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DIVISION III
STATES OF WASHINGTON
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No. 362337-III

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

PALMER D. STRAND AND PATRICIA N. STRAND

Appellants

v.

**Council 2 – Washington State Council of County and City
Employees, AFSCME, AFL-CIO, and Local 1553 – Council 2 –
Washington State Council of County and City Employees,
AFSCME, AFL-CIO**

Respondents.

BRIEF OF RESPONDENTS

**Larry J. Kuznetz
Sarah N. Harmon
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone, Ste. 380
Rock Pointe Tower
Spokane, WA 99201-2346
(509) 455-4151
ATTORNEYS FOR RESPONDENTS**

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I. INTRODUCTION

This is a case about whether a private Union, whose membership is made up of public employees, constitutes an agency or its functional equivalent pursuant to the Public Records Act. Appellants (hereinafter referred to as the “Strands”) initiated a lawsuit against Respondents Council 2 – Washington State Council of County and City Employees, AFSCME, AFL-CIO and Local 1553 – Council 2 – Washington State Council of County and City Employees, AFSCME, AFL-CIO (hereinafter referred to collectively as the “Union”), to obtain documents from the Union pursuant to RCW 42.56.550 of the Public Records Act (hereinafter referred to as the “PRA”). The Union moved to dismiss the lawsuit as it is neither an agency nor a functional equivalent of an agency pursuant to RCW 42.56.010 and WAC 44-14-01001, respectively.

The Trial Court granted the Union’s motion to dismiss finding that the Union was not subject to the PRA and that the Strands had filed the lawsuit without a basis in fact. The Union was awarded attorney’s fees and costs for having to defend a frivolous lawsuit pursuant to RCW 4.84.185. This appeal followed.

Based on the facts of this case and the record on review, the Trial Court’s rulings should be upheld and affirmed as the Union

is a private entity not subject to the PRA.

II. ASSIGNMENTS OF ERROR

1. Whether the Trial Court properly dismissed the Strands' PRA lawsuit for failing to plead or produce facts supporting a determination that the Union was subject to the PRA.
2. Whether the Trial Court properly denied the Strands' motion for reconsideration finding that the Strands' motion failed to set forth specific grounds under CR 59(a) for reconsideration, failed to state or argue relevant facts, and simply recited the very same arguments the Trial Court previously rejected.
3. Whether the Trial Court properly awarded attorney's fees to the Union pursuant to RCW 4.84.185 after finding that Strands' lawsuit was frivolous and that Strands had been advised by the Union before filing suit that their claim was legally unsupportable.

III. STATEMENT OF THE CASE

Prior to initiating any action, the Strands contacted the Union in February of 2017. CP 5. They first spoke with Mr. Gordon Smith, the union staff representative in Spokane, regarding the Spokane County Assessor's contract and compliance with said contract. *Id.* Mr. Smith referred the Strands to the Unions Everett office. *Id.* The Strands contacted the Union's Everett office and

spoke with Chris Dugovich, the Union's President and Executive Director. CP 6. The Strands again inquired about the labor contracts with the Assessor's office and requested a copy of the contracts. *Id.* Mr. Dugovich disputes that he ever spoke with either Mr. or Mrs. Strand. CP 154. Regardless, the Strands allege that Mr. Dugovich told them that they would have to be members of the Union in order to request and receive copies of the labor contracts. CP 5-6.

The Strands called the Union's Everett office again "specifically about filing a public records request." CP 6. The Strands then sent a records request by email and U.S. mail on February 23, 2017.

CP 6, 14-16. The Strands requested:

[A]ll records of employment agreements for employees of the Spokane County Assessor's office from Jan/1/12 through the date the records are produced. An employment agreement would include:

No. 1 Labor contracts including – attachments, amendments, revisions, etc.

No. 2 Labor agreements

No. 3 Job descriptions – the appraisers in the Assessor's office have the title, Exceptional Hourly (Non[]Exempt).

CP 29. The Union did not respond to the requests. CP 6.

