO or compel county officers to use WACO to perform coordination of their programs. CP 100.

Since 1961, WACO has been a private non-profit corporation organized under Chapter 24.03 RCW. CP 100. It is run by a Board of Trustees pursuant to the Association's Articles of Incorporation and its Constitution and By-Laws. *Id.* In 1971, the articles were amended to reflect the change in name to the Washington Association of County Officials. *Id.* Since 1979, WACO has operated as a §501(c)(3) tax exempt organization. WACO files federal tax returns and related documents. CP 101. WACO owns real property and pays property taxes. *Id.*

WACO is not a government agency, exercises no governmental authority and does not operate at the direction of any governmental agency. CP 100-101. It is a voluntary association of elected and appointed county officials. It cannot adopt legislation, ordinances or regulations. *Id.* It has no police powers. *Id.* Its primary functions are to inform, educate and advise its members. However, WACO has no authority to direct how public officials exercise the powers of their offices or to compel officials to join the association. CP 99.

## **B. PROCEDURAL HISTORY**

This case arose in June 2008 when Appellant Arthur West filed an

action against several associations including the Washington Association of County Officials (“WACO”), and the State Department of Transportation. Appellant then amended his Complaint to add claims against the Washington Department of Natural Resources. *See* Thurston County Superior Court Cause No. 08-2-01549-9. The Department of Natural Resources moved to sever the claims against the state agencies from those against WACO and the Washington State Association of Counties (“WSAC”). After severing the claims, Appellant refiled a new Complaint against the WSAC and WACO in Thurston County Cause No. 08-2-02607-7. CP 50.

Simultaneously with the service of the new Complaint, West moved for summary judgment on his claims that WACO and WSAC are subject to the “Washington State Public Disclosure Act [sic] pursuant to *Telford v. Thurston County Board of County Commissioners*, 95 Wn. App. 149 (1999)”.<sup>1</sup> CP 55. Appellant’s Summary Judgment motion did not discuss the different statutory definition in the OPMA.

On February 6, 2009, WACO moved to dismiss Appellant’s claims for failure to state a claim. CP 58-67. WACO contended that the Complaint failed to allege any violation of the Public Records Act by WACO, failed to

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<sup>1</sup> Subsequent to the *Telford* decision, the Public Disclosure Act was amended to recodify provisions concerning public records in Ch. 42.56 RCW, which is now known as the Public Records Act. Laws of 2005, Ch. 274. Appellant’s claims in his summary judgment motion concerned the Public Records Act.

state an actionable claim under RCW 36.47.070 and that WACO was not a “public agency” as defined by the OPMA, RCW 42.30.020. *Id.*

On February 23, 2009, in response to WACO’s Motion to Dismiss West filed a ten page memorandum which was completely nonresponsive to any of the arguments addressed in WACO’s motion. CP 68. Significantly, West neither discussed the allegations of the Complaint nor did he explain how he has stated a cause of action in any of the claims against WACO. *Id.* Instead, West argued that he had standing, an issue not raised by WACO’s motion.<sup>2</sup> CP 68-73. Next, Respondent argued that *Telford v. Thurston County* had determined that “both WSAC and WACO are the functional equivalent of public agencies subject to *the Public Disclosure Act.*” CP 74 (emphasis in original). However, Appellant did not address the precise issue raised by WACO’s motion to dismiss and in this appeal, which is the definition contained in the OPMA.

On March 27, 2009, Thurston County Superior Court entered an order granting Defendant WACO’s Motion to Dismiss. CP 118-119. The court’s order found that the Complaint did not allege a violation of the Public Records Act by WACO. *Id.* The court ruled that WACO and WSAC had not violated state law by failing to consolidate their operations under RCW

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<sup>2</sup>West supported this filing with a declaration re taxpayer standing and refiled a declaration from former Secretary of State Ralph Munro which had been filed in an unrelated case. CP 83-87.

36.47.070. *Id.* Finally, the court found that WACO is not a state agency, municipal corporation or political subdivision as defined by the OPMA. *Id.*

**C. APPELLANT IS SANCTIONED UNDER CR 11.**

On March 30, 2009, West filed a “Declaration by Continuing Fraud by WACO Counsel” alleging that WACO’s counsel materially misrepresented the circumstances for creation of WACO. CP 20. In response to West’s Declaration re Continuing Fraud, WACO’s counsel wrote to Mr. West requesting that he withdraw the allegations of false charges which were supported only by citation to WACO’s website, which stated a history virtually identical to that outlined in WACO’s Motion to Dismiss. CP 120-126. West refused. *Id.*

Following West’s refusal to withdraw his allegations of fraud, WACO filed a motion to strike West’s groundless allegations and for CR 11 sanctions. CP 127. On April 24, 2009, the Court granted WACO’s motion. WACO then moved for entry of a written order and judgment containing findings pursuant to CR 54(b) that all claims concerning WACO would be immediately appealable to the Court of Appeals. CP 160. The Court granted WACO’s motion to strike the Declaration re Fraud and imposed CR 11 sanctions of \$4, 029.00. CP 166. The court also denied West’s Motion for Reconsideration and entered CR 54(b) findings directing entry of a final judgment against West and dismissing all claims against WACO. *Id.* A

final judgment was entered on May 8, 2009 dismissing all claims against WACO and awarding \$4,029.00 plus \$200 as statutory attorney's fees. CP 177. On June 2, 2009, West filed a timely notice of appeal of the order dismissing the OPMA claims and the judgment imposing sanctions against him. CP 46.

### III. STATEMENT OF ISSUES

This case presents the following issues:

1. Whether a non-profit incorporated association of county officials is a "public agency" as defined by the Open Public Meetings Act?
2. Whether the Trial Court erred in awarding CR 11 sanctions against a party that filed groundless accusations of fraud for the purpose of harassing opposing counsel?

