

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II OF WASHINGTON
OF THE STATE OF WASHINGTON
No. 41497-0-II

ARTHUR WEST
APPELLANT

VS.
WASHINGTON PUBLIC PORTS ASSOCIATION
RESPONDENT

RESPONSE BRIEF OF RESPONDENT WASHINGTON PUBLIC
PORTS ASSOCIATION

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I. INTRODUCTION / SUMMARY

This is a Public Records Act (PRA) & Open Public Meetings Act case. Appellant West appeals the Trial Court's dismissal of PRA claims based on finding Appellant failed to state a cause of action upon which relief can be granted. Appellant West further appeals the Trial Court's dismissal of his requested Declaratory Judgment that the WPPA is "a subdivision of the State of Washington subject to the Open Public Meetings and Public Records Act". However, the Trial Court properly found that Appellant lacks standing to bring this issue.

At the Trial Court level and again here on appeal, Appellant misuses the resources of the Courts by complaining of a Public Record Act (PRA) violation which simply did not occur. Appellant then bootstraps another non-justiciable claim (request for Declaratory Judgment that WPPA is subject to Open Public Meeting Act) onto the frivolous PRA case. The appeal should be dismissed in its entirety. WPPA should be awarded its cost pursuant to RAP 18.1, 18.9, and RCW 4.84.185.

II. RESPONDENT WPPA'S RESTATEMENT OF FACTS

A. FACTS PRECEDING COMPLAINT¹

¹ All facts are based on Declaration of Eric Johnson Executive Director of the Washington Public Ports Association dated and previously filed June 16, 2009 unless otherwise stated. CP 52-79

On or about June 16, 2008, Appellant Mr. West submitted his initial request for information to the Defendant WPPA. See **CP 55 Exhibit 1** attached to Decl. of Eric Johnson, WPPA Executive Director. Thereafter, on June 20, 2008 the WPPA *timely* responded and notified Appellant West that the requested records would be ready by July 15, 2008. See **CP 56 Exhibit 2** attached to Decl. of Eric Johnson. WPPA's response was within five business days of receiving Appellant West's request for records.

On July 14, 2008 after WPPA gathered the records responsive to Mr West's 16 June 2008 records request, WPPA timely notified Mr West the records were ready for review and copying. See **CP 57 Exhibit 3** attached to Decl. of Eric Johnson.

On August 25, 2008, WPPA again contacted Mr West and advised him the records were available to him. See **CP 58 Exhibit 4** attached to Decl. of Eric Johnson. However, Mr West failed to respond and did not thereafter review the records in 2008. After Mr West failed to respond or review the gathered records, WPPA sent Mr West a letter notifying him the records request would be closed out on February 27, 2009. See **CP 59 Exhibit 5** attached to Decl. of Eric Johnson.

Nearly a year later on April 8, 2009, Mr West submitted another records request to WPPA. See CP 60-61 **Exhibit 6** attached to Decl. of Eric Johnson. West's records request (1) repeated the same request he has submitted in June 2008, and (2) requested additional records.

Two days later on April 10, 2009, the WPPA timely responded to West. WPPA advised Appellant West that the WPPA was gathering responsive records, and would have the records responsive to the renewed June 2008 request ready by May 8, 2009, with the balance of records available by June 10, 2009. See **CP 62 Exhibit 7** attached to Decl. of Eric Johnson.

On May 26, 2009 – Mr West reviewed the records made available by WPPA and marked some for copying.

On May 29, 2009, WPPA again wrote to Mr West, responding fully to the balance of the records request. See CP 63-4 **Exhibit 8** attached to Decl. of Eric Johnson. In that correspondence, WPPA provided Mr West with a copy of the WPPA records retention policy, and notified him what other records were available for inspection and review. See **CP 65-6 Exhibit 9** attached to Decl. of Eric Johnson. WPPA also advised Mr West that a few records were deemed exempt from public disclosure under

the attorney client privilege, where information between attorney and WPPA staff is disclosed. *See Hangartener v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004). WPPA provided Mr West with a Privilege Log which identified the exempt records and cited to the exemption. See **CP 76 Exhibit 10** to Decl. of Eric Johnson.

On or about June 2, 2009, Mr West picked up a copy of the records he had reviewed on May 26, 2009. Also June 2, 2009, **after** WPPA had fully responded, and **after** Mr West was in possession of the responsive records, and notwithstanding the WPPA's compliance with the PRA, Mr West apparently signed and filed his Complaint against WPPA alleging a public records violation and open public meetings act violation. (See signature date on West Complaint and Motion/Order for Show Cause, both dated June 2, 2009, CP 4-9 & CP 10-17).

B. PROCEDURAL FACTS²

The following Facts are pertinent to WPPA's request for fees, costs and sanction pursuant to RAP 18.9. The record shows that Mr

² Facts in this section are supported by CP___ Declaration of Counsel Carolyn Lake subjoined to DEFENDANT WPPA'S REPLY IN OPPOSITION TO PLAINTIFF'S **FOURTH** MOTION FOR RECONSIDERATION & RE-NEWED MOTION FOR TERMS/FEEES filed 10-27-2010 and **Exhibit A thereto**. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

West filed this case on June 2, 2009. Mr West's Complaint contained 3 primary issues: (1) alleging an Open Public Meetings Act violation, (2) Declaratory Judgment, and (3) a Public Records Act claim. CP 4-9

WPPA immediately moved to dismiss. CP_.³ On July 31 2009, this Court granted Defendant WPPA's Motion to Dismiss Open Public Meeting Act claims. The written Order was signed and entered August 28, 2009. CP 219-221. This ruling had the effect of dismissing all individually named Defendants, and left Appellant's Public Records Act claim against WPPA as the sole remaining issue in this suit.

On that same date the Court signed the Order granting WPPA's first Dismissal motion, Mr West responded by filing an improper Affidavit of Prejudice, which the Court did not accept. CP_⁴ As part of the Court's ruling on WPPA's dismissal motion on July 31, 2009, the Court directed the parties to set a briefing schedule on a "quick track".

³ See WPPA MOTION FOR SUMMARY JUDGMENT dated June 29, 2009. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁴ See Plaintiff Affidavit of Prejudice as to Judge Hirsh dated August 28, 2009. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

21the
 22 public records issues are not being dismissed.
 23 Those will need to get on a briefing schedule, and
 24 you should go see Trina and **talk with each
 other to**
 25 **get some dates to get that briefed and
 move forward**

1 **on sort of a quick track. ...**
 2
 3 You've been ordered to move those issues forward,
 4 but they need to be addressed. I'm prepared to
 sign
 5 an order.

See **Transcript** of 31 July 2009 at 17:21-18:4, attached to Dec. of
 Lake filed with the Court on 27 August 2009. CP 450-458.

Counsel for WPPA on at least three occasions proposed
 various briefing schedules to Appellant West. Mr West failed to
 respond to the proposed schedules in any way. Thereafter, the Port
 sought immediately sought and obtained an Order dated September
 18, 2009 which set the original hearing for the Court's
 consideration of the remaining Public Records Act claim for
October 23, 2009. CP 226-227. Although briefing of the parties
 was complete, yet Mr West failed to appear at the 23 October 2009
 hearing. The Court agreed terms should be imposed against Mr
 West for this failure to appear. CP 343-351 at 350.

Despite failing to appear, thereafter on 2 November 2009 Mr West filed his next unsuccessful and premature Motion for Reconsideration, objecting to the Court's ruling on the PRA issues. CP 493-506. These Public Record Act issues had been the subject of the 23 October hearing, (where Mr West was a no-show) but the ***Court has not yet ruled.*** No reconsideration motion was proper, because there was not yet an PRA Order to be reconsidered. The Court issued an Order Denying Reconsideration on 21 December 2009. CP 260-261. In the **nine months** after Mr West failed to appear. Mr West, as plaintiff in this matter, took no action to re-note the matter for show cause or to pursue relief.

In July 2010 WPPA renewed its Motion dismiss the matter based on Mr West's prior failure to appear pursuant to court order and or prosecute this case, to grant terms to the WPPA, and /or grant WPPA's Motion for Summary Judgment Dismissal based on the pleadings previously filed in June 2009. CP 262-266. The hearing was noted for August 6, 2010. Appellant West's response was due July 20, but was filed two days late on July 22nd. CP 80-8.

Finally, on August 13, 2010, parties appeared to argue the WPPA's motion to dismiss the remaining claims in this suit. At the August 13, 2010 hearing the Court issued a verbal ruling granting

WPPA's Motion to Dismiss. The Court set a hearing for parties to present a proposed Order for 27 August 2010. CP_.⁵

The parties appeared on 27 August for hearing on presentment. Mr West requested additional time to review the Order proposed by WPPA. The Court set the matter over to allow Mr West to comment, and WPPA to respond. *Id.* Instead of commenting on the proposed Order, on September 13, 2010 Mr West filed yet another premature Motion for Reconsideration, with hearing purportedly set for 1 October 2010. CP 545-556. Mr West failed to file any note of issue, but indicated a hearing date of October 1, 2010 on the face of the pleading and in subsequent email to WPPA counsel. As of the date Mr West filed his Motion to Reconsider, no Order had yet been filed.

Significantly, Mr West's Motion sought:

That the order entered by the Court **on September 3, 2010** be reconsidered and annulled, on the grounds that the order's entry constituted an error of law, a miscarriage of justice or was otherwise subject to review under CR 59.

CP 545-556. There is no September 3, 2010 Court Order.

⁵ CP__ Declaration of Counsel Carolyn Lake subjoined to DEFENDANT WPPA'S REPLY IN OPPOSITION TO PLAINTIFF'S **FOURTH MOTION FOR RECONSIDERATION & RE-NEWED MOTION FOR TERMS/FEEES** filed 10-27-2010 and **Exhibit A thereto**. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

On 27 September, 2010 the docket reflects that an ORDER OF DISMISSAL WITH PREJUDICE was filed. CP 343-351. Notably Mr West failed to attach a copy of the Court's Order which he seeks to reconsider, as required by the Court Rule.

On 29 September 2010, WPPA Counsel filed a Motion to Strike the hearing because (1) the Motion was premature, and (2) Mr West did not in any way conform to the requirements under the local Court rule for the procedures for filing a Motion for reconsideration. CP_.⁶ WPPA requested that the Court disregard the faulty and premature Motion and strike the 1 October 2010 hearing purportedly set by Mr West. WPPA also noted that Mr West was on notice that WPPA counsel was unavailable for court proceedings October 1, 2010 (and other dates). See CP__.⁷

As part of its Motion to Strike, WPPA requested that the Court impose terms for Mr West's non-compliance with the Court rules and the costs of WPPA having to respond to the improperly noted hearing. At the eleventh hour, and **after** WPPA responded to

⁶ See DECLARATION & WPPA MOTION TO STRIKE filed 9/29/10. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁷ See Notice of Unavailability filed 9/16/10. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

the improperly noted Motion, Mr West notified WPPA counsel that no hearing would be held on October 1, 2010.⁸

In sum, Mr West filed no less than four Motions for reconsideration at the trial court level in this case.⁹ None were successful. This appeal merely continues to extend Mr West's pursuit of frivolous actions against WPPA. WPPA should be awarded its fees and costs as part of this appeal.