On or about January 16, 2018, the Strands again contacted the Union's Everett office via email to inquire about the Union's tax filing status and requested a copy of the Union's 501(c)(3) non-

profit filing. CP 6, 156-57. The Union's business manager, Barbra Corcoran, responded via email that the Union was not subject to public document and records disclosure requests. *Id.* The Strands again contacted the Union and left a message asking for the basis of the assertion that the Union was not subject to the PRA. CP 6. The Union did not respond to the message. *Id.*

The Union represents state-wide county, city, and municipal employees in collective bargaining agreements negotiated with those counties, cities, and municipalities. CP 154. The Union is a private organization independent of the government and privately incorporated that assists its membership. *Id.* It is not a government agency, nor a quasi-government agency or its functional equivalent; the Union does not perform any government functions. *Id.* The Union does not receive any government funding; all of the Union's funding sources are private. *Id.* The Union receives no funding from the state, or any county, city, or municipality. *Id.* The Union is subject to state laws, but not specifically created or regulated by state law. *Id.*

On January 19, 2018, the Strands filed their Summons and Complaint in Spokane County Superior Court. CP 1-22. The Complaint did not plead nor allege that the Union is a government agency, a quasi-government agency or a functional equivalent of a

government agency. *See Id.* Nor did the Complaint allege that the Union was performing a government function, receiving government or public funding, or that the government had any authority, control, or involvement with the Union's activities or day-to-day operations. *Id.* The Complaint did include a footnote which stated the Union:

[R]epresents more than 16,000 employees who provide services to the citizens of Washington state. It is a democratic union providing a real voice for its members through active participation and professional representation. The Union works to preserve and enhance workers' compensation and benefits. It also promotes job security and improves other employment conditions.

CP 4. The Complaint requested a determination that the Union was subject to the PRA, that it violated the PRA, that the Union show cause why it did not produce the requested records, and all other relief mandated by RCW 42.56.550. CP 7-8.

Shortly after their lawsuit was filed, the Strands contacted Gordon Smith. CP 147-48. During that phone call, the Strands expressed concern about the employees in the Spokane Assessor's Office not getting their appropriate breaks during the day and requested a copy of the labor contracts. *Id.* Mr. Smith told Mrs. Strand that she could find the information she was requesting on the Spokane County website. *Id.*

On January 29, 2018, Ed Stemler, general counsel for the Union, reviewed the Strands' lawsuit and decided to call them as the Union is not a public entity subject to public disclosure under the PRA. CP 150. Mr. Stemler spoke with Mrs. Strand on the phone, and informed her that the Union was not a governmental agency subject to public disclosure requests. CP 150-151. He also told her that the Union was not a quasi-governmental agency subject to public disclosure requests either. *Id.* Mr. Stemler went so far as to discuss each factor of the *Telford* test with Mrs. Strand utilizing the *Woodland Park Zoo* case of which she was familiar. *Id.*; see generally *Woodland Park Zoo v. Fortgang*, 192 Wn. App. 418 (2016). He further explained to Mrs. Strand that because the Union was not subject to the PRA, if their lawsuit was found to be frivolous, the Strands could be held responsible for attorney's fees and costs incurred defending the lawsuit. CP 151.

In response, Mrs. Strand continued to inquire about where the Union received its funding and for more proof that the Union wasn't subject to the PRA. *Id.* Recognizing the conversation was going nowhere, Mr. Stemler ended the conversation. *Id.*

On March 27, 2018, the Union filed a motion and memorandum to dismiss the Strands' lawsuit with prejudice pursuant to CR 12(b)(6) and CR 12(c) and for attorney's fees and

costs pursuant to RCW 4.84.185. CP 132-146. Supporting declarations of Barbara Cocoran, Ed Stemler, Gordon Smith, and Chris Dugovich were also filed at that time. CP 147-57. The Strands did not respond to the Union's motion to dismiss.

Three days later on March 30, 2018, the Strands filed a Motion and Memorandum for an Order to Show Cause. CP 25-103. The Union filed its Response to the Strands' motion on April 13, 2018. CP 162-170. There was no reply brief filed by the Strands.