### IV. ARGUMENT

#### A. **A NOT-FOR-PROFIT INCORPORATED ASSOCIATION OF COUNTY OFFICIALS IS NOT A "PUBLIC AGENCY" UNDER THE OPEN PUBLIC MEETINGS ACT.**

Appellant contends that WACO is an "agency" under the Public Records Act, but fails to distinguish the definition of a "public agency" which is subject to the OPMA. The two Acts use different terms and contain different definitions. The definition of "public agency" under the OPMA does not include associations such as WACO.

The definition of an "public agency" in the OPMA is much narrower than the definition of "agency" in the Public Records Act. As a principle of statutory interpretation, when the legislature uses different words in statutes

relating to a similar subject matter, it intends different meanings. It is an “elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *Spain v. Employment Sec. Dept.* 164 Wash.2d 252, 259-260, 185 P.3d 1188 (2008), citing *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984); *Seeber v. Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981)).

RCW 42.30.020(1) defines a "public agency" as follows:

(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.

WACO does not fit under any of these definitions. WACO is a non-profit corporation, not a public agency. It does not meet any of the definitional prongs set forth in the definition in RCW 42.30.020(1).

### **1. WACO is not a state agency.**

WACO is not a state board, commission, committee, department educational institution or agency created by or pursuant to statute that would qualify under RCW 42.30.020(1)(a). WACO was created as a voluntary association in the early 1950s and has been a private, nonprofit corporation since 1961. See *Telford v. Thurston County BOCC*, 95 Wn.App. at 154-155. WACO is not a state agency, but a private association of local officials who organized in 1953 to "to promote more uniform procedure in respective county offices in order to better serve the public." *Id.* WACO was not created by statute, but by the desires of local officials who recognized that it was necessary to share information to more effectively deal with the myriad issues and responsibilities confronting their members. Thus, it does not satisfy the definition of "public agency" under RCW 42.30.020(1).

*Telford* considered whether WACO is a "state agency" and rejected such a conclusion. Thus, *Telford* is dispositive of this prong of the OPMA definition, having held that WACO is not a "state agency". In interpreting the Public Disclosure Act definition, *Telford* found that WSAC and WACO are "neither state agencies, nor offices, departments, bureaus, boards, commissions, or agencies of a local agency." *Telford*, 95 Wn.App. at 158. Thus, *Telford* itself precludes any finding that WACO is a "public agency" under RCW 42.30.020(1)(a).

**2. WACO is not a municipal corporation or political subdivision.**

WACO does not qualify under RCW 42.30.020(1)(b). It is a non-profit corporation, not a municipal corporation or political subdivision. WACO is not a county, city, special purpose district or other similar governmental body, and it has no area over which it exercises jurisdiction.

In considering the definition under RCW 42.30.020(1)(b), WACO does not qualify as an "other municipal corporation". Such a contention runs contrary to the well established principle of statutory interpretation.

First, such a contention is contrary to the principle of interpretation known as ejusdem generis. Ejusdem generis provides that when general words follow specific words, the general words are construed to embrace a similar subject matter. *Burns v. City of Seattle*, 161 Wn.2d 129, 149, 164 P.3d 475, 486 (2007). Thus, the definition only applies to "other municipal corporations" which are like the "cities, counties, school districts or special purpose districts" set forth in the previous portion of the definition. All of these entities exercise governmental authority over a specific jurisdictional area. Thus, the definition does not apply to private corporations that lack governmental authority, do not possess police powers and do not exercise governmental powers over a specific jurisdiction. *Brigade v. Economic Development Bd. for Tacoma-Pierce County*, 61 Wn.App. 615, 811 P.2d 697 (1991)(OPMA not applicable to private economic development board).

*Brigade* is controlling. There, the court ruled that allegations that the Economic Development Board for Tacoma-Pierce County violated the OPMA were sanctionable under CR 11. *Brigade*, 61 Wn. App. at 624. The Court found that the Board was a private corporation formed to encourage economic growth in the County. The Board was provided public funds by Pierce County and other municipalities pursuant to contract. The Court examined the definition in RCW 42.30.020(1) and stated:

The Open Public Meetings Act pertains to "public agencies," which include state agencies created by or pursuant to statute; municipal corporations and state political subdivisions; subagencies created by statute, ordinance, or other legislative act; and public utility policy groups. RCW 42.30.020(1). The Board is none of these.

*Brigade*, 61 Wn.App. at 623, n. 6 (emphasis added).

The court ultimately ruled that CR 11 sanctions were proper against the plaintiff because a reasonable investigation into the facts would have shown that the Economic Development Board is a "private organization, not subject to the Open Public Meetings Act". *Brigade*, 61 Wn.App. at 624. Thus, under *Brigade*, a non-profit corporation that received public funds to make recommendations on public policy issues to encourage economic growth is not a "municipal corporation", but a private entity. *Id.*

In *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 304 P.2d 656, 659, (1956), the Supreme Court defined a municipal corporation and described its powers as follows:

'A municipal corporation is a body politic established by law as an agency of the state-partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. *Columbia Irr. Dist. v. Benton County*, 1928, 149 Wash. 234, 235, 270 P. 813. It has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution.'

49 Wn.2d at 554 (emphasis added).

Likewise, in *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 307 P.2d 567 (1957) the Supreme Court defined a municipal corporation as "a creature of the state, derives its existence, powers, and duties from the legislative body of the state". WACO is not a creature of statute, nor does it regulate or administer the affairs of any city, county or district. RCW 36.47.030. which authorizes counties to use WACO as a "coordinating agency", did not create WACO, but implicitly recognizes that was a pre-existing association. It is not logically possible for this legislation to have created WACO because, on its face, the legislation empowered certain county officials to designate WACO as a coordinating agency.

