

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**JEFFERY RANDALL MCKEE**

**V.**

**PARATRANSIT SERVICES**

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**Appeal from the rulings of the Honorable Jennifer Forbes**

**Kitsap County Superior Court**

**Case no: 17-2-01798-3**

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**APPELLANT'S AMENDED OPENING BRIEF**

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**Jeffery Randall McKee**

**2503 Veldee Avenue**

**Bremerton, WA 98312**

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## INTRODUCTION

This case concerns whether Paratransit Services is the functional equivalent of a public agency and subject to the Public Records Act of the State of Washington RCW 42.56.

Functional equivalency has been defined by both *Telford v. Board of Comm'rs* 95 Wn. App.149 and *Fortgang v. Woodland Park Zoo* 187 Wn. 2d 509, 387 P. 3d 690, Sup. Ct 2017.

Telford identified four factors material to whether a private entity would be a functional equivalent of a public agency for the purposes of the Public Records Act of the State of Washington (RCW 42.56). The four factors are:

- (1) whether the entity performs a government function,
- (2) the extent to which the government funds the entity's activities,
- (3) the extent of government involvement in the entity's activities,
- (4) whether the entity was created by the government.

## ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that Paratransit is not subject to RCW 42.56 (Public Records Act) pursuant to Paratransit certifying through their contract with the State of Washington that Paratransit “shall remain in compliance with RCW 42.52 (Ethics in Public Service) throughout the terms of their contract?

1(a) Is Paratransit a “person” under RCW 42.52.010(14)?

1(b) Are David Baker and Ann Kennedy equivalent to “state officers” under RCW 42.52.010(19)?

1(c) Is Paratransit subject to RCW 42.56 under Paragraph 19 of their contract with the State of Washington titled Contractor Certification Regarding Ethics? At CP 92.

1(d) Is Paratransit subject to RCW 42.56 under Paragraph 19 of their contract with the State of Washington titled Contractor Certification Regarding Ethics? At CP 92.

2. Did the trial court abuse discretion in finding that Paratransit does not perform a government function as defined by *Telford v. Board of Comm’rs*

*95 Wn. App.149 and Fortgang v. Woodland Park Zoo 187 Wn. 2d 509, 387 P. 3d 690, Sup. Ct 2017?*

2(a) Is it a fact that Paratransit is a “broker” and “contractor” as opposed to a “subcontractor” and “transportation provider” as defined by WAC 182-546-5100, Non-emergency transportation-Definitions?

2(b) Does Paratransit perform a “core’ government function ?

2(c) Can Paratransit’s duties be delegated to the private sector?

2(d) Is Paratransit, as a transportation broker, the sole provider of Non-Emergency Medical Transportation (NEMT) in nine Washington counties and is NEMT a federally mandated program managed in the State of Washington by the Washington Healthcare Authority?

3. Did the trial court abuse discretion in finding that Paratransit is not funded by the government as defined by *Telford v. Board of Comm’rs 95 Wn. App.149 and Fortgang v. Woodland Park Zoo 187 Wn. 2d 509, 387 P. 3d 690, Sup. Ct 2017?*

3(a) Does Paratransit receive a majority of its funding from the government?

3(b) Does Paratransit receive multi-millions of dollars of funding from the government for administrative costs?

3(c) Is it a fact that service costs are not actual funding for Paratransit?

3(d) Is Paratransit's funding "pass-through" funding for purposes of the Telford factor regarding funding?

3(e) Is Paratransit's funding "fee-for-service" funding for purposes of the Telford factor regarding funding?

4. Did the trial court abuse discretion in finding that the government does not control and regulate Paratransit as defined by *Telford v. Board of Comm'rs* 95 Wn. App.149 and *Fortgang v. Woodland Park Zoo* 187 Wn. 2d 509, 387 P. 3d 690, Sup. Ct 2017?

4(a) Is Paratransit strictly controlled by US Federal Code 42 CFR 431.10 and 42 CFR 431.11?

4(b) Is Paratransit strictly controlled by Washington Administrative Code 182-546-5000 through 182-546-6200?

4(c) Is Paratransit extensively and strictly controlled by its Client Services Contract with the State of Washington?