III. AUTHORITY & ARGUMENT

A. Standard Of Review

In reviewing a trial court's decision to grant summary judgment, the appellate court considers all facts and reasonable inferences in the light most favorable to the nonmoving party. *Mason v. Kenyon Zero Storage*, 71 Wash.App. 5, 8-9, 856 P.2d 410 (1993). Absent a genuine issue of any material fact, the moving party is entitled to summary judgment as a matter of law. *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wash.App. 48, 54, 856 P.2d 713 (1993) (citing CR 56(c); *Marincovich v. Tarabochia*, 114

⁸ CP__ Declaration of Counsel Carolyn Lake subjoined to DEFENDANT WPPA'S REPLY IN OPPOSITION TO PLAINTIFF'S **FOURTH** MOTION FOR RECONSIDERATION & RE-NEWED MOTION FOR TERMS/FEEES filed 10-27-2010 and **Exhibit A thereto**. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

⁹ See CP 222-225- Reconsideration Motion on 9/8/2009, CP 240-253 Reconsideration Motion dated 11/2/2009 , CP__-Motion dated 9/13/2010, and CP__ Reconsideration Motion dated 9/30/2010.

Wash.2d 271, 274, 787 P.2d 562 (1990)). This case raises questions of law, which the court reviews de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 813, 854 P.2d 1072 (1993).

B. Trial Court Properly Found Appellant Lacked Standing To Bring Declaratory Judgment Action. (Appeal Issue I and II).

Appellant West appeals dismissal of his requested

Declaratory Judgment that the WPPA is “a subdivision of the State of Washington subject to the Open Public Meetings and Public Records Act” See West *Motion for Show Cause* on file. However, the Trial Court properly found that Appellant lacks standing to bring this issue.

To find that a party has personal standing in order to seek a declaratory judgment, the Uniform Declaratory Judgments Act (UDJA), Chapter 7.24.020 RCW, states:

A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial rather than speculative or abstract. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). This

statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.* at 419.

The Washington Supreme Court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). The second part of the test considers whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the party seeking standing. *Id.* at 866. Both tests must be met by the party seeking standing.

No Facts Support Standing. Appellant provided no facts which support he was the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

“Any person” Is Not the Standing criteria. To the extent that Mr West made any response at all to the threshold

standing issue, he argued “The OPMA provides that “any person” may bring an action for violation of the act.” CP 18-43, CP 80-88. Mr West then argues he is “any person”. Mr West’s overly simplistic argument is flawed in several ways. First, he failed to provide the Trial or Appellate Courts with a citation supporting his argument.

Second, Mr West overlooks that the Washington Supreme Court has ruled that standing under the Open Public Meeting Act is a ***threshold test prior*** to determining whether a violation occurred and or whether any alleged violation is actionable. In *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wash.2d 769, 630 P.2d 930 Wash., 1981, the Washington Supreme Court was asked to decide if a fire protection district violated the Open Public Meetings Act of 1971 (act), RCW 42.30, when it held a meeting to dismiss the fire chief. Two of the three fire commissioners held an "executive meeting" to consider the Fire Chief's dismissal from his position. The district, purporting to act through the two commissioners, terminated his employment. The Fire Chief brought an action for wrongful termination of his employment, seeking reinstatement and damages for lost salary and benefits. The trial court granted petitioner's motion for summary judgment,

ruling that because the district had not complied with the notice requirements for a special meeting, the district's action in dismissing petitioner on May 6 was invalid under the Open Public Meetings.

The Court of Appeals reversed the trial court, and the Supreme Court affirmed, finding that the ***fire chief did not have standing*** to raise issue whether fire protection district violated Open Public Meetings Act of 1971 by failing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed:

In any event, even if the absent commissioner was not properly notified, petitioner has no standing to raise the matter of improper notice to a board member. Only the aggrieved member of the board could raise that issue, and he failed to raise it.

Kirk, quoting *State ex rel. Hays v. Wilson*, 17 Wash.2d 670, 673, 137 P.2d 105 (1943); *Casebere v. Clark County Civil Serv. Comm'n*, 21 Wash.App. 73, 76, 584 P.2d 416 (1978).

In *Kirk*, the Fire Chief Petitioner had a significantly stronger argument that Petitioner West does in this case to claim injury resulting from an alleged Open Public Meetings Act Violation. The Chief was directly impacted by the meeting's results (terminated). Here, Petitioner West has provided the Court no linkage at all to

WPPA as an organization, nor alleged how any action at the unspecified meeting impacts Mr. West at all.

The *Kirk* case also tells us that West's inability to establish standing as a threshold matter eliminates any further discussion of whether a violation occurred and whether West would be entitled to damages. The Fire Chief in *Kirk* also contends that as a result of his wrongful dismissal he was entitled to damages. The Supreme Court disagreed, "...but he alleges no wrongdoing except violation of the act. Even assuming petitioner would have a private cause of action for such a violation, ***a question we need not decide, we discern no basis for an award of damages in these circumstances where there is no violation of which petitioner can complain.***" *Kirk* at 773.

No Injury Pled. Further, the Courts have required a specific injury in fact in order to invoke standing. For example, a taxpayer may not invoke Declaratory Judgments Act to test constitutionality of Port Districts Act, where he does not allege that he owns or is interested in any property within district or will be in any way affected by acts done pursuant to such act, and he shows no substantial interest therein. *Heisey v. Port of Tacoma* (1940) 4 Wash.2d76, 102 P. 2d 258. Here, Appellant has not properly

established that he is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Nor has he established any 'injury in fact'. One may not, by declaratory judgment action, challenge constitutionality of statute **unless it appears that he will be directly damaged in person** or in property by its enforcement. *De Grief v. Seattle* (1956) 49 Wash.2d 912, 297 P.2d 940.

Appellant's Second Bite at Standing Apple Also Properly Failed. This Court previously found this Appellant lacked standing to bring Declaratory Judgment Action in a case with near identical fact pattern. See *West v. WPPA*, Thurston County Cause NO. 06-2-01972-2, copy of Order Granting Summary Judgment to WPPA (Honorable Gary R Tabor) attached, as **Appendix 1. CP_**.¹⁰

In that prior case¹¹, West submitted a public records request to WPPA on September 25, 2006. Four days later, WPPA sought clarification. West clarified his request on October 6, and then, four days later, WPPA responded that it would make the requested

¹⁰ See WPPA MOTION FOR SUMMARY JUDGMENT dated June 29, 2009. Respondent WPPA has moved to supplement to the Clerks Papers by pleading dated August 18, 2011, and will update the Court on the Clerk's Papers assigned numbering when issued.

¹¹ See CP_. Copy of Court of Appeals Opinion attached at **Appendix 2**. The Opinion is unpublished and was provided to the Trial Court as a basis for the recitation of facts of the prior case, and for guidance.

records available to West by October 24. Nonetheless, West commenced a lawsuit against WPPA on October 20, 2006. He alleged generally that WPPA violated the Public Records Act, ch. 42.56 RCW, and sought a declaratory judgment stating that WPPA is a public agency subject to the Public Records Act and a host of other laws.

On February 9, 2007, the trial court entered a written order granting summary judgment to WPPA. The trial court held that West lacked standing to request a declaratory judgment under RCW 7.24.020. It also dismissed West's claims that (1) the WPPA violated the Open Public Meetings Act of 1971 (OPMA), ch. 42.30 RCW, (2) the WPPA made an "Unconstitutional Expenditure of Public Funds," (3) the WPPA violated the Public Records Act, (4) the trial court should enter a "Global Declaration" that the WPPA is subject to the Public Records Act, (5) the WPPA violated the State Environmental Policy Act, ch. 43.21C RCW, and (6) Van Schoorl had a conflict of interest. The trial court reasoned that these six claims warranted dismissal because West failed to present facts showing a justiciable controversy existed and failed to state a claim upon which relief may be granted. Thus, the trial court granted WPPA's motion for summary judgment, granted the WPPA's

motion to strike, and dismissed the claims without prejudice. The trial court denied West's motion for reconsideration. Id.

The Trial Court's ruling of dismissal was upheld on appeal. See copy of unpublished Court of Appeals Opinion at **Appendix 2**, wherein the Court found:

West challenged the trial court's dismissal of his UDJA claims, in which he asked the trial court to declare that the WPPA is a public agency that is subject to the Public Records Act, the OPMA, and the State Environmental Policy Act. **Because West lacked standing to bring these claims, the trial court did not have jurisdiction to consider them and their dismissal was appropriate.**

Our legislature crafted the UDJA in order "to settle and to afford relief from and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. The UDJA thus allows a trial court to issue a declaratory judgment if "a judgment or decree will terminate [a] controversy or remove an uncertainty." RCW 7.24.050; see also RCW 7.24.010. The act does not, however, allow trial courts to issue advisory opinions except on exceptionally rare occasions where the public's interest in the resolution of an issue is overwhelming and the issue is adequately briefed and argued. See *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-17, 27 P.3d 1149 (2001) (discussing justiciability under UDJA), *cert. denied*, 535 U.S. 931 (2002).

As under all laws, courts lack jurisdiction to consider an action if a party does not have standing to bring the lawsuit. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985)), *appeal dismissed* by 479 U.S. 1073 (1987).

Id, Appendix 2. In the present case, this Court should also find that West lacks standing to request the relief. In the prior case, West alleged he was a “property owner,” “citizen,” and taxpayer. Both the Trial Court and Appeals Court found each of these insufficient to confer standing:

We address the assertions of standing contained in West's pleadings in turn. First, **being a landowner and citizen is insufficient to confer on a person standing to commence a lawsuit over the question of whether an entity like WPPA is a public agency subject to a host of statutes.** If status as a citizen or consumer were sufficient to confer standing, the entire doctrine would be superfluous. See *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

And a plaintiff's status as a landowner will cause a litigant to have standing only if the lawsuit involves some harm to the land or the owner's property rights, thus fulfilling the "injury in fact" prong of the standing test. See, e.g., *Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985) (a landowner has standing if his property rights were allegedly infringed). West does not demonstrate how WPPA's actions implicate his property rights and, therefore, **his status as a landowner does not confer standing.**

Id, Emphasis provided. Finally, with respect to West claim that being a taxpayer confers standing, the Court of Appeals also rejected this argument:

...to sue, "the taxpayer must show that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other

taxpayers." Am. Legion Post No. 32, 116 Wn.2d at 7.
West has not done this.

Id, Appendix 2.