WACO is also not a political subdivision. It was not created by the state and does not have jurisdiction over some area of government. Similar cases have refused to hold associations to be political subdivisions. *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities* --- A.2d ----, 2010 WL 2089650 (N.J.Super.A.D., 2010) (State League of Municipalities was not a "combination of political subdivision" within the

meaning of the Open Public Records Act).<sup>3</sup> The New Jersey court based its ruling on the lack of governmental authority in its association, stating:

Unlike a governmental entity created by two or more municipalities to provide a governmental service, the League does not provide police protection, maintain roadways, engage in urban renewal projects, or perform any other function that would be recognized as a government service. Instead, the League advises municipal officials and acts as an advocate for municipal governments before the Legislature and in administrative and judicial proceedings. Its role is similar in this respect to a private association such as the Chamber of Commerce. Therefore, even though the League's membership consists of municipalities, this does not make the League a “combination of political subdivisions” . . .

*Id.*, at \*4.

Likewise, WACO does not have police powers, maintain public facilities or perform services recognized as “governmental”. This court should reach a similar result.

**3. WACO is not a “sub-agency” of another agency.**

WACO is clearly not a "sub-agency" of another agency under RCW 42.30.020(1)(c). *Telford* expressly found that WACO is not an agency of a local agency. *Telford*, 95 Wn.App. at 158. Hence, it is not a “sub-agency” of another agency. WACO was not created by another entity, but is a nonprofit corporation created as a voluntary association which is an entity unto itself. Thus, WACO does not qualify as an agency under RCW 42.30.020(1)(c).

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<sup>3</sup> A copy is attached as an Appendix.

**4. WACO is not an agency under RCW 43.30.020(1)(d).**

The provisions of RCW 42.30.020(1)(d) suggest that WACO is not covered by the statutory definition. This final prong of the definition of “public agency” covers "policy groups" that include representatives of public utilities. If the Legislature intended to cover nonprofit, incorporated associations such as WACO, the Legislature could have included a specific provision, like it has done for policy groups comprised of representatives from public utilities. That it has not done so is a clear indication that the Legislature does not intend to subject WACO to the OPMA.

Because WACO is not a "public agency" as defined by RCW 42.30.020(1), plaintiff failed to state a valid claim against WACO under the OPMA. The trial court correctly dismissed the plaintiff's OPMA claim.

**B. THE FUNCTIONAL EQUIVALENCY TEST IN *TELFORD* IS INAPPLICABLE TO THE DEFINITION OF PUBLIC AGENCY IN THE OPEN PUBLIC MEETINGS ACT.**

As Appellant's pleadings in the trial court acknowledged, *Telford v. Thurston County* applied its analysis to definitions in the Public Disclosure Act, Ch. 42.17 RCW, not the OPMA.<sup>4</sup> Where the legislature has defined terms used in a statute, the Court must use those definitions, and not those provided in some other statute, to interpret the statute's meaning. *State v. Leek*, 26 Wn.App. 651, 655-56, 614 P.2d 209 (1980) (plain statutory definitions of terms used therein control as to the intent of Legislature and

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<sup>4</sup> Appellant did not raise this argument in his reply to WACO's motion to dismiss.

any meaning which is not stated is excluded) (citing 2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 47.07) (5th ed.1992).

The weight to be given statutory definition of terms used in a statute is set forth in 1A C. Sands, Statutes and Statutory Construction s 27.02 at 310 (4th ed. 1972) as follows:

Statutory definitions of words used elsewhere in the same statute furnish official and authoritative evidence of legislative intent and meaning, and are usually given controlling effect. Such internal legislative construction is of the highest value and prevails over executive or administrative construction and other extrinsic aids.

A term whose statutory definition declares what it “means,” as used in the instant case, excludes any meaning that is not stated. *Leek, supra, citing* 2A C. Sands, Statutes and Statutory Construction s 47.07 (4th ed. 1973). The statutory definition of “for profit” is clear and precise. When the statutory language is plain, the meaning must be derived from the wording itself, and there is no room for judicial interpretation.

In applying a functional equivalency test, *Telford* began with an analysis of the definition and the statutory language used in the Public Disclosure Act. The *Telford* court observed that ordinarily definitions are interpreted according to the language used, and do not resort to “equivalency” tests unless there is some ambiguity. “If a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself.” *Telford*, 95 Wn. App. at 157.

*Telford* had no trouble determining whether WACO was a “state agency” or an “agency of a local agency” under the Public Disclosure Act. It found ambiguity, however, in a portion of the definition of “agency” that included “other local agencies”, stating:

Here, the statute is ambiguous as applied to WSAC and WACO. They are neither state agencies, nor offices, departments, bureaus, boards, commissions, or agencies of a local agency. To fit the statutory definition, they must qualify as “other local public agenc[ies],” which are not defined.

*Telford*, 95 Wn.App. at 158 (emphasis added).

Thus, the court in *Telford* adopted the functional equivalency test to determine whether the legislature intended to include associations such as WACO within the meaning of an open-ended, undefined term as “other local agencies” set forth in the Public Disclosure Act definition. Former RCW 42.17.020(1).<sup>5</sup>

No comparable term appears in the OPMA definition of “public agency” in RCW 42.30.020(1). *Telford* held that WACO was not a “public agency” under similar terms used by the OPMA definition – as a state agency, an office, department, bureau, board, commission, or agency of a local agency. Because *Telford* found that the only way WACO could be an agency was under the term “other local public agency”, and this term does not appear in the OPMA definition, there is no way to include WACO within the

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<sup>5</sup> The definition section of the Public Disclosure Act was reordered in 2005. Ch. 445, Laws of 2005. The definition of “agency” was previously found in RCW 42.17.020(1) was recodified as RCW 42.17.020(2). The definition has not substantively changed.

OPMA's definition.