4(d) Is it a fact that Paratransit, in performing services for Washington Healthcare Authority (Medicaid agency), must not have the authority to change or disapprove any administrative decision of

that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules and regulations issued by the Medicaid agency?

5. Did the trial court err in finding Paratransit Services is not the functional equivalent of a public agency pursuant to RCW 42.56.010(1) and RCW 42.56.070(1) and *Telford v. Board of Comm'rs* 95 Wn. App. 149 and *Fortgang v. Woodland Park Zoo* 187 Wn. 2d 509, 387 P. 3d 690, Sup. Ct 2017?

## **STATEMENT OF THE CASE**

### **Paratransit is contractually obligated to be subject to the Public Records Act.**

1. Paratransit has certified through contract with the State of Washington covering January 1, 2016 through December 31, 2017 that Paratransit shall remain in compliance with RCW 42.52 throughout the terms of the contract. CP at 92.

2. Paratransit General Manager, Ann Kennedy, is the Contractor Contact named on page one of many contracts between the State of Washington Department of Social and Health Services and Paratransit Services. The Contractor Signature is listed as Paratransit Services President/CEO David Baker. CP at 87.
3. Both Ann Kennedy and David Baker and the entity Paratransit Services are ‘persons’ as defined by RCW42.52.010(14). CP at 20-22 and 35-36.
4. Both Ann Kennedy and David Baker, representing Paratransit Services, contract to engage in supervisory and policy enforcing work on behalf of the State of Washington and the Washington Healthcare Authority and exercise the powers and functions of a state officer. CP at 21.
5. Both Ann Kennedy and David Baker are, for the purposes of RCW 42.52, ‘state officers’ as defined by RCW 42.52.010(19).  
  
Cp 35 and 36.
6. As ‘state officers’ Ann Kennedy, David Baker and the entity Paratransit Services are contractually bound to be subject to requirements of the Public Records Act (RCW 42.56) under RCW 42.52.050(4).

CP 35 and 36.

**Paratransit performs a core government function.**

7. Paratransit Services (Paratransit) is a ‘transportation broker’ under the Washington Administrative Code. CP at 53.
8. The administration of non-emergency medical transportation is a core government function as defined, regulated and enforced by Medicaid pursuant to Chapter 42 ss. 431 and regulated and enforced by the Washington Healthcare Authority, WAC 182-546 5000-6200. CP 71 and 53-66.
9. The duties performed by Paratransit on behalf of the Washington Healthcare Authority can not be delegated. 42 CFR 431.11. CP at 70.
10. The State of Washington’s single designated state Medicaid agency, the Washington Healthcare Authority (State agency) is solely responsible for administering any Medicaid-funded program or service. 42 CFR 431.10. Washington Healthcare Authority delegates its Medicaid administration duties to Paratransit through contracts. CP at 71.

11. Paratransit is a “broker” as defined by the Washington Administrative Code , non-emergency transportation – definitions, WAC 182-546-5100. CP at 53
12. Taxis and other physical forms of transportation, as referred to in the trial court’s Order Granting Summary Judgment, are defined as “transportation providers”. CP at 54.
13. In the contract between Paratransit and the State of Washington, Paratransit is the “contractor” and taxis or other physical transportation are defined as “subcontractors”. CP 88 and 89.
14. Paratransit is specifically prohibited from “directly providing transportation services”. CP at 107.

**Paratransit is government funded.**

15. Paratransit is entirely funded by the government through their contracts with the State of Washington and the Washington Healthcare Authority. CP 87-159
16. Paratransit brokers non-emergent medical transportation for nine Washington counties. CP at 52.

17. The contract for one region, Region 6A, is included in this case file. CP 87-159

18. For Region 6A only, Paratransit receives through their contract with the State compensation for “administrative costs” of \$38,000, payable monthly, not to exceed \$912,000 throughout the course of the contract (July 1, 2015 to December 31, 2018). CP at 152 and 153.

19. Paratransit also receives “service costs” through their contracts with the State. Paratransit invoices the State for the direct service costs (eg. subcontractor payments). For that consideration, Paratransit shall strive to provide a target number of trips per month and strive for an average cost per trip. CP at 111 and 112.