In the present case, Appellant West alleged *even less basis* to justify standing as alleged in his first go-round. West alleged only the following conclusory claims, "Plaintiff is citizen and a person defined in RCW 42.30.129(1) with standing to seek relief," see Complaint at Section 2.1, and "Plaintiff is beneficially interested in the acts of the WPPA which creates impacts which affect him personally". See Complaint at Section 3.7. CP 4-9.

By Order on file dated August 28, 2009, the Trial Court **dismissed** Petitioner's request for a global Declaratory Judgment that WPPA is an agency subject to the PRA and Open Public Meeting Act.

1. Defendant WPPA's Motion for Partial Summary Judgment on the issue of Uniform Declaratory Judgment Act is GRANTED as to all named Defendants".
2. Defendant WPPA's Motion for Partial Summary Judgment on the issue of an alleged violation of Open Public Meetings Act is GRANTED as to all named Defendants;
3. Appellant's claims on the issues of Uniform Declaratory Judgment Act and Open Public Meetings Act are hereby DISMISSED with prejudice.

See CP 219-221.

Notwithstanding the dismissal, Mr West later again

attempted to breathe life into those inert causes by arguing as his threshold point in his “Second Brief” that: “*A Ruling On The Merits Must Issue That The WPPA Is A Subdivision Of The State Of Washington Subject To The Public Records Act And The Open Public Meetings Act*”. See CP228-232. However, because no PRA violation exists, the Trial Court again found that West failed to present a justiciable controversy, upon which the Court could rule, and failed to state a claim upon which relief may be granted.

Declaratory Judgment action requires more than Just “A person.” The Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, unquestionably requires more than just being “a person” in order to pursue a declaratory judgment, as West seeks here:

A person . . . **whose rights, status, or other legal relations are affected by a statute**, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial rather than speculative or abstract.

Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.* at 419.

Mr West ignores both prongs of the Washington Supreme Court's two-part UDJA standing test: (1) Whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)), and (2) whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the party seeking standing. *Id.* at 866. **Both** tests must be met by the party seeking standing. Mr West has established neither.

Mr West's dearth of credible legal and factual standing arguments is especially telling, given he was specifically challenged to do so, by both WPPA's SJ Motion before the Trial Court and after the Court of Appeals previously so clearly found against him on near identical grounds *I West v WPPA* (Round 1).

This Court should dismiss this appeal and should find, as the Trial Court did here and as this Court of Appeals did

previously, that, “Accordingly, West does not have standing to seek a declaratory judgment and we may not address his alleged public interest claims in an advisory opinion”.

C. Trial Court Properly Found That No Justiciable Controversy Exists As Appellant Did Not Alleged Actual Open Public Meeting Act Violation. (Issue I).

A controversy must be justiciable in order to support a

proceeding for, or the award of, declaratory relief. RCW 7.24.010.

Here, Appellant timely alleged no **actual** violation of the Open Public Meeting Act by WPPA. Instead, Appellant merely seeks an advisory opinion from the Court, which is not permissible.

Declaratory Judgment Action may not be used for the purpose of obtaining a purely advisory opinions. *Seattle First National Bank v. Crosby*, 41 Wn2d 234, 254 P2d 732 (1953). Declaratory Judgment action must be adversarial in character, and involve present and actual, as opposed to possible or potential controversy between parties. *De Grief v. Seattle*, 50 Wa2d 1, 297 P.2d 940 (1956). The controversy must be justiciable in order to support a proceeding for, or the award of, declaratory relief.¹² The requirements for a justiciable controversy are no less exacting in a case brought under the declaratory judgment statute than in any

¹² *Nostrand v. Little*, 58 Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952); *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960). *Wash. 2d 111, 361 P.2d 551 (1961)*.

other type of suit. Id. ¹³ In order to be justiciable, the controversy must be within the jurisdiction of the court. Id. “Justiciable controversy” requires parties having existing and genuine, as distinguished from theoretical, rights or interests; controversy must be one upon which judgment of court may effectively operate; ¹⁴ judicial determination of controversy must have force and effect of final judgment or decree upon relationships of one or more of parties in interest or be of such great public moment as to constitute legal equivalent of them; and proceedings must be genuinely adversary in character. RCW 7.24.010.

Here, Appellant failed to timely allege any actual violation of the Open Public Meetings Act by WPPA, and therefore, failed to assert any facts upon which relief may be granted.

What are the principal elements of a justiciable controversy as contemplated by the Uniform Declaratory Judgments Act, RCW 7.24? **First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests.** Second, the controversy must be one upon which the judgment of the court may effectively operate, **as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.** Third, it must be a controversy

¹³ See also *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 210 U.S.P.Q. (BNA) 344 (9th Cir. 1981); *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973).

¹⁴ *State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 413 P.2d 972 (1966).

the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.

Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution. The decisions of this court, when considered seriatim, recognize and apply this definition. *Hubbard v. Medical Ser. Corp.*, 59 Wash.2d 449, 367 P.2d 1003 (1962); *State ex rel. Ruoff v. Rosellini*, 55 Wash.2d 554, 348 P.2d 971 (1960); *Huntamer v. Coe*, 40 Wash.2d 767, 246 P.2d 489 (1952); *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584 (1938); *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341, 114 A.L.R. 1345 (1937).

State ex rel. O'Connell v. Dubuque, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

'It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act. The action still must be adversary in character between real parties and upon real issues, that is, between a plaintiff and defendant having opposing interests, and the interest must be direct and substantial and involve an actual as distinguished from a possible or potential dispute, to meet the requirements of justiciability.' See also *Kitsap County v. City of Bremerton* (1955), 46 Wash.2d 362, 281 P.2d 841; *Adams v. City of Walla Walla* (1938), 196 Wash. 268, 82 P.2d 584.

Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405.

D. TRIAL COURT PROPERLY DISMISSED PUBLIC RECORDS ACT CLAIM PURSUANT TO SUMMARY JUDGMENT CR 56 AND CR 12(B)(6). (Issue II-VI).

1. Trial Court Properly Dismissed Where Alleged Public Records Act Violation Wholly Unsupported by Fact or Law. (Issue II)

The record shows that Mr West filed this case on June 2, 2009. Mr West's Complaint contained 3 primary issues: (1) alleging an Open Public Meetings Act violation, (2) Declaratory Judgment, and (3) a Public Records Act claim. CP 4-9. The Trial Court properly dismissed Appellant's alleged Public Records Act claim pursuant to CR 56 because it is not supported by either fact or law. CR 56 provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Dismissal of the alleged public record violation pursuant to CR 56(c) was therefore proper because the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d

457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

The centerpiece of Appellant's Complaint is an allegation of a violation of the Public Records Act, (PRA), Chapter 42.56 RCW-- a violation which did not occur. Under Washington's PRA all state and local public agencies must disclose any requested public record, unless the record falls within a specific exemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash.2d 243, 250, 884 P.2d 592 (1994). The PRA enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government's activities. RCW 42.17.010, RCW 42.56.030.

The Public Records Act allows an agency time to adequately respond. An agency is **not** required to issue all the requested records within five (5) days of the request. RCW 42.56.030. An agency properly may notify the requestor that additional time is needed to gather the records and to notify third parties, and to consider possible exemptions.

Additional time required to respond to a request may be based upon the need to clarify the intent of the request, **to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the**

information requested is exempt and that a denial should be made as to all or part of the request.

See RCW 42.56.520.

Here the WPPA timely responded to Appellant West's initial request, thereafter responded within a reasonable timeline made known in advance to Appellant West. The WPPA finalized its review and release of records and provided complete disclosure on May 26, 2009, *earlier* than its estimate. Because the WPPA fully complied with the PRA, no violation as alleged by Appellant West occurred.

Petitioner is simply incorrect in asserting that the WPPA failed to comply with the Act, or failed to timely produce records. Instead, here WPPA timely responded to the Petitioner's request, thereafter responded within a reasonable timeline made known in advance to the Petitioner. The timelines are reasonable given the scope of Petitioner's request. His complaint was properly dismissed as a matter of law for failing to state a claim upon which relief may be granted. CR 56. CR 12(b).

2. Trial Court Properly Found WPPA's Attorney-client Privilege Rendered Records Exempt (Issue V)

Here, the Trial Court properly found certain WPPA records were exempt based on attorney client privilege. RCW 5.60.060(2).

That ruling should not be disturbed. The Court may affirm a finding of exemption on any ground supported by the record. *State v. Ellis*, 21 Wn. App. 123, 124, 584 P.2d 428 (1978).

Certain records requested by Petitioner and deemed exempt by WPPA consist of communication between WPPA staff and the Port's attorney. These documents are exempt pursuant to the Attorney-Client Privilege. *See Hangartener v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004).

In *Hangartener*, the Washington State Supreme Court held that “documents that fall within the attorney-client privilege are exempt from disclosure under the PDA.” *Id.* at 453. (emphasis added). In making its holding, the Court acknowledged that the ‘controversy’ exemption embodied in (former)RCW 42.17.310(1)(j)¹⁵ only provides an exemption for documents related to a controversy. *Id.* at 450. However, the Court held that the attorney-client privilege codified in RCW 5.60.060(2) applied to the Public Disclosure Act. *Id.*

Because the Public Disclosure Act endorses exemptions authorized by other statutes that prohibit disclosure, the Court reasoned that the attorney-client privilege does apply to requests for

¹⁵ The public records provisions of Chapter 42.19 RCW were re-codified as the Public Records Act (PRA) Chapter 42.56 RCW in 2005. See RCW 42.56.001, Laws of 2005, chapter 274. Former RCW 42.17.310(1)(j) is re-codified as RCW 42.56.290. The exemption language has not changed.

public disclosure thereof. *Id.* at 451-453; citing (former) RCW 42.17.260(1). According to the Court, the attorney-client privilege “protect(s) ‘communications and advice between attorney and client.’” *Id.* at 452, citing *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 645 P.2d 708 (1981). In sum, WPPA is not required to disclose documents that are subject to the attorney-client privilege: “the attorney-client privilege protects documents and records that fall within the privilege regardless of whether they are ‘relevant to a controversy.’” *Id.* Documents cited by WPPA as Attorney-Client privilege satisfy the elements of this exemption.¹⁶

Because the WPPA fully complied with the PRA, no violation as alleged by Petitioner West has occurred. His Amended

¹⁶ The WPPA is mindful of the recent legislative enactment regarding attorney invoicing, and its exemptions are consistent with that recent directive. See RCW 42.56.904, which provides as follows:

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

H.B. Rep. on HB 1897, at 3, 60th Leg., Reg. Sess. (Wash. 2007); S.B. Rep. on SHB 1897, at 2, 60th Leg., Reg. Sess. (Wash. 2007). RCW 42.56.904 took effect on July 22, 2007. Laws of Washington, at ii (2007).

Complaint as to alleged PRA violations should be dismissed as a matter of law for failing to state a claim upon which relief may be granted. CR 12(b)(6), and pursuant to CR 56 because there is no dispute material fact. The WPPA is entitled to judgment as a matter of law.