The parties' respective motions were heard and argued before the Honorable Judge Maryann Moreno on April 20, 2018. Judge Moreno entered an Order that same day denying the Strands' motion and order to show cause and granting the Union's motion to dismiss with prejudice and for attorney's fees and costs. CP 186-190. The Court found that the Union was a private corporation doing business as a union representing county employees for the City of Spokane. CP 187. The Court further found that the Strands pursued a lawsuit without a factual basis despite being expressly told that the Union was not subject to the PRA. CP 188. Accordingly, the Court concluded that the Union was not subject to the PRA under RCW 42.56 and had no duty to disclose or respond to the Strands' public disclosure request. CP 189. The Union's request for attorney fees was taken under

advisement and the matter was reset to May 25, 2018, for presentment without oral argument. *Id.*

The Strands filed a Motion and Memorandum for Reconsideration on April 30, 2018. CP 109-117. The Union's response was filed on May 10, 2018. CP 197-201. The Court denied the Strands' Motion for Reconsideration pursuant to a letter opinion on July 10, 2018. CP 118-19. A Notice of Appeal was subsequently filed by the Strands on July 24, 2018. CP 202-215.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Trial Court Properly Dismissed Strands' Lawsuit and Denied Strands' Motion and Order to Show Cause as The Union is not Subject to the Public Records Act.

1. This Court Reviews Motions to Dismiss and PRA cases *de novo*.

This Court reviews *de novo* a 12(b)(6) order dismissing a complaint. *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 872 (2015). Dismissal is proper when the Court concludes that the plaintiff cannot prove any set of facts which would justify recovery. *Id.* (internal quotations and citations omitted). Likewise, the standard of review in a PRA case is also *de novo*. *Id.* at 872 citing *Neigh. All. Of Spokane County v. Spokane County*, 172 Wn. 2d 702, 715 (2011).

2. The Union's Motion to Dismiss Pursuant to CR 12(b)(6) and CR 12(c) Was Properly Granted as the Strands Failed to Plead and Could Not Produce Under Any Set of Facts That the Union Was Subject to the PRA.

CR 12(b)(6) allows a party to move for dismissal of an action that fails to state a claim upon which relief can be granted. Under CR 12(c), a party may move the court for judgment on the pleadings. CR 12(b)(6) and CR 12(c) raise identical issues. *Parmelee v. O'Neel*, 145 Wn. App. 223, 231-32 (2008). A PRA case may be resolved by a motion to dismiss. *Nissen v. Pierce County*, 183 Wn.2d 863 (2015).

Pursuant to CR 12, dismissal is appropriate if it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery. *Id.* The Court reviews the pleadings to determine whether the nonmoving party can prove any set of facts consistent with the complaint that would entitle the plaintiff to relief. *Id.* The Court must presume the plaintiff's allegations are true. *Id.*

In this case, even assuming all the facts and allegations pled in the Strands' complaint are true, they have failed to plead any facts that would support or suggest that the Union is subject to a claim under the PRA as an "agency" or a functional equivalent under the *Telford* test, *infra*. See RCW 42.56.010 and WAC 14-44-01001. CP 1-22. The only facts pled and alleged by the Strands are related exclusively to their document requests to the Union communicated via phone and email. CP 5-6. The complaint is silent as to whether the Union is an agency, a functional

equivalent, or subject to the PRA. Therefore, there are no facts or inferences that would support a finding that the Union is subject to the PRA based on the four corners of the Strands' complaint. Therefore, dismissal of the Strands' lawsuit under 12(b)(6) was appropriate and should be affirmed.

It is noteworthy that in a footnote to their complaint, the Strands state that the core functions of the Union is "representing union members, preserving and enhancing workers' compensation and benefits, and promoting job security and improving other employment conditions." CP 4. The only information about the Unions' purpose and organizational objectives in the Strands' complaint actually supports the conclusion that the Union is neither an agency or functional equivalent performing public services or governmental obligations. Rather, the Union is exactly what they purport to be: a private entity created to represent union members, and promote members' rights and benefits relating to their employment. *Id.*

Further, as discussed in detail below, the Strands cannot prove any set of facts to justify recovery under the PRA because the Union is not subject to the PRA. Accordingly, there is no set of facts that would be consistent with the Strands' complaint that would entitle them to any relief against the Union under the PRA.

For this reason, dismissal under CR 12(c) was appropriate.