20. Paratransit shall, no more frequently than monthly, submit invoices for direct service costs to the State. CP at 112. The State then directly compensates Paratransit within 30 days of receipt of the invoices. CP at 113.

21. Per trip targets for administrative costs and service costs show service costs run approximately ten times the amount of administrative costs. CP at 153.

22. Paratransit aggressively seeks to keep its revenue numbers confidential.

Paratransit filed for a protective order to prevent McKee from receiving their income statement through discovery in the trial court. CP 79-81.

23. Paratransit also has multiple contracts with the State for administering WorkFirst client transportation generating several million dollars of revenue. CP at 72-78.

**The government exercises extensive control over Paratransit?**

24. No person employed by Paratransit Services has the authority to change or disapprove any administrative decision of the Medicaid agency (Washington Healthcare Authority), or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.

42 CFR ss. 431.11(3). CP at 70.

25. Paratransit, as a transportation broker, is the sole provider of non-emergency medical transportation in nine Washington counties. Non-Emergency Medical Transportation (NEMT) is a federally-mandated program managed in the State of Washington by the Washington Healthcare Authority. CP at 52.

26. Paratransit, as a contractor for the Washington Health Care Authority, covers nonemergency transportation to and from covered healthcare services, as provided by the Code of Federal Regulations (42 CFR 431.53 and 42 CFR 440.170) subject to the limitations and requirements under Washington Administrative Code 182-546-5000 through 6200. CP 67 and 68.
27. Paratransit's day-to-day operations are controlled by the Washington Administrative Code 182-546-5000 through 182-546-6200. CP at 53-66.
28. Paratransit's day-to-day operations are controlled by 42 CFR 431.10. CP at 71.
29. Paratransit's day-to-day operations are controlled by 42 CFR 431.11. CP at 70.
30. Paratransit's day-to-day operations are controlled by 42 CFR 431.53. CP 67 and 68.
31. Paratransit's day-to-day operations are controlled by a comprehensive state plan (SPA) which describes how non-emergency medical transportation services are procured and provided to clients. CP at 67.
32. In addition to rules, regulations and policies set by the Washington Healthcare Authority and the Federal government Medicaid regulations,

Paratransit is extensively controlled by their contract with the Washington State Department of Social and Health Services as follows:

CP 87-159

33. Paratransit is controlled by Special Terms and Conditions. CP 99-117.
34. Paratransit's day to day operations are controlled by Exhibit B, Statement of Work Customer Service Center. CP 122-127.
35. Paratransit's day to day operations are controlled by Exhibit C, Client and Trip Eligibility. CP 129 and 130.
36. Paratransit's day to day operations are controlled by Exhibit D, Transport Vehicle Standards. CP 131-133.
37. Paratransit's day to day operations are controlled by Exhibit E, Driver Standards and Expectations. CP 134-138.
38. Paratransit's day to day operations are controlled by Exhibit F, Transportation Performance Standards; CP 139 and 140.
39. Paratransit's day to day operations are controlled by Exhibit G, Subcontracts with Transportation Service Providers. CP 141 and 142.
40. Paratransit's day to day operations are controlled by Exhibit H, Policies and Procedures Manual; CP 143 and 144.
41. Paratransit's day to day operations are controlled by Exhibit I, Required Reports Used for NEMT Program Monitoring. CP 145-148..

42. Paratransit's day to day operations are controlled by Exhibit J, Performance Incentives and Penalties. CP 149 and 150.
43. Washington Healthcare Authority is designated as the sole State agency established to administer and supervise the administration of Medicare and Medicaid services in the State of Washington. Washington Healthcare Authority is the sole State agency that makes rules and regulations that are binding upon local agencies (brokers)(Paratransit) that administer Medicare and Medicaid services in the State of Washington. Paratransit does not have the authority to change or disapprove any administrative decision of the Washington Healthcare Authority, or otherwise substitute their judgment for that of the Washington Healthcare Authority with respect to the application of policies, rules and regulations issued by the Agency. Emphasis added.  
42 CFR 431.10 and 431.11. CP 70 and 71.
44. Paratransit can not delegate it's contractually obligated duties under its agreement with the State of Washington to the private sector.  
42 CFR 431.11. CP at 70.