3. Trial Court Correctly Found WPPA Privilege Logs Proper. (Issue III)

WPPA claims only **one** exemption – Attorney Client privilege. See **CP 67 Exhibit 10** attached to (First) Decl. of Eric Johnson. WPPA’s privilege logs identify each record subject to the exemption with specificity – describing the type of record (emails), the dates, and specific controversy and or litigation which is the subject of the discussion between attorney and client WPPA. The litigation matters include West’s prior lawsuit against WPPA in *West v. WPPA*, Thurston County Cause No. 06-2-01972-2, *Futurewise v. WWGMHB*, WA Supreme Court No. 80396-0, and potential litigation with the Department of Ecology and US Army Corp of Engineers. The PRA requires the following, “Denials of requests must be accompanied by a written statement of the specific reasons therefor”. WPPA met and exceeded this standard. The Privilege Logs are **not** inadequate as West alleges, and no violation of the PRA exists.

On or about July 20, 2009, WPPA further supplemented its privilege logs in response to Petitioner's Discovery request. See CP 459-492, **Appendix 1**, to subjoined Declaration of Counsel, consisting of **Tab 8** to WPPA Response to Discovery. This information is precisely identical to that contained in WPPA'S Privilege Log previously provided to Petitioner, prior to Appellant's filing of this lawsuit. The log was voluntarily revised to add page numbers.

4. Trial Correct that WPPA Exercised Due Diligence in Records Search. (Issue IV)

At the trial court and again on appeal Petitioner West argues that WPPA's search for the emails was inadequate arguing that WPPA failed "to produce other requested records on the baldfaced assertion that they are "unavailable" without any form of diligent effort at recovery". See CP 229 West Second Brief at page 2.

Mr West both misstates that facts, and equally important, fails to provide the Courts with any legal authority on what constitutes a reasonable search pursuant to a Public Records request. Below, WPPA describes WPPA's diligence in responding to the request for emails, and shows how that action complies with the PRA standard for diligence.

a. WPPA Met PRA Standards for Due Diligence Search

Under the PRA, all state and local agencies must make available for public inspection and copying any public record not falling within a statutory exemption. Former RCW 42.17.260(1) (1997).

"The agency has the burden of proving that refusing to disclose 'is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.'" *Smith v. Okanogan County*, 100 Wn. App. 7, 11, 994 P.2d 857 (2000) (quoting former RCW 42.17.340(3) (1992)).

The PRA closely parallels the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970), as amended, (Supp. V, 1975); thus, where appropriate, Washington courts look to judicial interpretations of FOIA in construing the PRA. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)

"The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995).

An agency fulfills its obligations under the PRA if it can demonstrate beyond a material doubt that its search was

"reasonably calculated to uncover all relevant documents."

Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (quoting *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)).

b. WPPA's Due Diligence Meets Standard.

On or about June 16, 2008, Appellant Mr. West submitted his initial request for information to the Defendant WPPA. See **CP 55 Exhibit 1** attached to (first) Declaration of Eric Johnson dated 16 June 2009. Nearly a year later on April 8, 2009, Mr West submitted another records request to WPPA. See **CP60-61 Exhibit 6** attached to (first) Declaration of Eric Johnson dated 16 June 2009. West's April 8, 2009 records request (1) repeated the same request he had previously submitted in June 2008, and (2) requested additional records. *Id.*

A portion of Mr West's new April 8, 2009 requested records were for E-mails of Pat Jones, WPPA's former Executive Director, and Eric Johnson, current WPPA Executive Director. See CP 233-239 Second Declaration of Eric Johnson. WPPA took the following steps to respond. *Id.*

Emails of Eric Johnson, current WPPA Executive Director

Eric Johnson became the WPPA Executive Director effective

January 1, 2009. Mr Johnson has a policy of deleting emails that are more than eight weeks old if they are obsolete or superseded. See Second Declaration of Eric Johnson.

Consistent with this policy, Mr Johnson provided emails responsive to Petitioner's requests dating from February 2 2009, through the end of April 2009. After inquiry in response to Petitioner's request, WPPA Staff discovered that they are not able to retrieve any prior deleted emails. Id.

E-mails of Pat Jones, WPPA's former Executive Director

Former Executive Director Pat Jones left WPPA employment voluntarily on January 1 2009. At that time, his email account was deleted. See Second Declaration of Eric Johnson. After inquiry in response to Appellant's request, WPPA Staff discovered that they are not able to retrieve these deleted emails.

All of Pat Jones' memos, minutes, etc are retained for WPPA records, and WPPA has all of those. But Mr Jones' emails and his email account were deleted upon his leaving, and are not on that laptop anymore. Id.

WPPA advised the Trial court that Pat Jones' old laptop was not sitting in WPPA storage or surplus - it has been assigned a new user, username, etc. Pat Jones old laptop was re-issued to WPPA's

newest employee (Mandy, WPPA's Admin Assistant, and it was wiped clean of all of Pat's emails when it was re-configured for a new user. Kathy Olson in the WPPA office wiped all the old stuff off of the computer. Id.

That laptop was initially cleaned of Pat's files in early January, 2009, around the 7th or 8th. Mandy was hired here in mid-February, 2009, and her start date was March 2, 2009. The laptop was wiped clean again and reconfigured for her the week of **Feb. 23, 2009**.Id.

Mr West's PRR occurred in **April, 2009, post-computer reconfiguration**. WPPA also tried to log into both Mr Jones' former computer and the WPPA server with Pat Jones' user name and password, and as expected, they were not recognized. Id.

If Pat Jones' laptop had been idle, then WPPA would have certainly attempted to determine if further forensics could have retrieved material from it, but it had already been reconfigured for the new employee. WPPA is not a County or a City, or even a big Association with an IT department. WPPA has six employees and a small operation. WPPA doesn't have public works contracts, a big payroll, utility billings or any of the other things that would require a fancy big system to be backed up and crash-proof. Id.

The adequacy of the search is judged by a standard of reasonableness and depends upon the particular facts of each case. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999).

WPPA staff backs up all its documents, memos, newsletters, promotional materials, studies, and similar things. But old emails are routinely deleted. Starting in January 2010 (or before) WPPA intends to use the state retention schedule. CP 233-239. Here, WPPA conducted a search reasonably calculated to uncover all relevant documents. The Court properly determined that WPPA's actions were compliant with the PRA.

An agency is compliant with the Public Records request if it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Because the WPPA fully complied with the PRA, no violation as alleged by Appellant West has occurred. The Trial Court properly dismissed his Complaint as a matter of law for failing to state a claim upon which relief may be granted CR 12(b)(6), and pursuant to CR 56 because there is no dispute material fact. That ruling

should not be disturbed.

E. APPELLANT’S LACK OF FACTS ROBS THE COURT OF TOOLS NECESSARY TO RENDER GLOBAL DECISION THAT PRA APPLIES TO WPPA. (ISSUE I)

To the extent that Appellant seeks to bootstrap his singular public records request into a global general declaration that the WPPA is subject in all cases to the PRA, the action is entirely insufficient. The lack of specific facts in support of Appellant’s general “shot gun” approach to his allegations is an especially critical omission given that Washington Courts and other authorities have previously ruled that the status of the WPPA in the context of the PRA is **highly fact dependant**. See WA AGO 2002 No.2, citing *Telford v. Thurston Cy. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886, *rev. denied*, 138 P.2d 1015, 989 P.2d 1143 (1999).

In *Telford v. Thurston Cy. Bd. of Comm'rs*, the Washington Court of Appeals held that the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO) were the functional equivalents of public agencies for purposes of the campaign finance provisions of the Public Disclosure Act. *Telford*, 95 Wn. App at 166. However, the Court of Appeals opinion suggests that the given purpose of a law must be

taken into account in determining whether “hybrid” organizations with both private and public attributes are the “functional equivalent” of public agencies. Thus, whether these organizations are the functional equivalent of public agencies for purposes of the public records provisions of the Public Disclosure Act is not answered by the *Telford* decision. “The answer to this question would depend on a case-by-base analysis that takes into account the purposes of the public records provisions of the Public Disclosure Act and the nature of the particular organization.” See AGO 2002 No. 2, citing *Telford*.

The Attorney General Opinion 2002 No 2 also underscores the **fact-dependant** nature of whether the PRA applies to the WPPA. As an initial step, the Attorney General first addresses the same inquiry applied to two other quasi public associations, the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO).

Unlike the issue before the court in *Telford*, **your inquiry is posed in very general terms and asks whether, as an abstract matter, WSAC and WACO should be considered agencies for purposes of the public records provisions of the Public Disclosure Act. Providing a definitive answer to your question is problematic for two related reasons. First, the statutes related to WSAC and WACO do not establish that these associations are the functional equivalents of agencies for purposes of the public**

records provisions of the Public Disclosure Act. Second, as *Telford* makes plain, functional equivalency analysis is highly fact dependent.

Although the *Telford* court recounts numerous facts relating to WSAC and WACO, presumably the parties to that litigation presented the factual information that they thought relevant to the specific challenge at issue -the expenditure of public funds for purposes of political campaigns. Additional facts not presented or considered in *Telford* might well be relevant to whether WSAC and WACO would be treated as “public agencies” for purposes of the public records provisions of the Act. Whether an entity is public “may depend on the purpose for which the determination is made.” *Telford*, 95 Wn. App. at 157 n.11.

An examination of the statutes related to WSAC and WACO does not provide a definitive answer to the nature of these associations for purposes of the public records provisions of the Public Disclosure Act. As noted in *Telford*, there are statutes relating to WSAC and WACO that declare the public necessity of coordinating county administrative programs. RCW 36.32.335; RCW 36.47.010. Both acts require county officials to take such action as is necessary to effect this coordination and empower the counties to employ WSAC or WACO to fulfill their statutory duties. *Id.* **However, we cannot conclude from these statutes standing alone that WSAC or WACO exercises governmental power. As in *Telford*, this determination would depend on additional facts.**

See CP 459-492 - AGO 2002. No.2, Copy attached **Appendix 3.**

Next, the Attorney General Opinion applies the same reasoning to address whether the WPPA is subject to the Public Record Act, finding also the answer **cannot** be resolved due to the absence of specific facts.

Your second question essentially is the same as your first but relates to the Association of Washington Cities and the Washington Public Ports Association, rather than to WSAC and WACO. **As with WSAC and WACO, the statutes referring to these associations do not provide a definitive answer to your question¹⁷**

Nor are we in a position to weigh this question in the context of relevant factual circumstances. Thus, for the same reasons that we have explained in responding to your first question, we are not in a position to answer this question with an appropriate degree of confidence in the analysis that we would provide. Indeed, we have considerably less necessary factual information before us with respect to AWC and WPPA than with respect to the associations who are the subject of your first inquiry, as we do not even have the benefit of factual determinations of the sort made by *Telford* concerning WSAC and WACO. **Accordingly, any analysis of the status of the WPPA or of the AWC in a public records context must await the development of an actual factual situation to which the principles set forth in the statute, as interpreted in *Telford*, might be applied.**

See AGO 2002, No.2 CP 459-492.