3. The Union is not an Agency or Functional Equivalent so is not Subject to the PRA.

The threshold question in this case is simply whether the Union is subject to the PRA. The Strands failed to prove in support of their Motion and Order to Show Cause why the Union was subject to the PRA. The Strands failed to produce evidence to support their position that the Union is subject to the PRA or produce any controverting evidence in response to the Union's Motion to Dismiss under 12(b)(6) and 12(c). Finally, the Strands have failed yet again in this appeal, to set forth any facts, evidence or argument that would support a finding that the Union is subject to the PRA. The reason the Strands have failed to provide such evidence is because the Union is simply not an agency or its functional equivalent under the PRA. Therefore, no set of facts supports the validity of the Strands' lawsuit.

The Strands attempt to argue irrelevant issues and evidence in order to distract the Court from the threshold issue which is whether the Union is subject to the PRA. If The Union is not, the Strands' entire lawsuit must fail. It is immaterial what Strands believe is the "public policy purpose" behind their effort to seek documents from the Union. "Public policy" is neither a factor nor

element in determining whether the Union is required by law to comply with producing documents as required under the PRA.

The underlying purpose of the PRA is set forth in RCW 42.56.030, which states as follows:

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

The overall purpose of the PRA is “nothing less than the preservation of the most central tenets of representative government, mainly, the sovereignty of the people and the accountability to the people of public officials and institutions.” *Wades Eastside Gun Shop, Inc. v. Dept. of Labor and Industries*, 185 Wn.2d 270, 277 (2016)(internal citations omitted)(emphasis added); *see also Benton County v. Zink*, 191 Wn. App. 269 (2015) (stating the primary purpose is to provide broad access to public records to ensure government accountability)(emphasis added); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205 (1998) (the purpose of the PRA is to keep the public informed so it can control and monitor government’s functioning)(emphasis added).

RCW 42.56.070 requires documents and indexes to be made

public, specifically: “Each **agency**, in accordance with published rules, shall make available for public inspection and copy all public records[.]” (emphasis added). The PRA defines “agency” in RCW 42.56.010(1) as:

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

The Strands do not allege that the Union is an “agency” under this definition. Rather, they argue that the Union is a “functional equivalent of an agency” under the *Telford* test, which the Supreme Court adopted to determine whether a private entity is the functional equivalent of an agency. *Fortgang v. Woodland Park Zoo*, 187 Wn. 2d 509, 517, 518-19 (2017); CP 5-6.

The *Telford* test balances four factors to determine whether an entity is a functional equivalent of an agency, and accordingly, subject to the PRA. 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, and (4) whether the entity was created by the government. *Fortgang v. Woodland*

Park Zoo, 187 Wn. 2d 509, 518-19 (2017).

The four *Telford* factors are balanced on a case-by-case basis. *Telford v. Thurston Co. Bd. Of Com'rs*, 95 Wn. App. 149, 162 (1999), *review denied*, 138 Wn.2d 1015, 989 P.2d 1143 (1999). “The *Telford* test is designed to prevent the government from operating in secrecy via a private surrogate.” *Fortgang*, 187 Wn.2d at 532. The *Telford* test is not designed to “sweep within PRA coverage every private organization that contracts with the government.” *Id.* Yet this is exactly what the Strands are attempting to do. Their approach under the guise of the *Telford* test, is to make broad, irrelevant, and inaccurate assertions about the Union in an attempt to acquire documents from it as a private, non-governmental entity. The record is replete with evidence supporting the Court’s finding that the Union is neither an “agency” under RCW 42.56.010(1) nor a “functional equivalent” under the *Telford* test codified in WAC 14-44-01001.

a. None of the Published Opinions Support the Claim that the Union is a Functional Equivalent After Applying the *Telford* test.

Even liberally construing the PRA in favor of the fullest possible public records access, the *Telford* test does not support the conclusion that the Union is the functional equivalent of an agency and subject to the PRA. The Union is non-governmental.

CP 154. It receives no funds from the government nor relies upon the government for its existence. *Id.* It was not created to fulfill a legislative mandate. *Id.* Nor does it make any policy or legislate any laws or regulations. *Id.*

The Union is a private entity that is not controlled by elected or appointed public officials. *Id.* Employees of the Union are not paid by the government nor do they enjoy government benefits. *Id.* The fact that Union membership is comprised of employees from county and city government and government agencies does not make it subject to the PRA. Neither does the Strands underlying purpose or rationale in seeking records and documents from the Union somehow convert the Union into an entity subject to the PRA. Whatever the Strands claimed laudable purpose for seeking such records may be, it is immaterial to the threshold determination of whether the Union is subject to the PRA.