## Argument

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). *Reid v. Pierce County*, 136 Wash.2d 195, 201, 961 P.2d 333 (1998).

We construe the facts most favorably toward the nonmoving party. *Babcock v. State*, 116 Wash.2d 596, 599, 809 P.2d 143 (1991).

Because summary judgment is appropriate only if there are no material issues of fact, the trial court's factual findings are not binding on appeal. *Duckworth v. City of Bonney Lake*, 91 Wash.2d 19, 21-22, 586 P.2d 860 (1978) (citing *Washington Optometric Ass'n v. Pierce County*, 73 Wash.2d 445, 438 P.2d 861 (1968)).

The PRA is "a strongly-worded mandate for open government," *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 527, 199 P.3d 393 (2009), that "must be 'liberally construed ... 'to ensure that the public's interest [in broad disclosure] is protected," *Yakima County v. Yakima Herald Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011) (quoting RCW 42.45.030).

In the case at hand, the trial court ignored the pleadings of McKee, based the granting of summary judgment on untenable reasoning and disregarded the mandate that the Public Records Act must be liberally construed.

This case presents both a question of statutory interpretation and a challenge to a summary judgment ruling, review is de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015) ("We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (questions of statutory interpretation reviewed de novo)).

**Paratransit is contractually bound to be subject to RCW 42.56 by certifying they are bound by RCW 42.52.**

Paratransit has certified through contract with the State of Washington covering January 1, 2016 through December 31, 2017 that Paratransit shall remain in compliance with RCW 42.52 throughout the terms of the contract.

**DSHS-Paratransit Services  
Client Services Contract**

**19. Contractor Certification Regarding Ethics.** The Contractor certifies that the Contractor is now, and shall remain, in compliance with Chapter 42.52 RCW, Ethics in Public Service, throughout the term of this Contract.

Paratransit General Manager, Ann Kennedy, is the Contractor Contact named on page one of many contracts between the State of Washington Department of Social and Health Services and Paratransit Services. The Contractor Signature is listed as Paratransit Services President/CEO David Baker.

Both Ann Kennedy and David Baker and the entity Paratransit Services are 'persons' as defined by RCW42.52.010(14).

(14) "Person" means any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

Both Ann Kennedy and David Baker, representing Paratransit Services, contract to engage in supervisory and policy enforcing work on behalf of the State of Washington and the Washington Healthcare Authority and undertake to exercise the powers and functions of a state officer.

RCW 42.52.010(19) "State officer" means every person holding a position of public trust in or under an executive, legislative, or judicial office of the state. "State officer" includes judges of the superior court, judges of the court of appeals, justices of the supreme court, members of the legislature together with the secretary of the senate and the chief clerk of the house of representatives, holders of elective offices in the executive branch of state government, chief executive officers of state agencies, members of boards, commissions, or committees with authority over one or more state agencies or institutions, and employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work. For the purposes of this chapter, "state officer" also includes any person exercising or undertaking to exercise the powers or functions of a state officer. Emphasis added.

No state officer or state employee may intentionally conceal a record if the officer or employee knew the record was required to be released under chapter [42.56](#) RCW, was under a personal obligation to release the record, and failed to do so. This subsection does not apply where the decision to withhold the record was made in good faith. [RCW 42.52.050\(4\)](#).

If a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself. *Harmon v. Department of Soc. and Health Servs.*, 134 Wash.2d 523, 529-30, 951 P.2d 770 (1998) (citing *State v. Mollichi*, 132 Wash.2d 80, 87, 936 P.2d 408 (1997); *Marquis v. City of Spokane*, 130 Wash.2d 97, 107, 922 P.2d 43 (1996)).

Here, the statute is unambiguous as applied to Paratransit. Both the terms “person” and “state officer” for the purposes of RCW 42.52 are defined. Paratransit, Ann Kennedy and David Baker are engaged in supervisory and policy-enforcing work on behalf of the Washington Healthcare Authority and thereby undertaking to exercise the powers or functions of a state officer.