There is no ambiguity as to whether WACO is defined as a "public agency" under the OPMA definition. *Telford* itself rejected application of RCW 42.30.020(1)(a) and (c). *Brigade* held that publicly funded non-profit corporations that make policy recommendations are not "municipal corporations" under RCW 42.30.020(1)(b). No other term used in RCW 42.30.010(1) applies. Therefore there is no room for doubt that WACO is not a "public agency" under the OPMA definition and no reason to apply the functional equivalency test from *Telford*.<sup>6</sup>

**C. COLLATERAL ESTOPPEL DOES NOT APPLY BECAUSE TELFORD DECIDED ISSUES UNDER THE PUBLIC DISCLOSURE ACT, NOT THE OPEN PUBLIC MEETINGS ACT.**

Appellant contends that the doctrine of collateral estoppel establishes that WACO is subject to the OPMA based upon the holding in *Telford v. Thurston County, supra*. Brief at 14-17.<sup>7</sup> Appellants correctly cite the elements of collateral estoppel as set forth in *Reninger v. Department of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); see also, *Nielson v.*

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<sup>6</sup> West's policy arguments about the intent and purpose of promoting open government are better addressed to the Legislature. The fact that the Legislature did not adopt the same statutory definitions shows they intended a different result, only applying the OPMA to multi-member agencies that have governing powers and governing bodies. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now* 119 Wn.App. 665, 704, 82 P.3d 1199 (2004) (OPMA does not apply to public agencies headed by single elected official).

<sup>7</sup> Appellant also cites to the trial court ruling in the *Telford* case. The trial court ruling in *Telford* was affirmed by the Court of Appeals and is not material to the collateral estoppel analysis.

*Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998). However, Appellants fail to satisfy those elements.

Collateral estoppel will apply only where there are identical issues. *Reninger*, 134 Wn.2d at 449. The issue decided in *Telford* was whether the restrictions on use of public funds for lobbying purposes under the Public Disclosure Act applied to WACO, not the OPMA. 95 Wn.App. at 166. This required a determination of whether the associations were “agencies” under the Public Disclosure Act, as defined by RCW 42.17.020. *Id.*, at 156-157.

Here, the issue is whether WACO is a “public agency” as defined by the OPMA, not the PDA. Therefore, the issues are not identical and collateral estoppel does not apply. The trial court correctly rejected this contention. CP 172.

**D. CH. 69, LAWS OF 1970 DOES NOT DETERMINE DEFINITIONS UNDER THE OPEN PUBLIC MEETINGS ACT.**

Appellant next contends that WACO must be a public agency under laws adopted by the 1970 Legislature, Chapter 69, Laws of 1970, §§1-3.<sup>8</sup> This law requires certain associations to make biennial reports to the Legislature and does not define public agencies subject to the OPMA.

RCW 44.04.170 requires associations of municipal corporations or officers who are utilized as coordinating agencies to file reports with the governor and legislature on how to improve the functions of the various

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<sup>8</sup> Section 2 is codified at RCW 44.04.170.

municipal corporations. This statute, however, does not convert a non-profit association of county officials into a “public agency” for purposes of the OPMA. It merely directs that they report to the Legislature on how to make their various governmental entities more efficient.

There is no evidence that this statute converts WACO into a “public agency” as defined by the OPMA. The statute cited by Appellant did not create WACO as a “state agency” or “municipal corporation”. The statute does not mention WACO, even though it mentions two other associations. Appellant’s argument appears to be that because the statute refers to certain entities which are utilized as “official agencies” for the coordination of policy and/or administrative programs of “municipal corporations” that this necessarily means the associations are “public agencies” for purposes of the OPMA. This result does not logically follow. Just because the associations serve “municipal corporations” and inform the legislature how to improve them, does not mean that the “associations” themselves are “public agencies” under the OPMA.<sup>9</sup>

Moreover, plaintiff’s assumption ignores the applicable statutory definition in the OPMA. If the legislature wanted the OPMA to apply to these associations, it could easily have done so by including them in the definition in RCW 42.30.020. The legislature has not done so, even though

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<sup>9</sup> Section 3 of Chapter 69, Laws of 1970 recognizes that the purpose of the statute was not to impair the function of “any existing municipal corporation or association”. This recognizes that an association is a different thing from a municipal corporation.

WACO has been a “coordinating agencies” under RCW 36.47.020 since it was adopted in 1959.

**E. APPELLANT’S CONTENTION THAT EVERY CORPORATION IS CREATED BY STATUTE AND IS THEREFORE COVERED BY THE OPMA IS ABSURD.**

Much of Appellant’s brief is devoted to the argument that every “corporation” was “created” by the state. Appellant’s Brief at 25-29. Thus, he contends that because all corporate entities are created by or pursuant to statute, it follows that WACO must be a public agency under the OPMA. This contention leads to absurd results clearly beyond the intention of the Legislature in adopting the OPMA. The Court should interpret the OPMA to reflect the Legislature’s intent and avoid absurd consequences. *Northwest Gas Ass’n v. Washington Utilities and Transp. Com’n*, 141 Wn.App. 98, 168 P.3d 443 (2007).

Under Appellant’s reasoning, any corporation is “created” by statute. If this is sufficient to be a “public agency” under the OPMA, then Coca-Cola, Inc., Microsoft, Boeing, and a host of other corporations would be subjected to the OPMA. It would also expand the OPMA to cover private incorporated associations such as home-owner’s associations. Such results are clearly not within the intent reflected in the language of RCW 42.30.020.

**F. APPLICATION OF THE OPMA TO WACO WOULD INFRINGE ON CONSTITUTIONALLY PROTECTED RIGHTS OF ASSOCIATION.**

There are two types of freedom of association that are protected by the Constitution: the freedom of expressive association and the freedom of intimate association. *City of Bremerton v. Widell*, 146 Wn.2d 561, 575, 51 P.3d 733 (2002). Here, WACO was formed to provide an opportunity for county officials to express themselves, discuss issues of concern to the members, to educate their members and coordinate their activities to better their functions. CP 101.

The First and Fourteenth Amendments protect the rights to freely associate for educational and expressive purposes. The freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by due process clause, which embraces freedom of speech. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163 (1958). The utilization of sovereign power to coerce disclosure of political beliefs and associations is an invasion of the private rights of individuals who are members of WACO and forbidden under the First, Fourth and Fifth Amendments and the cognate provisions of the State Constitution. *State v. James*, 36 Wn.2d 882, 221 P.2d 482 (1950); *Barsky v. United States*, 167 F.2d 241, 244 (1948).