The fact is the Union is a private entity with standard union attributes and characteristics: conducting business for and on behalf of its membership, representing and protecting the economic and employment interests of its members. CP 4, 154. The Union possesses no material governmental attributes or characteristics. *Id.* (See e.g. *Spokane Research & Defense Fund v. West Central Community Development*, 133 Wn. App. 602, 608

(2006); *See also State ex rel Evergreen Freedom Foundation v. WEA*, 111 Wn. App. 586, 600-01 (2002)(Court found that the Washington Education Association, a state teachers' union, was not subject to the PRA as a "political committee." The Court considered the Union's goals and core values and found the Union's purpose was to enhance the economic and professional security of its members. Its purpose was not exclusively electoral political activity, and, therefore, not subject to the PRA).

The *Telford* test has been applied in Washington in only five published opinions. None of those opinions have applied the test to a union. Of the five opinions, three entities were found to be a functional equivalent of an agency and subject to the PRA, and two were not. The cases are as follows:

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

In *Telford*, the court determined that two non-profits that were formed for the purpose of administering county programs were subject to the PRA as all four factors of the *Telford* test weighed in favor of government agency status. *Telford*, 95 Wn. App. at 152-57.

(2) Clarke v. Tri-Cities Animal Care & Control Shelter, 144 Wn. App. 185 (Div III, 2008).

In *Clarke*, the court determined three of the four factors weighed in favor of government agency status. 144 Wn. App. 185, 188 (2008). The court found that the entity in question was privately incorporated, but was ultimately an extension of the city's animal control efforts. *Id.* at 188, 192-95. Accordingly, it was subject to the PRA disclosure obligations as the functional equivalent of an agency. *Id.*

(3) Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695 (2015).

In *Cedar Grove Composting*, the court reached the conclusion that although it was privately incorporated, the company contracted with and provided consulting services to city governmental agencies. 188 Wn. App. 695, 716-720 (2015). Therefore, three of the four *Telford* factors weighed in favor of government agency status.

(4) Spokane Research & Defense Fund v. West Central Community Development, 133 Wn. App. 602 (2006).

In that case, no functional equivalent was found. The court found that all four of the *Telford* factors weighed against finding a

functional equivalency of an agency for purposes of the PRA. 133 Wn. App. 602, 604-05 (2006).

(5) *Fortgang v. Woodland Park Zoo*, 187 Wn. 2d 509 (2017).

Likewise in *Fortgang*, the Washington Supreme Court found that the Zoo was not a functional equivalent of a public agency and subject to disclosure under the PRA despite receipt of government funds and regulating legislation. 187 Wn.2d 509, 532 (2017). The Court reasoned:

The *Telford* test is designed to prevent the government from operating in secrecy via a private surrogate. It is not designed to sweep within PRA coverage every private organization that contracts with government. This remains true even if the contracts in question are governed or authorized by statute.

Id.

In analyzing the *Telford* factors in the instant case, the Union is more closely aligned with the *Woodland Park Zoo* and *Spokane Research* cases.

i. The Union Does Not Perform a Government Function.

The first *Telford* factor looks at whether an entity's purpose is a "core" government function or a function that could not be delegated to the private sector. *Woodland Park Zoo*, 187 Wn. 2d at 524 (internal citations omitted). If determined to be a "core government function" then that factor weighs in favor of PRA

coverage of the entity. A government function does not include simply contracting with the government pursuant to enabling legislation. *Id.* at 525.