A statute is ambiguous if it is susceptible of two or more reasonable interpretations. *State v. Van Woerden*, 93 Wash.App. 110, 116, 967 P.2d 14, 17 (1998) (citing *State v. Sunich*, 76 Wash.App. 202, 206, 884 P.2d 1 (1994)).

If a statute is ambiguous, resort to the tools of statutory construction is appropriate. *Harmon*, 134 Wash.2d at 529-30, 951 P.2d 770 (citing *State v. Bash*, 130 Wash.2d 594, 601-02, 925 P.2d 978 (1996)). Our paramount duty is to ascertain and to give effect to the Legislature's purpose and intent. *Marquis*, 130 Wash.2d at 108, 922 P.2d 43; *Koker v. Armstrong Cork, Inc.*, 60 Wash.App. 466, 470, 804 P.2d 659, review denied, 117 Wash.2d 1006, 815 P.2d 265 (1991).

The trial court seemed confused by the clause in the contract between Paratransit and the State, Paragraph 19, finding, "I think it was Paragraph 19 that referred to RCW 42.52. I'm not sure how that should be weighed by the Court."

19. Contractor Certification Regarding Ethics. The Contractor certifies that the Contractor is now, and shall remain, in compliance with Chapter 42.52 RCW, Ethics in Public Service, throughout the term of this Contract.

RCW 42.52 goes on to require compliance with RCW 42.56

The trial court went on to find, "I'm not really sure how to apply 42.52 to Paratransit, but its noteworthy it didn't say 42.56. 42.56 is the statute we're talking about. The fact that 42.52 references 42.56 is only applicable in a specific and narrow setting, and that is that the government agencies and employees who are state officers or employees are required to comply with 42.56, which is the Public Records Act and it becomes an ethical issue if they don't otherwise. 42.52 is an ethics statute, and it would appear to the Court that if the intention was that the

State wanted Paratransit to comply with the Public Records Act, they would have said so specifically, and they did not.” Abuse of discretion occurs where the trial court's decision rests on untenable grounds or untenable reasons. *Kleyer v. Harborview Med. Ctr.*, 76 Wash.App. 542, 545, 887 P.2d 468 (1995).

The Contract between the State and Paratransit speaks for itself. So does the plain language of RCW 42.52. RCW 42.52 does specifically include the requirement for complying with RCW 42.56. RCW 42.56 is not only applicable in a specific and narrow setting and it is not only the government agencies and employees who are state officers or employees that are required to comply with RCW 42.56.

RCW 42.56 is included in RCW 42.52 because the Legislature intended it to be there. The statutory definitions of “person” and “state officer” also show the Legislature’s intent that entities other than actual government agencies, state employees or state officers are subject to all of RCW 42.52, and not parts of it.

Ignorance of the terms of a signed contract is not a defense of good faith when in violation of RCW 42.52 or RCW 42.56.

Paratransit is contractually bound to be subject to the Public Records Act.

## **Telford factors**

Our Court of Appeals has ... interpreted the statutory word "agency" to include private entities when they act as the functional equivalent of government agencies. In *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 162-63, 974 P.2d 886 (1999), Division Two of the Court of Appeals adopted a four-factor test to determine whether a private or quasi-private entity is an "agency" for purposes of the PRA. The other two divisions later adopted that "Telford test."

Telford identified four factors material to whether a private entity would be a functional equivalent of a public agency for the purposes of the Public Records Act of the State of Washington (RCW 42.56). The four factors are:

- (1) whether the entity performs a government function,
- (2) the extent to which the government funds the entity's activities,
- (3) the extent of government involvement in the entity's activities,
- (4) whether the entity was created by the government.

*Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008) (citing Telford, 95 Wn. App. at 162). Courts applying the test consider whether "the criteria on balance . . . suggest that the entity in question is the functional equivalent of a state or local agency." Id.

**Paratransit performs a core government function.**

This Court erred in defining Paratransit as a ‘transportation provider’ and ruling that, “Taxicabs could do this. Uber could do this. Lyft could do it. A variety of other transportation services could perform the services provided by Paratransit.”