F. WPPA Should Be Awarded Fees & Costs

WPPA requests attorney fees and costs based on this

¹⁷ RCW 53.06.030 empowers the port district commissions in this state to designate the WPPA as a coordinating agency, but does not confer governmental power on the WPPA itself. Additionally, RCW 53.06.090 provides that “the legislature recognizes that any nonprofit corporation created or re-created for the purposes of this chapter, is a private nonprofit corporation contracting to provide services to which port districts may subscribe.” Several statutes provide for the WPPA to nominate persons for committees or boards. See, e.g., RCW 47.06A.030; RCW 47.26.121. Similarly, certain statutes provide for the AWC to nominate or appoint persons for committees or boards. See, e.g., RCW 90.58.170 (shorelines hearings board) and RCW 43.20A.685 (state council on aging). Again, as noted above, a number of statutes also provide for similar nominations by decidedly private organizations.

frivolous appeal. RAP 18.1;¹⁸ RCW 4.84.185.¹⁹ and RAP 18.9.²⁰ A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Department of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).

The Trial Court declined to award the Respondent its attorney fees and costs as requested. Mr West avoided the consequences of his meritless pleadings before the trial Court but

¹⁸ RAP 18.1. **(a) Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

¹⁹ **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

²⁰ **RULE 18.9 VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules **to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply** or to pay sanctions to the court.

still presses on, requiring scarce WPPA member dollars to be spent once again defending against baseless claims; this Court should not allow him the same clemency in this **fifth** round of similarly vacuous pleadings. WPPA requests this Court order Appellant West to pay its attorney fees and costs for having to respond **yet again** to this frivolous appeal. RAP 18.1, 18.9 and or RCW 4.84.185.

An appeal is clearly without merit if the issues on review: (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985).

Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes the Court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999).

An appeal is frivolous if there are “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003)

(quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

This appeal is frivolous. West presents no debatable point of law, his appeal (yet again) lacks merit, and the chance for reversal is nonexistent. This was true in his pleadings before the Superior Court,; it remains true now. Mr West was given the several opportunities for a graceful exit, without a monetary penalty to him, but he chooses to persist. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane* (2007) 139 Wash.App. 21, 156 P.3d 912.

IV. CONCLUSION

Appellant's appeal should be denied as to all issues.

- **Issue I:** Appellant lacks standing to bring this Declaratory Judgment action pursuant to RCW 7.24.020 as no standing or injury is alleged or supported. Appellant failed to pled any actual violation of the Open Public Meeting Act, i.e., no justiciable controversy exists. WPPA is entitled to Summary Judgment pursuant to CR 56 and RCW 7.24.010,
- **Issue II-VI:** Appellant fails to prove a violation of the Public Records Act, as none occurred. Appellant failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6). Appellant failed to pled ay facts or law in support of

finding any actual violation of the Public Records Act, for which WPPA is entitled to Summary Judgment pursuant to CR 56, and Appellant lacked Facts in Support of a Global Declaration that the WPPA is subject to the Public Records Act (PRA) and thus Appellant failed to state a claim upon which relief may be granted pursuant to CR 12(b)(6).

In addition, WPPA should be awarded its fees and costs.

RESPECTFULLY SUBMITTED this 18th day of August 2011.

GOODSTEIN LAW GROUP PLLC

By: _____

Carolyn A. Lake, WSBA #13980
Attorneys for Respondent WPPA.

1 EXPEDITE

2 HEARING IS SET:

3 DATE:

4 TIME:

5 JUDGE: Honorable Judge Tabor

6 THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
7 IN THE COUNTY OF THURSTON

8 ARTHUR S. WEST,

9 Plaintiff,

10 v.

11 WASHINGTON PUBLIC PORT ASSOCIATION
12 & ROBERT VAN SCHOORL

Defendants,

NO. 06-2-01972-2

ORDER GRANTING WPPA'S
MOTION FOR SUMMARY
JUDGEMENT & MOTION TO STRIKE

13 THIS MATTER coming on for hearing on the motion of Defendant Washington
14 Public Port Association (WPPA) for summary judgment, said defendants appearing by
15 and through their attorney of record, Carolyn Lake of the Goodstein Law Group PLLC,
16 and plaintiff Arthur West appearing pro se. The Court having heard argument of the
17 parties and considered the records and files herein, including:

| | Date Filed | Pleading |
|----|-------------------|--|
| 19 | 11-30-2006 | WPPA's Motion To Dismiss |
| 20 | 11-30-2006 | Declaration Of Pat Jones |
| 21 | 12-06-2006 | Response Of Plaintiff |
| 22 | 12-27-2006 | Declaration Of A. West |
| 23 | 01-05-2007 | WPPA Memorandum In Support of Summary Judgment & Motion to Strike |
| 24 | 01-22-2007 | Plaintiff's Memorandum In Response |
| 25 | 01-25-2007 | Response Of Defendant WPPA |

ORDER GRANTING WPPA'S MOTION FOR
SUMMARY JUDGEMENT & MOTION TO STRIKE

- 1 070131.pldg.Order Granting WPPA SJ .doc

APPENDIX 1

GOODSTEIN
LAW GROUP PLLC
1001 Pacific Avenue
Ste 400
Tacoma, WA 98402
Fax: 253 779-4411
Tel: 253 779-4000

1 Based on the foregoing, and the Court being fully advised; the Court finds:

- 2 1. To the extent that the Plaintiff seeks a Declaratory Judgment, the
3 Plaintiff lacks standing to bring to bring this Declaratory Judgment
4 action pursuant to RCW 7.24.020 under the facts presented to the Court.
- 5 2. Based on Plaintiff's failure to present facts or make an offer of proof in
6 support of his claim of WPPA's alleged violation of the Open Public
7 Meeting Act, i.e., no justiciable controversy exists and or Plaintiff has
8 failed to state a claim upon which relief may be granted pursuant to CR
9 12(b)(6).
- 10 3. Based on Plaintiff's failure to present facts or make an offer of proof in
11 support of his claim of WPPA's alleged "Unconstitutional Expenditure of
12 Public Funds", no justiciable controversy exists and or Plaintiff has failed
13 to state a claim upon which relief may be granted pursuant to CR
14 12(b)(6).
- 15 4. Based on Plaintiff's failure to present facts or make an offer of proof (a)
16 in support of his claims of WPPA's alleged violation of the Public
17 Records Act, (b) in Support of Plaintiff's requested Global Declaration
18 that the WPPA is subject to the Public Records Act (PRA), (c) in support
19 of his claims of WPPA's alleged violation of the State Environmental
20 Policy Act, and (d) in support of his claims of Defendant Van Schoorl's
21 alleged conflict of interest claim, no justiciable controversy exists and or
22 Plaintiff has failed to state a claim upon which relief may be granted
23 pursuant to CR 12(b)(6).
- 24
25

1 Now, therefore, IT IS ORDERED, DECREED AND ADJUDGED that:

- 2 1. Defendant WPPA's Motion for Summary Judgment is GRANTED;
- 3 2. Defendant WPPA's Motion to Strike is GRANTED;
- 4 3. Counsel for WPPA shall cause to be filed a transcript of the
- 5 Court's verbal ruling in this matter.
- 6 3. Plaintiff's claims are hereby DISMISSED with out prejudice.

7
8 DONE IN OPEN COURT THIS 9 day of February 2007.

9
10 SI
11 Hon. Judge Tabor

12 Presented by:

13 GOODSTEIN LAW GROUP, P.L.L.C.

14 SI
15 Carolyn A. Lake WSBA #13980
16 Attorneys for Defendant Port of Olympia

17 ~~Approved as to form,~~
18 ~~notice of presentation waived:~~

19 ARTHUR S. WEST

20 *with objections as to findings*

21 SI
22 Arthur S. West, plaintiff pro se

23
24
25 ORDER GRANTING WPPA'S MOTION FOR
SUMMARY JUDGEMENT & MOTION TO STRIKE

- 3 070131.pldg.Order Granting WPPA SJ .doc

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COURT OF APPEALS

03 JUN 22 AM 8:04

STATE OF WASHINGTON
BY  CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR S. WEST,

Appellant,

v.

WASHINGTON PUBLIC PORTS
ASSOCIATION and ROBERT VAN
SCHOORL,

Respondents.

No. 36112-4-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Arthur West appeals an order granting summary judgment to the Washington Public Ports Association (WPPA) and Robert Van Schoorl, WPPA's former president. West argues that the trial court erred when it (1) did not require WPPA to respond to his discovery requests that he made after the summary judgment hearing, (2) struck three documents he submitted as evidence, (3) held that West did not have standing under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and (4) granted summary judgment to the WPPA. We affirm.

FACTS

West submitted a public records request to WPPA on September 25, 2006. Four days later, WPPA sought clarification. West clarified his request on October 6, and then, four days later, WPPA responded that it would make the requested records available to West by October

APPENDIX 2

West commenced a lawsuit against WPPA on October 20, 2006. He alleged generally that WPPA violated the Public Records Act, ch. 42.56 RCW, and sought a declaratory judgment stating that WPPA is a public agency subject to the Public Records Act and a host of other laws.

On January 5, 2007, WPPA moved for summary judgment and to strike three documents that West had attached to his pleadings. West responded to the motion on January 22. The trial court held a summary judgment motion hearing on January 26.¹ Then, on February 2, West filed a document entitled "MOTION TO COMPEL ADMISSIONS AND PRODUCTION AND MOTION FOR DEFAULT." Clerk's Papers (CP) at 292. WPPA responded with a brief in which it argued that the discovery request was untimely. The trial court held a motion hearing on February 9, apparently to resolve the continuance and discovery issue, but our record does not contain a ruling on this matter.

Also on February 9, 2007, the trial court entered a written order granting summary judgment to WPPA.² The trial court held that West lacked standing to request a declaratory judgment under RCW 7.24.020. It also dismissed West's claims that (1) the WPPA violated the Open Public Meetings Act of 1971 (OPMA), ch. 42.30 RCW, (2) the WPPA made an

¹ The hearing is shown on the trial court's docket. WPPA contends that the trial court granted summary judgment in an oral ruling that day. West did not make the report of proceedings part of our appellate record to dispute this claim. RAP 9.2(a), 9.3, 9.5(a) (declaring appellant's duty to perfect record for appeal). We do not review matters outside our record. *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 779, 37 P.3d 354 (2002) (citing *State v. McFarland*, 127 Wn.2d 335, 899 P.2d 1251 (1995)).