In *Telford*, the entities “core functions” were largely determining the manner in which county programs were administered. *Telford*, 95 Wn. App. at 164. In *Clarke*, the “core function” of the private corporation was to enforce provisions of the state’s animal control services. *Clarke*, 144 Wn. App. at 193-94. In *Cedar Grove*, the entity conceded that its employees in question were performing a governmental function and acting as a functional equivalent of a city employee. *Cedar Grove Composting Inc.*, 188 Wn. App. at 719. But in *Woodland Park Zoo*, the “core function” was determined to be the overall management and operation of a zoo. *Woodland Park Zoo*, 187 Wn. App. at 526. Likewise, in *Spokane Research*, the “core function” was to provide community services to benefit low to moderate income residents. 133 Wn. App. at 609. The Court held that serving public interests is not the exclusive domain of the government. *Id.*

Unlike, *Telford* and *Clarke*, the Union’s core function in the instant case has no tangible nexus to a government agency or a government function. CP 154. The Union’s core function is to represent the interests of and enhance the economic and

professional security of its membership. CP 4, 154. *See also State ex rel. Evergreen Freedom Foundation v. WEA*, 111 Wn. App. 586, 600-01 (2002)(finding teachers' union's core values were to enhance the economic and professional security of its members). The Union' primary purpose in this case is to represent their membership when it comes to their compensation, benefits, job security, and working conditions. CP 4, 154. Providing such representation for employees, whether they be public or private employees, is neither a core government function nor within the exclusive domain of the government. The Strands have provided no evidence to the contrary. Therefore, the first *Telford* factor does not weigh in favor of finding the Union as an organization, is a functional equivalent of an agency for purposes of the PRA.

ii. The Union Receives No Government Funding or Government Benefits.

The second *Telford* factor looks at the entity's sources of funds to determine if there is any nexus to the government or any functional equivalency to an agency. The Union's sources of funds are exclusively private. CP 154-55. No funds are directed to the Union from the government in any way. *Id.* None of The Union's employees receive government benefits. *Id.* The Strands have not provided any evidence to the contrary. The second

Telford test factor weighs in favor of finding that the Union is not subject to the PRA.

iii. The Government Does Not Control the Day-to-Day Operations of The Union.

The third *Telford* factor looks at government involvement with the private entity in question. In this case, there is no governmental involvement. The government has no say, authority or control over the Union's day-to-day operations. CP 154.

Government control is distinguishable from and different than government regulation. *Woodland Park Zoo*, 187 Wn.2d at 530-31. Day-to-day control supports a finding of a functional equivalency, but mere regulation does not. *Id.*

The government in this case has absolutely no control or authority over the Union, much less its day-to-day operations. In fact, the government has absolutely no governmental authority or involvement with the Union whatsoever.

Further, the Union is not controlled by any elected or appointed governmental officials. CP 154. Although the Union's membership is made up of public employees, the organization is run by private employees without government involvement, authority, or oversight. *Id.* As a consequence, the third *Telford* factor is not met and does not support a finding that the Union is subject to the PRA.

iv. The Union is a Private Not-For-Profit Entity Incorporated in 1988.

The fourth and final *Telford* factor analyzes the origins of the entity to determine whether or not the entity was incorporated

by or for the government. Here, the Union was incorporated as a private entity by private members in 1988. CP 154. It was neither incorporated by nor for the government. *Id.* There is no evidence to the contrary. Therefore, this final factor under the *Telford* test also supports a finding that the Union is not a functional equivalent of an agency for the purposes of the PRA.

Balancing the four factors under the *Telford* test, the Union is not a functional equivalent of an agency under the PRA. The trial court did not err in so finding, but rather, properly applied the applicable law, the undisputed facts presented before the Court, and found the Union to be a private entity not subject to the PRA. The Union is not a private surrogate or an extension of the government.

The Strands cannot plead any set of facts that would suggest, much less support, a finding that the Union is a functional equivalent of an agency under the *Telford* test. The Strands cannot state a claim under the PRA against the Union where they would be entitled to any relief. Accordingly, this matter was properly dismissed with prejudice as the Union is not subject to the PRA. The Trial Court's order of dismissal with prejudice should be affirmed.

B. The Trial Court Properly Denied Strands' Motion for Reconsideration Pursuant to CR 59.

1. This Court Reviews Motions for Reconsideration Under the Abuse of Discretion Standard.

Motions for reconsideration are addressed to the sound discretion of the trial court. *Wagner Dev., Inc. v Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 906 (1999) citing *Perry v. Hamilton*, 51 Wn. App. 936, 938 (1988). Therefore, a reviewing court will not reverse a trial court's ruling on a motion for reconsideration absent a showing of manifest abuse of that discretion. *Id.* A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *Wagner Dev., Inc.*, 95 Wn. App. at 906.