Paratransit is a ‘broker’ not a “transportation provider” as defined by WAC 182-546-5100 Non-emergency transportation –Definitions. A broker is an organization or entity contracted with the Medicaid agency (Washington Healthcare Authority) to arrange non-emergency transportation services for their clients. A transportation provider, such as a taxi or bus, is a person or company under contract with the broker to provide trips to eligible clients.

In the case at hand Paratransit performs a function of the Washington Healthcare Authority, who is designated as the single State agency for the Medicaid program under 42 CFR ss 431.10.

42 CFR ss 431.10 (b) A State plan must-

- (1) Specify a single State agency established to administer or supervise the administration of the plan; and
- (2) Include a certification by the State Attorney general, citing the legal authority for the single State agency to –
  - (i) Administer and supervise the plan; and
  - (ii) Make rules and regulations that it follows in administering the plan or that are binding upon local agencies that administer the plan.
  - (iii) *Authority of the single State agency.* In order for an agency to qualify as the Medicaid agency—
    - (v) (1) The agency must not delegate, to other than its own officials, authority to—
      - (i) Exercise administrative discretion in the administration or supervision of the plan, or
      - (ii) Issue policies, rules, and regulations on program matters.
    - (2) The authority of the agency must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State.

(3) If other State or local agencies or offices (Paratransit) perform services for the Medicaid agency (Washington Healthcare Authority), they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency. Emphasis added.

Telford involved The Washington State Association of Counties (WSAC) and the Washington State Association of County Officials (WACO), entities founded and organized by elected and appointed county officials empowered statewide to administer government programs. *Telford*, 95 Wn.App. 163–65. State statutes imposed explicitly non-delegable public duties on these entities. The court noted that these duties “could not be delegated to the private sector.” *Telford*, 95 Wash.App. at 163–64, 974 P.2d 886. These cases found the entity performed a core government function. Our Court of Appeals decisions describe the first Telford factor as looking for "core" government functions, *Clarke*, 144 Wn. App. at 194, or functions that could not be delegated to the private sector, *Telford*, 95 Wn. App. at 165.

Washington Healthcare Authority is the sole State Medicaid agency in the State of Washington. Paratransit is a local agency, a broker. Paratransit performs a core government function on behalf of the Washington Healthcare Authority, the administration of non-emergency medical transportation. That function can not be delegated under 42 CFR 431.10 (b)(2)(v).

Paratransit is the functional equivalent of a public agency because they perform a core government function that can not be delegated to the private sector. Applying Telford factors, the court concluded that the TCAC was subject to the PRA when they performed “core government functions.” *Clarke, 144 Wash App at 194, 181 P3d 881*. State statutes imposed explicitly non-delegable public duties on these entities. The court noted that these duties “could not be delegated to the private sector.” *Telford, 95 Wash. App. At 163-164, 974 P. 2d 886*. The court held that under these circumstances WSAC and WACO were public entities for the purpose of the PRA. These entities retained characteristics of private entities, but “their essential functions and attributes are those of a public agency.” *Telford, 95 Wash. App. at 165, 974 P. 2d 886*.

Paratransit’s sole function is administering a Federal program, Medicaid; as administered and supervised by the State of Washington through the Washington Healthcare Authority. That function can not, by law, be delegated. Paratransit performs a government function.

## **Paratransit is government funded?**

Paratransit is entirely funded by the government through their contracts with the State of Washington and Washington Healthcare Authority. CP 87-159.

Paratransit brokers non-emergent medical transportation for nine Washington counties. CP at 52. The contract for one region, Region 6A, is included in this case file. CP 87-159. For Region 6A only, Paratransit receives through their contract with the State compensation for administrative costs of \$38,000, payable monthly, not to exceed \$912,000 throughout the course of the contract (July 1, 2015 to December 31, 2018). CP at 152 and 153. Paratransit also has multiple contracts with the State for administering WorkFirst client transportation generating several million dollars of revenue annually. CP at 72-78.

Paratransit also receives service costs through their contracts with the State. Paratransit invoices the State for the direct service costs (eg. Subcontractor payments). For that consideration, Paratransit shall strive to provide a target number of trips per month and strive for an average cost per trip. CP at 111 and 112. Paratransit shall, no more frequently than monthly, submit invoices for direct service costs to the State. CP at 112. The State then directly compensates Paratransit within 30 days of receipt of the invoices. CP at 113.