² The trial court did not consider two declarations that West submitted on February 8, 2007, which was after the summary judgment hearing and one day before the trial court entered its written ruling granting summary judgment. The decision to reject declarations filed after a summary judgment hearing, but before the final written ruling, lies within the trial court's sound discretion. *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Although West refers to his declarations in his brief, he has not appealed the decision to reject them. A commissioner of our court issued a ruling striking the declarations. Accordingly, we do not rely on the declarations because they are not a part of the record at the trial court or on appeal.

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“Unconstitutional Expenditure of Public Funds,” (3) the WPPA violated the Public Records Act, (4) the trial court should enter a “Global Declaration” that the WPPA is subject to the Public Records Act, (5) the WPPA violated the State Environmental Policy Act, ch. 43.21C RCW, and (6) Van Schoorl had a conflict of interest. The trial court reasoned that these six claims warranted dismissal because West failed to present facts showing a justiciable controversy existed and failed to state a claim upon which relief may be granted. Thus, the trial court granted WPPA’s motion for summary judgment, granted the WPPA’s motion to strike, and dismissed the claims without prejudice. The trial court denied West’s motion for reconsideration.

West appeals.³

ANALYSIS

CONTINUANCE

West argues that the trial court erred by not requiring WPPA to respond to his February 2 discovery requests. But the proper issue before us is whether the trial court erred when it declined to grant a continuance in order to allow West to conduct additional discovery. West made this request after the summary judgment hearing on January 26, which is not contained in our record, but before the February 9 written ruling, which is in our record. Such discovery may have proven relevant if the trial court had not yet made a final summary judgment ruling or if it heard a motion to reconsider an earlier ruling. The record before us is insufficient to address this issue.

³ A commissioner of our court ruled that this matter is appealable as a matter of right because the order effectively discontinued the action. See *Barnier v. Kent*, 44 Wn. App. 868, 872 n.1, 723 P.2d 1167 (1986).

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The party seeking review, West, has the burden to perfect the record so that, as the reviewing court, we have all relevant evidence before us. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (citing *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992)). An insufficient appellate record precludes review of the alleged errors. *Bulzomi*, 72 Wn. App. at 525 (citing *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), *review denied*, 105 Wn.2d 1014 (1986)).

Here, West has not provided us with an adequate record. At a minimum, such record would include the written ruling denying his request for a continuance or the report of proceedings from the motion hearing containing the trial court's oral decision. Upon the record provided, we cannot determine whether West proved to the trial court good cause to conduct additional discovery nor can we evaluate the trial court's rationale for denying West's request. See CR 56(f); *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (outlining rules regarding requests for a continuance to conduct further discovery in order to oppose a summary judgment motion; determination is fact-based). Accordingly, we do not address West's discovery challenge on its merits.

EVIDENTIARY RULING

Next, West appeals the trial court's decision to strike three documents that he submitted. It appears that the trial court struck (1) the WPPA's 1960 Articles of Incorporation, (2) a check dated December 2006, and (3) a letter that West wrote to the Attorney General.⁴

⁴ On appeal, WPPA argues that the trial court properly struck nine of West's attachments. The trial court did not explain what documents it struck in its written ruling and the oral ruling is not part of our appellate record. But the trial court indicated that it granted WPPA's motion to strike and the written motion (the only relevant portion of our record) contends only that the trial court should strike these three attachments. Accordingly, we review whether the ruling was erroneous regarding the three contested documents and consider the remaining six documents in our review of summary judgment because they were apparently before the trial court.

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We review a trial court's ruling on a motion to strike for abuse of discretion. *King County Fire Prot. Dists. No. 16, et al. v. Housing Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (citing *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988)). A trial court may base its summary judgment ruling only on "pleadings, depositions, answers to interrogatories, . . . admissions on file [and] affidavits, if any." CR 56(c). Further:

[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies* of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

CR 56(e) (emphasis added).

Here, the three attachments are admissible for summary judgment purposes only if they are "sworn or certified copies" of documents referred to in West's affidavits. CR 56(e). These three documents are neither sworn nor certified. Accordingly, the trial court did not abuse its discretion when it declined to consider them when ruling on summary judgment.

STANDING UNDER THE UDJA

West challenges the trial court's dismissal of his UDJA claims, in which he asked the trial court to declare that the WPPA is a public agency that is subject to the Public Records Act, the OPMA, and the State Environmental Policy Act. Because West lacked standing to bring these claims, the trial court did not have jurisdiction to consider them and their dismissal was appropriate.

Our legislature crafted the UDJA in order "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. The UDJA thus allows a trial court to issue a declaratory judgment if "a judgment or decree will

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terminate [a] controversy or remove an uncertainty.” RCW 7.24.050; *see also* RCW 7.24.010. The act does not, however, allow trial courts to issue advisory opinions except on exceptionally rare occasions where the public’s interest in the resolution of an issue is overwhelming and the issue is adequately briefed and argued. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-17, 27 P.3d 1149 (2001) (discussing justiciability under UDJA), *cert. denied*, 535 U.S. 931 (2002).

As under all laws, courts lack jurisdiction to consider an action if a party does not have standing to bring the lawsuit. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985)), *appeal dismissed by* 479 U.S. 1073 (1987). Standing is roughly defined as a personal stake in the challenge. *See High Tide Seafoods*, 106 Wn.2d at 701-02. We review a party’s standing de novo. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999).

We review whether a party has standing to bring a particular action by applying a two-part test:

First, we ask whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question. Second, we consider whether the party seeking standing has suffered from an injury in fact, economic or otherwise. Both tests must be met by the party seeking standing.

Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004) (citations omitted).

The only allegations relevant to standing are West’s assertions that (1) he is “a landowner and a citizen conducting business in Thurston County Washington and in the Cities of Tumwater and Olympia, with standing to maintain this action,” CP at 11; (2) he is “a property owner in a port district whose representative[, Tim Sheldon,] has requested an [Attorney General’s Opinion] on the issue of the status of the WPPA,” CP at 269; (3) the issue of whether WPPA is a public

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agency is “of statewide significance and of broad public import,” CP at 58; and (4) West “submitted the required standing letter under Reiter v. Wal(l)gren, 28 Wn. 2d 872, 184 P.2d 571 (1947)” regarding the claim of unconstitutional expenditure of public funds, CP at 61. These assertions are insufficient to confer standing because they fail to show that West has “suffered from an injury in fact,” a basic requirement for invoking a court’s jurisdiction. *Branson*, 152 Wn.2d at 876.

We address the assertions of standing contained in West’s pleadings in turn. First, being a landowner and citizen is insufficient to confer on a person standing to commence a lawsuit over the question of whether an entity like WPPA is a public agency subject to a host of statutes. If status as a citizen or consumer were sufficient to confer standing, the entire doctrine would be superfluous. *See Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). And a plaintiff’s status as a landowner will cause a litigant to have standing only if the lawsuit involves some harm to the land or the owner’s property rights, thus fulfilling the “injury in fact” prong of the standing test. *See, e.g., Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985) (a landowner has standing if his property rights were allegedly infringed). West does not demonstrate how WPPA’s actions implicate his property rights and, therefore, his status as a landowner does not confer standing.

Second, a state senator’s decision to ask for an Attorney General’s Opinion is irrelevant to the question of whether one of that senator’s constituents has standing to commence a lawsuit. Standing analysis focuses on litigants’, not politicians’, interests. *See Orion Corp.*, 103 Wn.2d at 455. Third, West suggests that he has presented a question of public interest for which standing requirements are relaxed. In *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), our Supreme Court has held that appellate courts may decide a

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question of public interest that has been adequately briefed and argued if doing so would benefit the public and government officers. Assuming the questions posed are of public interest, West's briefing and the inadequate appellate record make it inappropriate for us to attempt to address West's claims on the merits.

Last, West's reliance on taxpayer standing and *Reiter* is misplaced. In *Reiter*, our Supreme Court held that, without statutory authorization, a taxpayer *does not* have standing to challenge the legality of public officers' acts unless he first requests that a proper public official sue on behalf of all taxpayers. 28 Wn.2d at 876-77. But *Reiter's* holding does not mean, conversely, that a taxpayer *has* standing simply because he wrote a letter demanding that the Attorney General's Office commence litigation. Rather, to sue, "the taxpayer must show that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers." *Am. Legion Post No. 32*, 116 Wn.2d at 7. West has not done this. Moreover, to the extent that West seeks an advisory opinion regarding a matter for which he lacks standing, Washington courts may not issue such advisory opinions. *To-Ro Trade Shows*, 144 Wn.2d at 416 (holding that a court may not deliver an advisory opinion under the UDJA if standing and other justiciability factors are not satisfied, barring a substantial public interest that is adequately briefed). Accordingly, West does not have standing to seek a declaratory judgment and we may not address his alleged public interest claims in an advisory opinion.

SUMMARY JUDGMENT

Last, West appeals the trial court's grant of summary judgment to WPPA on his claims that (1) it violated the OPMA, (2) it made unconstitutional expenditures of public funds, and (3) its president had a conflict of interest. He has abandoned his public records request claim. And

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he does not dispute WPPA's evidence that it responded to his request with a timely letter asking for clarification, followed by the disclosures West sought.

As stated above, we do not issue advisory opinions. *Commonwealth Ins. Co. of Am. v. Grays Harbor County*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004) (citing *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). Thus, even if the record before us contained sufficient evidence, which it does not, we may not issue a ruling answering the merits of West's claims absent a real justiciable controversy. *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 924, 91 P.3d 903 (2004) (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000); *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960 (2000), *aff'd*, 144 Wn.2d 403, 27 P.3d 1149 (2001)), *review denied*, 153 Wn.2d 1015 (2005).

A. STANDARD OF REVIEW

We review an appeal from summary judgment *de novo*. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)); *see also Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001).

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). Here, West is the nonmoving party. After the moving party meets its initial burden to show an absence of material fact, the burden shifts to the party with the burden of proof at trial, here West. *Young v. Key*

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Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). When that party responds to the summary judgment motion, he cannot rely on mere allegations contained in the pleadings. *Young*, 112 Wn.2d at 225. Instead, he must offer affidavits or other means provided in CR 56 to set forth specific facts showing that there is a genuine issue for trial. *Young*, 112 Wn.2d at 225-26.

B. OPEN PUBLIC MEETINGS

In his complaint, West (1) sought a declaratory judgment that WPPA is subject to the OPMA, ch. 42.30 RCW, (2) asserted that WPPA violated the OPMA without specifying how, and (3) requested an injunction to prevent future violations. Above, we held that West lacks standing to bring a declaratory judgment action. And we hold that summary judgment was appropriate for the remaining OPMA claims.

Unless an exception applies, “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency.” RCW 42.30.030. “Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of [the OPMA] by members of a governing body.” RCW 42.30.130.