Here, Appellant seeks to use the power of the state through the OPMA to intrude upon a private association which does not exercise

governmental powers. As such, it would chill the ability of WACO's members to discuss and debate issues of concern and ultimately hinder WACO from efficiently and effectively making recommendations to the Legislature on matters of public concern. As such, application of the OPMA to WACO would be unconstitutional.

**G. THE TRIAL COURT DID NOT ERR IN SANCTIONING APPELLANT FOR FILING GROUNDLESS ACCUSATIONS OF FRAUD FOR THE PURPOSE OF HARASSING OPPOSING COUNSEL.**

An appellate court reviews a trial court's decision to impose or deny Rule 11 sanctions under the abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn.App. 720, 218 P.3d 196 (2009). The trial court must make findings as to the basis for imposing CR 11 sanctions, which were contained in the Court's May 8, 2009 order. Those findings confirm that CR 11 sanctions were appropriate in this case.

Clear evidence supports the trial court's findings that Appellants' "declaration re fraud" was in violation of CR 11 as groundless and intended to harass opposing counsel. West accused counsel of fraud for statements about the creation of WACO that were virtually identical to what West contended. WACO's motion to dismiss set forth facts about its formation in the early and mid 1950s by citing to portions of the opinion authored by this court in *Telford v. Thurston County*. CP 62. Despite the support provided for

WACO's factual statements, after losing the motion to dismiss, West filed a Declaration re Continuing Fraud by WACO Counsel. In addition, West's declaration re fraud supplied material from the WACO's website that was the same as the factual recitations in WACO's brief, but nevertheless contended that WACO's statements were fraudulent.

In response to these filings, counsel for WACO wrote a letter to Mr. West requesting that he withdraw his groundless accusations and calling his attention to specific inaccuracies in his declarations. Despite being given ample opportunity to either provide support for his accusations or to withdraw them, West did not respond to WACO's request, forcing WACO to move to strike and seek CR 11 sanctions.

The Court made detailed findings of West's misconduct, and recited clear violations of CR 11 in its oral decision which was incorporated into its order. The court noted that West had made baseless allegations against opposing counsel's character, and it was not the first time. CP 174. Judge McPhee found that he had made similar baseless allegations in federal court, which were rejected. CP 175. Judge McPhee noted that West has previously sued counsel and even judges when his arguments are rejected. *Id.* Finally, Judge McPhee noted that West is an experienced litigator who was well acquainted with CR 11 due to prior sanctions being imposed. Despite prior warnings from the court, West did not comply with CR 11 in the conduct of this litigation. CP 175-176.

West now makes the after-the-fact contention that the Court was obviously biased and should have recused itself. Brief at 30. In making this contention, West inaccurately claims that the Court tolerated and encouraged comparison of West to Adolf Hitler and Joseph McCarthy. Review of the transcript shows that WACO's counsel compared the rhetorical strategy being employed by West to the rhetorical strategy used by Hitler, McCarthy and others known as the "Big Lie".<sup>10</sup> The Court did not "encourage" this comparison, but interrupted counsel to note that he saw some differences and to direct counsel to move on. RP, 4/24/09 at 6. Moreover, it is clear that West only raised his unsupported accusation of "bias" after the court had ruled against him. This unfounded claim is nothing but sour grapes.

West cites *Caperton v. A.T. Massey Coal Co.*, 556 U.S. \_\_\_, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) which held that due process compelled recusal where a Supreme Court judge had received \$3 million in contributions to his re-election campaign from one of the parties. West cavalierly likens this case to *Caperton* without having provided a shred of support for his allegations of bias by the court.

West then claims that sanctions deter his advancement of claims. West ignores the fact that he was sanctioned for improper litigation conduct in filing a baseless and improper declaration accusing opposing counsel of

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<sup>10</sup> See, *The Language of Oppression*, H. A. Bosmajian, University Press of America, Lanham, MD, 1983.

fraud. He was not sanctioned for bringing the OPMA claims, but for how he conducted himself in litigating this case. Hence, there is no deterrent against the right of a citizen to bring legitimate claims to the court, but there is a narrow, targeted deterrent to filing of baseless, harassing pleadings.

**H. WACO SHOULD BE AWARDED ITS REASONABLE ATTORNEY'S FEES UNDER RAP 18.9.**

Plaintiffs' brief makes numerous irrelevant assault allegations against an attorney at the law firm representing WACO. These contentions are repeated to slander the good name of an attorney who did not participate in this case. West thereby repeats the same conduct that resulted in initial sanctions award. Additional sanctions under RAP 18.9 are appropriate for his continuing CR 11 violations.

The trial court awarded attorney's fees to WACO under CR 11. These same court rules provide authority pursuant to RAP 14.2 and RAP 18.1(a) for the award of attorney fees to respondent on appeal. WACO hereby requests its attorney fees pursuant to these authorities.

Finally, this appeal is frivolous and stands no possibility of success on the merits. This Court's holding in *Brigade* expressly confirms that non-profit incorporated bodies are not within the definition of "public agency" under the OPMA and any such claim is legally frivolous. 61 Wn.App. at 624. Because of this dispositive ruling, this appeal is frivolous and attorney's fees should be awarded under RAP 18.9.

#### IV. CONCLUSION

The Court should affirm the ruling of the trial court and hold that WACO is not a “public agency” under the OPMA. The Court should further affirm the trial court’s imposition of CR 11 sanctions against Appellant and award attorney’s fees on appeal.

DATED this 21st day of June, 2010.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.



Jeffrey S. Myers, WSBA# 10390  
Attorney for Respondent WACO

# **APPENDIX**

--- A.2d ---, 2010 WL 2089650 (N.J.Super.A.D.)  
(Cite as: 2010 WL 2089650 (N.J.Super.A.D.))

Only the Westlaw citation is currently available.