Paratransit aggressively seeks to keep its revenue numbers confidential. Paratransit filed for a protective order to prevent McKee from receiving their income statement through discovery in the trial court. CP 79-81.

Paratransit is entirely funded by their contract with the State for administrative costs. The amounts of these costs are based on an annual budget and determined at the time the contracts are signed and are paid monthly. These payments are not a fee-for-services or pass through funding. The administration costs are not identified for specific costs or services. These administration costs support the entire operation of Paratransit.

In Telford, most of WSAC's and WACO's funds came from current county expense funds via membership dues. WSAC and WACO asserted that these public funds were consideration for services they provide, and therefore the funds become private when received by WSAC/WACO. This argument ignores that the dues were based upon an annual operating budget and were paid before services were rendered.

The dues support the associations' entire operations; they are not identified for specific goods or services. *Cf. Weston v. Carolina Research and Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161, 165 (1991) (FOIA does not apply to business enterprises that receive public money in return for specific goods on an arms-

length basis, but when a block of public funds is diverted en masse, the public must have access to records of the spending organization to determine how the funds were spent).

The trial court took a narrow and incorrect view of the government funding factor. The Court reasoned that Paratransit is funded by a fee-for-services model and found that sole factor definitive in finding Paratransit is not government funded, citing *Fortgang v. Woodland park Zoo, Wa. Sup Ct, 92846-1 (2017)*.

Fortgang also considered that a fee-for-services model weighed against functional equivalency even when an entity receives all or most of its funding from public sources. *Id.* at 24. But, the Court in Fortgang did not find that factor alone was conclusive to make a determination against functional equivalency. In fact, the Court's determination on the entire Telford factor of government funding was 'inconclusive.' *Id.* at 25.

The Court weighed additional criteria in determining the Telford government funding factor. It would logically follow that a funding scheme weighs in favor of functional equivalency when it is a fixed allocation, i.e., designated levy funds, instead of fees for service. One Court of Appeals case so held. We agree that this general rule-that the type of funding matters and, specifically, that an ordinary fee-for-services model typically weighs against functional equivalency-

accurately reflects the PRA's goals of transparency in government affairs. This weighs in favor of WPZS's functional equivalency to a government agency on this factor. *Id.* at 24.

But Washington cases also suggest that the percentage of funds attributable to public sources is the foremost consideration when applying the second Telford factor. *Cedar Grove*, 188 Wn. App. at 720 (government funding factor supported PRA coverage where city paid private consulting firm "for at least a majority of the work at issue"); *Clarke*, 144 Wn. App. at 194-95 (government funding factor weighed in favor of functional equivalency where nearly all of entity's operating budget comes from public sources); *Telford*, 95 Wn. App. at 164 (government funding factor weighed in favor of PRA coverage where "[ m ]ost" of entities' funds come from "current county expense funds"). And no Washington case concludes that an entity's funding supports PRA coverage in the absence of majority public funding. *Id.* at 25.

Paratransit is entirely funded by their contracts with the State of Washington.

Paratransit is government funded under Telford.

**Paratransit is extensively controlled by the government.**

No person employed by Paratransit Services has the authority to change or disapprove any administrative decision of the Medicaid agency (Washington Healthcare Authority), or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency. 42 CFR ss. 431.11(3).

Paratransit, as a transportation broker, is the sole provider of non-emergency medical transportation in nine Washington counties. Non-Emergency Medical Transportation (NEMT) is a federally-mandated program managed in the State of Washington by the Washington Healthcare Authority.

Paratransit, as a contractor for the Washington Health Care Authority, covers nonemergency transportation to and from covered healthcare services, as provided by the Code of Federal Regulations (42 CFR 431.53 and 42 CFR 440.170) subject to the limitations and requirements under Washington Administrative Code 182-546-5000 through 6200.

Paratransit's day-to-day operations are controlled by the Washington Administrative Code 182-546-5000 through 182-546-6200.

Paratransit's day-to-day operations are controlled by 42 CFR 431.10.

Paratransit's day-to-day operations are controlled by 42 CFR 431.11.