Here, West did not present a genuine issue of material fact regarding this open meetings claim because he did not support his claim of an OPMA violation. Instead, he asserted that the OPMA applies to the WPPA and requested an advisory opinion confirming his assertion. Courts are prohibited from issuing advisory opinions. *Commonwealth Ins. Co. of Am.*, 120 Wn. App. at 245. And the record contains no evidence of an OPMA violation. “[B]are assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

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Evidence of an OPMA violation could include affidavits showing that a meeting was held on a particular day but that it was closed to the public or otherwise did not conform to the OPMA's requirements.⁵ See, e.g., *Protect Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), review denied, 121 Wn.2d 1011 (1993). Assuming, without deciding, that WPPA is subject to the OPMA, West did not present a genuine issue of material fact regarding an OPMA violation and, therefore, the trial court did not err when it entered summary judgment on this claim.

C. UNCONSTITUTIONAL EXPENDITURE OF PUBLIC FUNDS

West also claimed that WPPA made an unconstitutional expenditure of public funds for lobbying activities. In support of this claim, he provided evidence of a WPPA disclosure that it spent money to hire lobbyists.

It is unclear what law West relies on in bringing this claim. Our constitution sets requirements for the expenditure of public funds, including (1) a prohibition on paying money out of the state treasury without an appropriation, (2) a requirement of timely payments and specific sums and objects of an appropriation, and (3) a prohibition on lending or giving public money or credit. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365-66, 70 P.3d 920 (2003) (citing WASH. CONST. art. VIII, § 4); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 652, 62 P.3d 462 (2003) (quoting WASH. CONST. art. VIII, § 7). It is unclear how West's claim challenges WPPA's compliance with these, or other, constitutional requirements and his evidence does not raise a genuine issue of material fact regarding whether

⁵ West had an opportunity to obtain such evidence through the discovery process before WPPA moved for summary judgment but apparently declined to do so.

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WPPA violated any law when it hired lobbyists. The trial court did not err in entering summary judgment on this claim.⁶

D. CONFLICT OF INTEREST

Finally, West alleged that Van Schoorl had a conflict of interest because he was simultaneously WPPA's president, an Olympia port commissioner, and budget director for the Department of Natural Resources. Van Schoorl was defeated as port commissioner in the November 2007 general election and is no longer WPPA's president. We may decline review of an issue if it is moot because we are unable to provide effective relief. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981); *see also To-Ro Trade Shows*, 144 Wn.2d at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Courts cannot provide effective relief regarding the alleged conflict of interest here because such a conflict no longer exists. Thus, the conflict issue is moot and we decline to review it.

ATTORNEY FEES AND COSTS

WPPA requests West pay its attorney fees and costs for having to respond to what it characterizes as a frivolous appeal. RAP 18.1; RCW 4.84.185. An appeal is frivolous if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005 (2006). Although West does not prevail, this appeal is not frivolous. He arguably has raised issues of public interest concerning alleged expenditures of public funds. Moreover,

⁶ West also argues that WPPA's lobbying activity exceeded the authority delegated to it under chs. 39.84 and 53.06 RCW. We decline to address this issue because it was not properly before the trial court. RAP 2.5(a).

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the conflicts issue is moot, not wholly devoid of merit. Accordingly, we decline to award fees and costs.

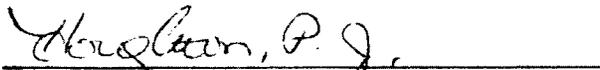
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.



QUINN-BRINTNALL, J.

We concur:



HOUGHTON, P.J.



BRIDGEWATER, J.

Wash. AGO 2002 NO. 2, 2002 WL 727029 (Wash.A.G.)

Office of the Attorney General
State of Washington

AGO 2002 No. 2

April 10, 2002

COUNTIES - CITIES - PORT DISTRICTS - STATE AGENCIES - PUBLIC DISCLOSURE ACT - PUBLIC RECORDS - Applicability of public records sections of RCW 42.17 to associations comprised of counties, county officials, cities, and port districts.

While associations comprised of counties or local public officers are not "agencies" as defined in RCW 42.17.020, they could in certain circumstances be found to be "functional equivalents" of agencies for purposes of applying particular portions of the Public Disclosure Act; this would be greatly dependent on the facts of a particular case.

The Honorable Tim Sheldon
State Senator
35th District
P.O. Box 40435
Olympia, WA 98504-0435

Dear Senator Sheldon:

By letter previously acknowledged, you requested our opinion on the following questions in light of the decision of the Court of Appeals in Telford v. Thurston Cy. Bd. of Comm'rs, 95 Wn. App. 149, 974 P.2d 886, rev. denied, 138 P.2d 1015, 989 P.2d 1143 (1999). We have paraphrased your questions slightly for ease of understanding.

QUESTIONS

- 1. Are the Washington State Association of Counties and the Washington Association of County Officials subject to the public records provisions of the Public Disclosure Act, RCW 42.17.250 through 42.17.348?**
- 2. Are the Association of Washington Cities and the Washington Public Ports Association subject to the public records provisions of the Public Disclosure Act, RCW 42.17.250 through 42.17.348?**

SHORT ANSWER

In Telford v. Thurston Cy. Bd. of Comm'rs, the Washington Court of Appeals held that the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO) were the functional equivalents of public agencies for purposes of the campaign finance provisions of the Public Disclosure Act. Telford, 95 Wn. App. at 166. However, the Court of Appeals opinion suggests that the given purpose of a law must be taken into account in determining whether "hybrid" organizations with both private and public attributes are the "functional equivalent" of public agencies. Thus, whether these organizations are the functional equivalent of public agencies for purposes of the public records provisions of the Public Disclosure Act is not answered by the Telford decision.

The answer to this question would depend on a case-by-case analysis that takes into account the purposes of the public records provisions of the Public Disclosure Act and the nature of the particular organization. A determination of whether an entity's records are subject to the public records provisions likely would depend in part on whether the entity has authority to make and implement decisions of a governmental nature. See Telford, 95 Wn. App. at 163. Therefore, to determine whether these organizations are the functional equivalents

APPENDIX 3

of public agencies under the public records provisions of the Public Disclosure Act would require a fully developed factual record on a particular issue.

*2 We are not in a position to provide a definitive response to your inquiry with respect to the organizations that were parties to the *Telford* case, WSAC and WACO, or with respect to the Association of Washington Cities (AWC) or the Washington Public Ports Association (WPPA). Given the ambiguity in the law, the application of the Public Disclosure Act on the basis of "functional equivalent" test is a fact-specific inquiry. Attorney General opinions are for the purpose of addressing questions of law rather than resolving issues of fact. However, while we cannot resolve these factual issues, we can discuss the general legal framework that the courts could apply to the factual situations.

ANALYSIS

In that the *Telford* decision is central to your questions and to our analysis of them, it is appropriate to begin with a discussion of *Telford* and the principles to be drawn from it. [FN1]

At issue in *Telford* was whether WSAC and WACO were "agencies" for purposes of the campaign finance provisions of the Public Disclosure Act, and thus were prohibited by RCW 42.17.128, .130, and .190 from donating their funds to support or oppose initiative campaigns. *Telford*, 95 Wn. App. at 152. The *Telford* court concluded, as had the trial court, that neither association was a public agency as specifically defined by RCW 42.17.020(1). *Id.* at 152. However, *Telford* determined that the reach of the Act, liberally construed, was not confined to statutorily defined "agencies", but might also encompass entities that were the "functional equivalent" of agencies for a given purpose. *Id.* at 161.

The functional equivalence test "determines, on a case-by-case analysis of various factors, whether a particular entity is the functional equivalent of a public agency for a given purpose." *Id.* at 161 (emphasis added). *Telford* identified four factors to be considered in determining whether an entity having both public and private characteristics is the functional equivalent of a public agency for purposes of the campaign finance provisions of the Public Disclosure Act: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government. In considering the four factors, the *Telford* court had before it a great deal of factual information about WSAC and WACO. The court considered the history and formation of each association, its organic documents, its sources of revenue and funding system, its purposes, its membership, its services and activities, the degree to which the association was controlled by public officials, whether the association participated in public retirement systems or other government systems, and the reporting and auditing of the association's financial affairs, including whether the association was audited by the state.

Telford then considered these facts, and the four factors, in light of the relevant statutory context. As identified by the *Telford* court, that context was comprised of statutes prohibiting the expenditure of public funds in initiative campaigns and promoting disclosure of such expenditures. *Id.* at 165-66. Likely because of this financial context, the funding of each association played a prominent role in the court's analysis. *Id.* at 164-65. The court pointed out that each association received most of its revenue in the form of dues paid directly from county funds, and the dues were essentially provided in block form rather than in return for specific services. The court observed that in this respect, county funds were made available for expenditure by WSAC and WACO, essentially within the discretion of the two organizations, as though the funds were private funds. *Id.* at 164. The court also observed that each association received additional financial support from government. *Id.* at 165.

*3 In this factual and statutory context, the *Telford* court concluded that WSAC and WACO were the functional equivalents of public agencies, and that subjecting them to the Act was in keeping with the purposes of the relevant statutes, i.e., to prohibit government expenditures for "private political agendas" and to promote disclosure of political expenditures. *Id.* at 165-66 ("Allowing WSAC/WACO to use their public funds to support private political agendas would contravene both policies.").

Telford suggests another factor that may be appropriate for evaluating functional equivalence under the public records provisions of the Public Disclosure Act. Noting that one of the factors used by an Oregon court was the authority of the entity to make and implement decisions, *Telford* concluded this factor was not relevant to campaign funding provisions of Washington's law, though it might be relevant to the public records provisions:

Whether an entity has authority to make and implement decisions may be relevant to determining whether that entity's records should be available to the public, but it has no relation to the misappropriation of public funds.

Telford, 95 Wn. App. at 163. [FN2] Thus, the *Telford* court was careful to point out that its inquiry was context-specific and spent a significant portion of the opinion evaluating the level of governmental funding for purposes of campaign financing. *Id.* at 159-60, 164-65

With this background in mind, we proceed to your specific questions:

1. Are the Washington State Association of Counties and the Washington Association of County Officials subject to the public records provisions of the Public Disclosure Act, RCW 42.17.250 through 42.17.348?

As the above discussion demonstrates, the fact that *Telford* determined that WSAC and WACO were the functional equivalents of "public agencies" in the context of campaign financing statutes does not necessarily mean that the associations would be so considered for other purposes. The question then becomes what tests our courts would use to evaluate whether these organizations are the "functional equivalents" of public agencies for the particular statutes that relate to disclosure of documents. In the context of *Telford*, the court did not find relevant the additional factor of "the authority of the entity to make and implement decisions" as outlined in *Marks v. McKenzie High Sch. Fact-Finding Team*, 878 P.2d 417, 423 (Ore. 1994). However, we believe this factor would be considered relevant for purposes of the public records provision of the Public Disclosure Act.

There are several considerations that would support application of this test under Washington law. First, the provision of the Public Disclosure Act that declares the policy of the public records provisions relates to governance: "[F]ull access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The term "governance" is a term that refers to the exercise of sovereign power to make decisions and meet the public needs. Thus, the court might logically look to the ability to make and implement decisions of a governmental nature in determining whether an association is the functional equivalent of an agency for purposes of the public records provisions of the Public Disclosure Act.