Superior Court of New Jersey,  
Appellate Division.  
FAIR SHARE HOUSING CENTER, INC.,  
Plaintiff-Appellant,  
v.  
NEW JERSEY STATE LEAGUE OF  
MUNICIPALITIES, Defendant-Respondent.  
Argued March 16, 2010.  
Decided May 26, 2010.

#### SYNOPSIS

**Background:** Public interest housing organization brought action against State League of Municipalities alleging that it was entitled to requested documents under both Open Public Records Act (OPRA) and common law. The Superior Court, Law Division, Mercer County, dismissed complaint. Housing organization appealed.

**Holdings:** The Superior Court, Appellate Division, Skillman, P.J.A.D., held that:

(1) League was not a “combination of political subdivision” within the meaning of OPRA, and  
(2) housing organization did not have a common law right of access to documents.

Affirmed.

West Headnotes

#### [1] Records 326 ↪51

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k51 k. Agencies or Custodians Affected.

Most Cited Cases

To constitute a political subdivision for purposes of the Open Public Records Act (OPRA), an entity must provide some governmental service, such as education, police protection, maintenance of roadways, sewage disposal, or urban renewal. N.J.S.A. 47:1A-1.1.

#### [2] Records 326 ↪51

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k51 k. Agencies or Custodians Affected.

Most Cited Cases

State League of Municipalities was not a “combination of political subdivision” within the meaning of the Open Public Records Act (OPRA), and therefore was not subject to OPRA; unlike a governmental entity created by two or more municipalities to provide governmental service, League did not provide police protection, maintain roadways, engage in urban renewal projects, or perform any other function that would have been recognized as government service, instead, League advised municipal officials and acted as advocate for municipal governments before Legislature and in administrative and judicial proceedings. N.J.S.A. 47:1A-1.1.

#### [3] Records 326 ↪30

326 Records

326II Public Access

326II(A) In General

326k30 k. Access to Records or Files in General. Most Cited Cases

Documents in possession of State League of Municipalities were not common-law public document, and therefore public interest housing organization did not have a common law right of access to them; although there is statutory authorization for municipalities to join League, it was nonprofit unincorporated association that was governed by its constitution rather than by statute, and it did not perform any governmental function, rather, its role was limited to acting as an advisor to, and advocate for, municipalities and municipal officials.

#### [4] Records 326 ↪30

326 Records

326II Public Access

326II(A) In General

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326k30 k. Access to Records or Files in General. Most Cited Cases

The common law definition of a public record is broader than the definition of government record contained in the Open Public Records Act (OPRA). N.J.S.A. 47:1A-1.

## **[5] Records 326 ↪30**

### 326 Records

#### 326II Public Access

##### 326II(A) In General

326k30 k. Access to Records or Files in General. Most Cited Cases

The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure.

## **[6] Records 326 ↪30**

### 326 Records

#### 326II Public Access

##### 326II(A) In General

326k30 k. Access to Records or Files in General. Most Cited Cases

For documents to be considered common law public documents subject to disclosure under common law public access, they must have been created by, or at the behest of, public officers in the exercise of a public function.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1487-08. Kevin D. Walsh argued the cause for appellant (Fair Share Housing Center, attorneys; Mr. Walsh, on the briefs).

Trishka Waterbury argued the cause for respondent (Mason, Griffin & Pierson, and Kearns, Reale & Kearns, attorneys; Ms. Waterbury, of counsel and on brief; William J. Kearns, Jr., of counsel).

Before Judges SKILLMAN, GILROY and SIMONELLI.

Kevin D. Walsh argued the cause for appellant (*Fair Share Housing Center*, attorneys; *Mr. Walsh*, on the briefs). Trishka Waterbury argued the cause for respondent (*Mason, Griffin & Pierson*, and *Kearns, Reale & Kearns*, attorneys; *Ms. Waterbury*, of counsel and on brief; William J. Kearns, Jr., of counsel).

\*1 The opinion of the court was delivered by SKILLMAN, P.J.A.D.

The issue presented by this appeal is whether the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, requires the State League of Municipalities to provide public access to any nonprivileged document generated in the course of the League's operations. We conclude that the League is not subject to OPRA.

Municipalities are authorized by statute to join in an organization of municipalities. N.J.S.A. 40:48-22 provides that "[a]ny municipality ... may join with any other municipality or municipalities in the formation of an organization of municipalities, for the purpose of securing concerted action in behalf of such measures as the organization shall determine to be in the common interest of the organizing municipalities[.]" See also N.J.S.A. 40:48-23.

However, the League was not formed by statute but rather by action of its original members, who established a nonprofit, unincorporated association and adopted a constitution to govern its operations. The League's objectives, as described in that constitution, include:

- (1) The promotion of the general welfare of the municipalities of this State;
- (2) The improvement of municipal administration in its several branches;
- (3) The maintenance of a central office to serve as a clearing house of information relating to the functions of municipal government;
- (4) The fostering of scientific studies of municipal government by educational institutions and the publication and distribution of reports based on such research and study;
- (5) The

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publication and circulation of an official League magazine; (6) The study and advocacy of necessary and beneficial legislation affecting municipalities and the opposition of legislation detrimental thereto; (7) The holding of an annual conference and special meeting for the discussion and study of current municipal problems and the techniques involved in their solution and the sponsoring of training courses by the League and State University; (8) The providing of means whereby officials may interchange ideas and experiences and obtain expert advice[.]

In accordance with this statement of objectives, the League pools information and resources for its members, publishes a magazine that reports on a variety of issues affecting municipal government, conducts educational programs for municipal officials, provides legislative analysis and legislative bulletins to its members, and maintains a library of municipal ordinances. The League's officers also testify at legislative hearings on a variety of issues of interest to municipal government and sometimes participate as a party or amicus curiae in litigation affecting municipalities generally.

No municipality is required to join the League. Nevertheless, every municipality in the State is currently a member.