Paratransit's day-to-day operations are controlled by 42 CFR 431.53.

Paratransit's day-to-day operations are controlled by a comprehensive state plan (SPA) which describes how non-emergency medical transportation services are procured and provided to clients.

In addition to rules, regulations and policies set by the Washington Healthcare Authority and the Federal government Medicaid regulations, Paratransit is extensively controlled by their contract with the Washington State Department of Social and Health Services as follows:

Paratransit is controlled by Special Terms and Conditions.

Paratransit's day to day operations are controlled by Exhibit B, Statement of Work Customer Service Center.

Paratransit's day to day operations are controlled by Exhibit C, Client and Trip Eligibility.

Paratransit's day to day operations are controlled by Exhibit D, Transport Vehicle Standards.

Paratransit's day to day operations are controlled by Exhibit E, Driver Standards and Expectations.

Paratransit's day to day operations are controlled by Exhibit F,  
Transportation Performance Standards.

Paratransit's day to day operations are controlled by Exhibit G.  
Subcontracts with Transportation Service Providers.

Paratransit's day to day operations are controlled by Exhibit H, Policies  
and Procedures Manual.

Paratransit's day to day operations are controlled by Exhibit I, Required  
Reports Used for NEMT Program Monitoring.

Paratransit's day to day operations are controlled by Exhibit J,  
Performance Incentives and Penalties.

Washington Healthcare Authority is designated as the sole State agency  
established to administer and supervise the administration of Medicare and  
Medicaid services in the State of Washington. Washington Healthcare  
Authority is the sole State agency that makes rules and regulations that are  
binding upon local agencies (brokers)(Paratransit) that administer Medicare  
and Medicaid services in the State of Washington. Paratransit does not have  
the authority to change or disapprove any administrative decision of the  
Washington Healthcare Authority, or otherwise substitute their judgment for  
that of the Washington Healthcare Authority with respect to the application  
of policies, rules and regulations issued by the Agency. Emphasis added.

42 CFR 431.10 and 431.11.

The "government control" factor should be used to distinguish between mere regulation-which does not weigh in favor of PRA accountability and actual day-to-day management by a government agency which does. *Fortgang v. Woodland Park Zoo*, *Wa Sup. Ct. No. 92846-1 at 26*.

Out-of-state case law largely supports Service Providers' argument. It distinguishes between day-to-day control (supporting functional equivalency) and mere regulation (supporting private entity status).<sup>14</sup> We agree. There is no good reason to value government transparency more in a heavily regulated area than in a less regulated area. The "day-to-day operations" analysis followed in other jurisdictions better furthers the purposes of the PRA: preventing governments from operating (as governments) in secrecy. *Id.* at 26 and 27.

The "day-to-day operations" analysis followed in other jurisdictions better furthers the purposes of the PRA: preventing governments from operating (as governments) in secrecy.

Paratransit is extensively controlled by Federal law regarding the Medicaid program CFR Chapter 42, the Washington Administrative Code covering non-emergent medical transportation and their very detailed contract with the State of Washington. That includes the mandate that Paratransit is statutorily prohibited

from substituting their judgment for that of the Washington Healthcare Authority with respect to the application of policies, rules and regulations issued by the Agency. That amount of control can not be considered mere regulation. The government has day-to-day control over Paratransit.

Paratransit is government controlled under the Telford factor.

### **Entity's origin**

Appellant concedes that Paratransit was not created by the government.

### **Conclusion**

Based on the foregoing, Appellant Jeffery Randall McKee, respectfully requests that this Court reverse the order of summary judgment by the trial court.

The Appellant respectfully requests that this Court find Paratransit Services is the functional equivalent of an agency under the Public Records Act of the State of Washington.

Appellant respectfully requests statutory attorney's fees and costs incurred in this appeal.

Respectfully submitted this 17<sup>th</sup> day of April, 2019.

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In the case at hand Paratransit has no authority to change or disapprove of any administrative decision of Washington Healthcare Authority, or otherwise substitute their judgment for that of Washington Healthcare Authority with respect to the application of policies, rules, and regulations issued by the Medicaid agency.



**JEFFERY MCKEE**

**April 19, 2019 - 1:10 PM**

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