*4 Unlike the issue before the court in *Telford*, your inquiry is posed in very general terms and asks whether, as an abstract matter, WSAC and WACO should be considered agencies for purposes of the public records provisions of the Public Disclosure Act. Providing a definitive answer to your question is problematic for two related reasons. First, the statutes related to WSAC and WACO do not establish that these associations are the functional equivalents of agencies for purposes of the public records provisions of the Public Disclosure Act. Second, as *Telford* makes plain, functional equivalency analysis is highly fact dependent. Although the *Telford* court recounts numerous facts relating to WSAC and WACO, presumably the parties to that litigation presented the factual information that they thought relevant to the specific challenge at issue—the expenditure of public funds for purposes of political campaigns. Additional facts not presented or considered in *Telford* might well be relevant to whether WSAC and WACO would be treated as "public agencies" for purposes of the public records provisions of the Act. Whether an entity is public "may depend on the purpose for which the determination is made." *Telford*, 95 Wn. App. at 157 n.11.

An examination of the statutes related to WSAC and WACO does not provide a definitive answer to the nature of these associations for purposes of the public records provisions of the Public Disclosure Act. As noted in *Telford*, there are statutes relating to WSAC and WACO that declare the public necessity of coordinating county administrative programs. RCW 36.32.335; RCW 36.47.010. Both acts require county officials to take such action as is necessary to effect this coordination and empower the counties to employ WSAC or WACO to fulfill their statutory duties. *Id.* However, we cannot conclude from these statutes standing alone that WSAC or WACO exercises governmental power. As in *Telford*, this determination would depend on additional facts.

A number of other statutes provide for WSAC or other associations to nominate or appoint individuals to advisory bodies or to boards. Several of these statutes provide for the associations to recommend persons for appointment by the governor or other appointing authority. For example, RCW 43.20.030 provides that before appointing the county official member of the State Board of Health, the governor "shall consider any recommendations submitted by the Washington state association of counties." Similarly, RCW 47.26.121 provides that certain appointments to the Transportation Improvement Board shall be made by the Secretary of Transportation from among nominees of the Washington State Association of Counties for county members, the Association of Washington Cities for city members, the Washington State Transit Association for the transit members, and the Washington Public Ports Association for the port member. Other statutes provide for WSAC to appoint members to boards or committees. See, e.g., RCW 43.32.010, which creates a state design standards committee with some members appointed by the executive committee of WSAC.

*5 However, in many instances, the Legislature has also provided that indisputably private organizations will make nominations or appointments to such boards or committees. See, e.g., RCW 47.06C.030, which provides that the transportation permit efficiency and accountability committee shall include among its nonvoting members a member designated by each of the following organizations: the Consulting Engineers Council of Washington, the Associated General Contractors of Washington, the Association of Washington Business, the Washington State Building and Construction Trades Council, and statewide environmental organizations. See also RCW 36.110.030 (three members of Jail Industries Board of Directors to be selected from a list of nominations provided by state-wide labor organizations representing a cross-section of trade organizations). Thus, the statutes that provide for nomination or appointment to advisory councils or boards do not necessarily establish the associations as public agencies for purposes of the public records act provisions of the Public Disclosure Act. [FN3]

As noted above, Attorney General opinions are provided on legal questions. RCW 43.10.030(5)-(7). The opinion process is not designed to gather facts or to make factual determinations. Yet factual information clearly is relevant to a functional equivalence analysis under *Telford*. For these reasons, we cannot be sufficiently certain that all information relating to WSAC and WACO that would be relevant to your inquiry is before us and, accordingly, we are not in a position to respond to your inquiry with a meaningful level of confidence in the

analysis that we would provide. Much might depend, for instance, on the nature of a specific public record requested and the relationship of that record (if any) to an organization's "governmental" functions (if any).

We do observe, however, that even if one were to consider only the facts recounted in *Telford*, those facts would not necessarily lead to the conclusion that WSAC and WACO are the "functional equivalent" of public agencies for purposes other than the specific issue before the *Telford* court. This is so because in a functional equivalence analysis, the weight to be given to relevant facts varies with the purposes of the statutes at issue. *Telford*, 95 Wn. App. at 157 n.11. For example, *Telford* notes that "[w]hether an entity has authority to make and implement decisions may be relevant to determining whether the entity's records should be available to the public, but it has no relation to the misappropriation of public funds", and similarly suggests that the public versus private status of an entity's employees may or may not shed light on legislative intent, depending on the purpose of the statutes at issue. *Id.* at 163. See also *Pub. Citizen Health Research Group v. Dep't of Health*, 668 F.2d 537, 543 (D.C. Cir. 1981) (recognizing that authority in law to make independent decisions on behalf of government may be an important but not necessarily determinative consideration in whether an entity is an "agency" for purposes of the federal Freedom of Information Act (FOIA)). [FN4]

*6 The public records provisions of the Public Disclosure Act serve purposes different from the campaign finance provisions of the Act at issue in *Telford*. The public records provisions focus on the relationship between the people and the institutions that they have created to govern themselves. It is intended to ensure that the people remain sufficiently well informed about the conduct of their government institutions to properly control those institutions. The public records provisions thus are designed to ensure that the people have "full access to information concerning the conduct of government... [as a] necessary precondition to the sound governance of a free society", and to ensure that the people remain informed "so that they may maintain control over the instruments that they have created." RCW 42.17.010(1), .251. In a similar vein, the Act defines a "public record" to include any writing "containing information relating to the conduct of government". RCW 42.17.020(36).

These different statutory purposes would appear to call for a different balance of the facts and factors considered in *Telford*, from the balance there undertaken. For example, *Telford* concludes that "the associations perform mainly advisory functions and do not govern citizen action". *Telford*, 95 Wn. App. at 153 (emphasis added). These conclusions seemingly would take on a different and higher level of importance in the context of public records statutes whose purpose it is to ensure that the people retain control over the institutions that do govern them, than they had in *Telford*. Similarly, the *Telford* court noted that the associations were not created by statute, and they existed before the Legislature chose to authorize them to perform certain functions. *Id.* at 165. [FN5] These facts may be more important in determining whether the associations are the functional equivalents of "public agencies" in the context of public records statutes designed to protect the people's control over government institutions that they created than in the context of campaign finance statutes intended to prohibit the expenditure of public funds to support private political campaigns. *Id.* at 166.

In addition, whether the public records provisions of the Act could be effectuated without finding the associations to be "functional equivalents" of agencies would also seemingly be a relevant consideration, as courts interpret the term "agency" in any given statute, in order to effectuate the statute's purposes. As the *Telford* court concluded, the only members of WSAC and WACO are county officials, and the function of the associations largely "is statewide coordination of county administrative programs". *Id.* at 165. In this respect, it seems likely that virtually all (if not all) of the records of the associations relating to governing also would be records "used or retained" by the counties, and thus would be available upon request to those public agencies, absent a relevant exception under the Act. RCW 42.17.020(36), .260. The same would seem to be true with respect to the consultative and other functions of the associations referenced in *Telford*. *Telford*, 95 Wn. App. at 163-64.

*7 In any event, based on the limited and particularized facts available concerning WSAC and WACO from *Telford*, we are not in a position to apply a functional equivalence analysis for purposes of the public records provisions of the Act.

2. Are the Association of Washington Cities (AWC) and the Washington Public Ports Association (WPPA) subject to the public records provisions of the Public Disclosure Act. RCW 42.17.250 through 42.17.348?

Your second question essentially is the same as your first but relates to the Association of Washington Cities and the Washington Public Ports Association, rather than to WSAC and WACO. As with WSAC and WACO, the statutes referring to these associations do not provide a definitive answer to your question. RCW 53.06.030 empowers the port district commissions in this state to designate the WPPA as a coordinating agency, but does not confer governmental power on the WPPA itself. Additionally, RCW 53.06.090 provides that "the legislature recognizes that any nonprofit corporation created or re-created for the purposes of this chapter, is a private nonprofit corporation contracting to provide services to which port districts may subscribe." Several statutes provide for the WPPA to nominate persons for committees or boards. See, e.g., RCW 47.06A.030; RCW 47.26.121. Similarly, certain statutes provide for the AWC to nominate or appoint persons for committees or boards. See, e.g., RCW 90.58.170 (shorelines hearings board) and RCW 43.20A.685 (state council on aging). Again, as noted above, a number of statutes also provide for similar nominations by decidedly private organizations.

Nor are we in a position to weigh this question in the context of relevant factual circumstances. Thus, for the same reasons that we have explained in responding to your first question, we are not in a position to answer this question with an appropriate degree of confidence in the analysis that we would provide. Indeed, we have considerably less necessary factual information before us with respect to AWC and WPPA than with respect to the associations who are the subject of your first inquiry, as we do not even have the benefit of factual determinations of the sort made by *Telford* concerning WSAC and WACO. Accordingly, any analysis of the status of the WPPA or of the AWC in a public records context must await the development of an actual factual situation to which the principles set forth in the statute, as interpreted in *Telford*, might be applied.

We trust that this will be of assistance to you.

Sincerely,

Jonathon Gurish
Assistant Attorney General

[FN1] . There is little Washington case law to draw on in analyzing this issue. We note that review of this case was denied by our Supreme Court, and no Washington appellate courts have squarely dealt with the issue of whether a private corporation could be subject to the Public Records Act.

[FN2] . Given the context, we interpret the court's use of the term Public Records Act or Public Disclosure Act to be synonymous with the campaign finance portions of that Act. These terms are frequently used interchangeably. Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. 503, 95 Wn. App. 106, 108 n.1, 975 P.2d 536, 538 n.1 (1999).

[FN3] . In one case, the Washington Supreme Court held that a statute that limited members of a chiropractic examining board and disciplinary board to persons either appointed by or nominated by two chiropractic societies violated due process rights of chiropractors not members of either society where not all chiropractors were members of the named societies, and adequate safeguards and standards to guide in licensing and disciplinary practices were not provided by the Legislature. United Chiro. of Wash., Inc. v. State, 90 Wn. 2d 1, 578 P.2d 38 (1978). However, the Court stopped short of holding that the power to appoint or nominate can never be delegated to private persons or organizations.

[FN4] . Cases interpreting FOIA are relevant in interpreting Washington's Act. Dawson v. Daly, 120 Wn.2d 782, 791-92, 845 P.2d 995 (1993).

[FN5] . *Telford* does note that the associations, while not created by acts of the Legislature, were created by local public officers acting in their official capacities. *Telford*, 95 Wn. App. at 165. The origin of an association, and its relationship to the local governments who are its members, might or might not be an important factor in analyzing whether an

*~~8~~ association's records are open to public inspection and copying. The facts of a particular case might well determine the outcome of the analysis.

Wash. AGO 2002 NO. 2, 2002 WL 727029 (Wash.A.G.)

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