Approximately 16% of the League's revenue is derived from dues assessed upon its members according to population. The rest of its revenue is obtained from a variety of other sources including the League's annual convention.

**\*2** The issue of the right of public access to documents in the League's possession was spawned by the League's expression of opposition to the revised "Third Round" rules of the Council on Affordable Housing (COAH) relating to the calculation and satisfaction of the need for affordable housing, which COAH proposed following our remand in *In re Adoption of N.J.A.C. 5:94 & 5:95 by Council on Affordable Housing*, 390 N.J.Super. 1, 914 A.2d 348 (App.Div.), certif. denied, 192 N.J. 71, 72, 926 A.2d 856 (2007). In that opposition, the League asserted that adoption of the proposed rules would result in the imposition of substantial additional tax burdens upon the

owners of real property. Plaintiff Fair Share Housing Center, a public interest organization that acts as an advocate for affordable housing policies, sent a letter to the League requesting production of any studies or other documents supporting this assertion as well as any letters or emails relating to the Third Round rules received by the League. Fair Share claimed that the League was required by OPRA and the common law right of access to public records to produce those documents. The League denied Fair Share's request on the ground that it is not subject to either OPRA or the common law right. The League also directed Fair Share to its website, where its public correspondence is posted.

Fair Share then brought this action in the Law Division. Fair Share's complaint claimed that it was entitled to the requested documents under both OPRA and the common law. The case was brought before the court by an order to show cause. Fair Share conducted limited discovery before the return date. The parties agreed that the case presented purely legal issues that could be decided based on the factual materials presented in support of and in opposition to the order to show cause.

The trial court concluded in a lengthy written opinion that the League is not subject to OPRA. In reaching this conclusion, the court stated:

[T]he League is non-profit association organized for the purpose of advancing the interests of local government before the three branches of State government and providing educational and other services to its member municipalities and local government officials.... [T]he League does not perform any governmental functions.

....

... Instead, the League is similar to a trade association, serving in a lobbying capacity and providing information to its membership on matters affecting the residents of the member municipalities.

The court's opinion did not directly address Fair Share's claim under the common law right of access to public

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records. However, the court entered an order dismissing Fair Share's complaint in its entirety, including the count asserting the common law right. Therefore, we deem that claim to have been rejected even though not discussed by the court.

I.

Fair Share's argument that OPRA provides a right of public access to documents in the League's possession is based upon the definition of “[p]ublic agency” or “agency” set forth in N.J.S.A. 47:1A-1.1, which determines whether “[a]n entity is subject to OPRA.” Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535, 874 A.2d 1064 (2005) (*Lafayette Yard*). This definition states:

**\*3** “Public agency” or “agency” means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. *The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.*

[N.J.S.A. 47:1A-1.1 (emphasis added).]

The first sentence of this definition clearly does not apply to the League because it refers solely to the State Legislature, departments in the Executive Branch of State Government and other State agencies and instrumentalities. Thus, Fair Share's argument relies solely upon the part of the definition of “public agency” contained in the second sentence of N.J.S.A. 47:1A-1.1.

[1][2] Fair Share's primary argument is that the League is a “combination of political subdivisions” within the intent of the second sentence because it was formed by its member municipalities, which are indisputably political subdivisions. However, to constitute a political subdivision, an entity must provide some governmental service, such as education, police protection, maintenance of roadways, sewage disposal, or urban renewal. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, ---U.S. ---, ---, 129 S.Ct. 2504, 2513, 174 L. Ed.2d 140, 152 (2009) (citing *Black's Law Dictionary* 1197 (8th ed.2004)). Consequently, the only reasonable interpretation of “combination of political subdivisions” in N.J.S.A. 47:1A-1.1 is a combination of political subdivisions established to provide a governmental service that otherwise would be provided by a single political subdivision.

We note in this regard that in some circumstances the statutes governing municipal corporations authorize municipalities to provide governmental services in combination with other municipalities by the creation of a separate entity to perform that governmental service. *See, e.g., N.J.S.A. 40:14A-4(c)* (joint sewerage authority); N.J.S.A. 40:14B-5 (joint municipal utilities authority); N.J.S.A. 40:66A-4(b) (joint municipal incinerator authority); N.J.S.A. 40A:65-14(a) (“joint meeting” of municipalities to provide for “joint operation of any public services, public improvements, works, facilities, or [other public] undertakings”). If such an entity is established, it undoubtedly would generate government records in the course of providing the government service. Therefore, the evident legislative objective in including a “combination of political subdivisions” in the definition of “public agency” or “agency” was to assure that such a governmental entity would be subject to OPRA.

**\*4** Unlike a governmental entity created by two or more municipalities to provide a governmental service, the League does not provide police protection, maintain roadways, engage in urban renewal projects, or perform any other function that would be recognized as a government service. Instead, the League advises municipal officials and acts as an advocate for municipal governments before the Legislature and in administrative and judicial proceedings. Its role is similar in this respect to a private association such as the Chamber of Commerce. Therefore, even though the League's

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membership consists of municipalities, this does not make the League a “combination of political subdivisions” within the intent of N.J.S.A. 47:1A-1.1.

Fair Share also argues that the League constitutes an “office ... or other instrumentality ... *created by a ... combination of political subdivisions*” or an “independent ... instrumentality or agency *created by a ... combination of political subdivisions*” within the intent of the second sentence of N.J.S.A. 47:1A-1.1 (emphasis added). However, for the reasons previously discussed, we conclude that “combination of political subdivisions” refers to an entity created by two or more political subdivisions to provide a service ordinarily provided by a single political subdivision, and the League does not constitute such an entity. Furthermore, within government, the terms “office,” “instrumentality,” and “agency” are generally understood, like the term “combination of political subdivisions,” to refer to an entity that performs a governmental function. See *Black's Law Dictionary* 1115, 814, 67 (8th ed.2004); 37A Am.Jur.2d Freedom of Information Acts § 21 (2005) (“The cornerstone of the analysis of whether a private entity operates as the functional equivalent of a governmental agency, such that its records are public records governed by a state public records act, is whether and to what extent the entity performs a governmental or public function.”).