2. The Strands Raised No Grounds Under CR 59(a) to Support Reconsideration.

CR 59 requires that any motion for reconsideration identify the specific reasons reconsideration should be granted. The Strands had the burden of articulating their reasons which must be grounded in fact and law. The purpose of reconsideration is to afford the court an opportunity to correct any errors which occurred without the necessity of an appeal. *Koboski v. Cobb*, 161 Wn. 574, 577 (1931). The basis for all the stated grounds in CR 59(a) for reconsideration is the inherent power of the court to correct any errors made in its proceedings that have had any

material effect on the outcome of the matter. *Brammer v. Lappenbusch*, 176 Wn. 625, 629-30 (1934). Those specific grounds recognize and include irregularities occurring inside or outside the courtroom which may have prevented the fair and impartial treatment of all parties and resulted in a possible miscarriage of justice. *See generally* CR 59(a)(1)-(9). A motion under CR 59 is not a vehicle for presenting a new claim, argument, or theory of recovery. *Vaughn v. Vaughn*, 23 Wn. App. 527, 529-30 (1979).

As required by CR 59, the Strands' motion for reconsideration did not state nor identify the specific reasons or grounds on which it was based. Rather, the Strands simply reargued their position by repeating facts and arguments already presented to the Trial Court. CP 109-117. They also presented other arguments and facts that were inappropriate for a motion for reconsideration. *Id.* The Strands improperly used CR 59 as a vehicle to reargue, relitigate, and raise issues already heard and ruled upon by the Court.

The Trial Court recognized this issue and denied the Strands' motion for reconsideration on July 10, 2018, reasoning:

After review of the record and pleadings filed the court finds that the motion fails to set forth specific grounds as to the basis for reconsideration, puts forth facts irrelevant to the motion and recites the very same arguments which this court previously rejected.

CP 118-19. There is no evidence of error or abuse of discretion in the Trial Court's ruling. The Trial Court's decision is supported by and grounded in law. The order denying reconsideration is not manifestly unreasonable, nor is it based upon untenable grounds or reasons. The order denying the Strands' motion for reconsideration is rooted in law and was not an abuse of discretion. Therefore, the order denying the Strands' motion for reconsideration should be affirmed.

C. The Trial Court Properly Awarded the Union Their Attorneys Fees and Costs for Defending a Frivolous Suit.

1. An Attorney's Fee Award Based on a Frivolous Lawsuit is Reviewed under the Abuse of Discretion Standard.

The Trial Court awarded the Union its attorney's fees and costs for having to defend a frivolous suit pursuant to RCW 4.84.185. The Trial Court's award is reviewed for abuse of discretion. *Curhan v. Chelan Cty.*, 156 Wn. App. 30, 37 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex re. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971).

2. The Strands' Lawsuit Was Frivolous and an Award of Attorney's Fees and Costs Was Appropriate.

The Trial Court found the Strands' lawsuit to be frivolous and awarded attorney's fees and costs pursuant to RCW 4.84.185. CP 189. RCW 4.84.185 permits a trial court to award attorney fees to the prevailing party if the action was frivolous and advanced

without reasonable cause. A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Curhan v. Chelan Cty.*, 156 Wn. App. 30, 37 (2010) citing *Skimming v. Boxer*, 119 Wn. App. 748, 746 (2004). The frivolous lawsuit statute has a very particular purpose: “that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases.” *Biggs v. Vail*, 119 Wn.2d 129, 137 (1992).

The Strands brought a frivolous lawsuit. It was meritless. They were told that before pursuing the matter by the Union’s General Counsel. CP 150, 189. He explained to the Strands that the Union was not subject to the PRA as it was private and not an agency or functional equivalent. CP 150-51. They even discussed the *Woodland Park Zoo* case and its application to the Union. *Id.* The Strands would not listen. They were warned, yet nonetheless proceeded at their peril. *Id.* Not only did the Union have to defend a meritless lawsuit, but they did so *after* having explicitly told the Strands that the Union was not subject to the PRA. *Id.* The Strands should never have brought this action against the Union.