If we had any doubt about our conclusion that the terms “combination of political subdivisions,” “office,” “instrumentality,” and “agency” should be given their commonly understood meaning as an entity that performs a governmental service, it would be dispelled by the legislative definition of “government record,” which is also contained in N.J.S.A. 47:1A-1.1. The pertinent part of this definition states:

“Government record” or “record” means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof. ...

\*5 [Emphasis added.]

By its plain terms, in addition to State officers and agencies, this definition only applies to “political subdivision[s]” and “subordinate boards thereof.” There is no reasonable basis upon which the League could be viewed as a “subordinate board” of a political subdivision. Moreover, the critical term in the main operative sections of OPRA is “government record” rather than “public agency.” See, e.g., N.J.S.A. 47:1A-5, -6. Therefore, the restrictive definition of “government record” in N.J.S.A. 47:1A-1.1 is an additional reason for rejecting the expansive interpretation of “public agency” urged by Fair Share.

Our conclusion that the League is not subject to OPRA is consistent with *Lafayette Yard, supra*, which involved a private nonprofit corporation established to enable the City of Trenton to redevelop a blighted area by construction of a hotel, conference center, and parking facility. 183 N.J. at 522, 874 A.2d 1064. The corporation was structured in the manner required to issue bonds that would be exempt from federal taxation. Id. at 522-23, 874 A.2d 1064. This requirement included an agreement that the corporation's property would revert to Trenton when its indebtedness was retired. Id. at 523, 874 A.2d 1064. In addition, Trenton guaranteed repayment of the corporation's tax-exempt bonds. Id. at 525-26, 874 A.2d 1064. Most significantly, Trenton's governing body was given authority to appoint and remove at least 80% of the corporation's governing board. Id. at 523, 874 A.2d 1064. Under all these circumstances, the Court concluded that the corporation was “an ‘instrumentality or agency created ... by a political subdivision’ under N.J.S.A. 47:1A-1.1, and that the Corporation is therefore subject to [OPRA].” Id. at 534, 874 A.2d 1064. In rejecting the corporation's argument that “it was not ‘created’ by ‘a political subdivision of the State’ “ because it was incorporated by “public-spirited citizens ... to assist [Trenton] ... in its redevelopment plan[.]” the Court stated: “Suffice it to say that the Mayor and City Council have absolute control over the membership of the Board of Lafayette Yard and that the Corporation could only have been ‘created’ with their approval.” Id. at 535, 874 A.2d 1064.

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Unlike the nonprofit corporation involved in *Lafayette Yard*, which was established and controlled by a municipality to provide a vital public service ordinarily performed directly by the affected municipality—the redevelopment of a blighted area—which made the corporation an “instrumentality” of that municipality, the League does not provide any governmental service ordinarily provided by a municipality or group of municipalities. Instead, as previously discussed, the League’s role is purely to advise municipalities and municipal officials and to advocate the positions of its membership before the Legislature, administrative agencies, and the courts. In these capacities, the League is not an “office,” “instrumentality,” or “agency” of any individual municipality or combination of municipalities.

## II.

\*6 [3] We turn next to Fair Share’s claim of a right of access to documents in the League’s possession under the common law right of access to public records.

[4] OPRA preserves “the common law right of access to a government record [.]” *N.J.S.A. 47:1A-8*. “The common law definition of a public record is broader than the definition [of government record] contained in OPRA.” *Mason v. City of Hoboken*, 196 N.J. 51, 67, 951 A.2d 1017 (2008).

[5][6] “The common-law right to access public records depends on three requirements: (1) the records must be common-law public documents; (2) the person seeking access must ‘establish an interest in the subject matter of the material,’ and (3) the citizen’s right to access ‘must be balanced against the State’s interest in preventing disclosure.’” *Keddie v. Rutgers*, 148 N.J. 36, 50, 689 A.2d 702 (1997) (citations omitted). For documents to be considered “common law public documents,” they must have been “created by, or at the behest of, public officers in the exercise of a public function.” *Ibid*.

For reasons similar to our reasons for concluding that the League is not a “public agency” within the intent of OPRA, we conclude that documents in the League’s possession are not “common-law public documents” and

therefore there is no common law right of access to those documents. Although there is statutory authorization for municipalities to join the League, it is a nonprofit unincorporated association that is governed by its constitution rather than by statute. Moreover, it does not perform any governmental function. Rather, its role is limited to acting as an advisor to, and advocate for, municipalities and municipal officials. Therefore, the League is not a public agency and its employees are not “public officers” who “exercise ... a public function” in performing their duties. *Ibid*.

## III.

Fair Share argues under the final point of its brief that the League is subject to the Open Public Meetings Act (OPMA), *N.J.S.A. 10:4-6* to -21. However, Fair Share’s complaint did not include any claim under OPMA. Although Fair Share filed a reply brief in the trial court that contained a short discussion of the applicability of OPMA to the League, this discussion was solely a response to “the League’s contention that an entity must be covered by the OPMA in order to be covered by OPRA.” Fair Share did not seek leave to amend its complaint to assert a claim under OPMA, and the conclusion to Fair Share’s reply brief only seeks a declaration that the League is subject to OPRA and the common law right of access to public records. Moreover, the trial court did not consider whether the League is subject to OPMA. Therefore, Fair Share’s argument that the League is subject to OPMA is not properly before us. *See Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973).

Affirmed.

N.J.Super.A.D.,2010.

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE ASSOCIATION OF  
COUNTIES, et al.

Respondents.

NO. 39366-2-II

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AND SERVICE

I certify that I served, in the manner indicated below, a true and correct copy of *Brief of Respondent Washington Association of County Officials* and this *Certificate of Filing and Service*.

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DATED this 21<sup>st</sup> day of June, 2010 at Tumwater, WA.

  
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Jo Anne Caines, Legal Assistant to  
Jeffrey S. Myers