The Trial Court did not err nor abuse its discretion when awarding attorney’s fees and costs to the Union for defending a

meritless suit.¹ A PRA claim against a defendant who is not subject to the PRA is categorically meritless. The Union was entitled to fees under RCW 4.84.185. The Trial Court's discretion awarding attorney's fees was not exercised on untenable grounds or for untenable reasons. Rather the award recognized the frivolous nature of the Strands' lawsuit, and the fact that the Union had to defend a meritless action. Therefore, the award for attorney's fees and costs should be affirmed as it was within the sound discretion of the trial court.

D. The *Janus* Decision and Other Arguments and Allegations Raised by the Strands are Irrelevant, Immaterial and Not Dispositive of the Issues in this Case.

1. The *Janus* Decision has no relevance to this case.

The U.S. Supreme Court ruled in *Janus v. American Federation of State, County, And Municipal Employees, Council 31, et. al.*, that an Illinois statute authorizing public-sector unions to assess agency fees against non-member public employees on whose behalf the Union negotiated, violated the First Amendment. 138 S.

¹ The Strands argue that they have brought and prevailed on the merits in other previous lawsuits that were not frivolous. The merits of other actions initiated by the Strands are immaterial when determining whether this action, as a whole, was frivolous. None of those were brought against a union.

Ct. 2448 (2018). The far reaching effect of this decision outside of the state of Illinois is that public-sector unions can no longer require non-members to pay an agency fee without consent. *Id.* Under that decision, members must affirmatively choose to support the union prior to any deductions or withholdings for union fees. *Id.* at 2459.

This decision is immaterial and irrelevant to the issues presented before this Court. Under ER 401, the *Janus* decision does not make it any more or less likely that the Union is subject to the PRA. Accordingly, the *Janus* decision which was issued after the order of dismissal, but prior to the order denying the Strands' motion for reconsideration, has no material effect on the merits of this case and is nothing but a distraction from the issue and threshold question whether the Union is subject to the PRA.

2. The Strands' Remaining Arguments are Red Herrings.

The Strands spend the vast majority of their brief detailing and arguing what prompted them to request documents from the Union, what information they were trying to acquire, and how the information may have public policy implications. The Strands' motives for requesting the documents from the Union are irrelevant, immaterial, and not dispositive in determining whether the Union is subject to the PRA. *Caldecott v. Superior Court*, 243

Cal. App. 4th 212, 219-220 (2015) (court concluding that under the California Public Records Act (CPRA), the motive for seeking public records is irrelevant and the purpose for which the records are requested is likewise irrelevant.) The court reasoned the CPRA did not differentiate among those who seek access to public records, and there could be no practical way of limiting the use of information once disclosed. *Id.* Therefore, whatever purpose the Strands had in mind is irrelevant. *See also Wade v. Taylor*, 156 Id. 91, 101 (2014)(the Idaho Supreme Court stated that “the motivation of the person requesting the public record is irrelevant. The public’s right, and consequently, an individual person’s right to inspect a public record ‘is conditioned *solely* on whether the document is a public record that is not expressly exempted by statute”)(emphasis in original)(internal citations omitted).

A record is only subject to disclosure if the entity is subject to the PRA and the document being requested is a public record. RCW 42.56. The purpose and reasons alleged by the Strands as to why they are seeking documents from the Union are irrelevant and immaterial to the issues before this Court.

E. Request for Attorney’s Fees and Costs on Appeal.

The Union respectfully requests this Court authorize an award of attorney’s fees and costs for the Strands’ frivolous appeal. RAP

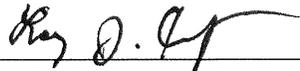
18.9. “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906 (2007). This appeal is devoid of merit, and the Strands have no possibility of reversal as the Union is not subject to the PRA. The Strands have produced no evidence that would support a finding that the Union is subject to the PRA. Therefore, this appeal is frivolous. Pursuant to RAP 18.9 and RCW 4.84.185, the Union respectfully requests an award of attorney’s fees and costs for defending a frivolous appeal.

V. CONCLUSION

Based on the records, applicable laws, and argument presented above, the Trial Court correctly decided this case pursuant to the threshold issue that the Union is not an agency or functional equivalent that is subject to the PRA. Therefore, the Union respectfully requests this Court affirm and uphold the Trial Court’s orders: (1) Denying the Strands’ Motion and Order to Show Cause; (2) Granting the Union’s Motion to Dismiss with Prejudice; (3) Awarding reasonable attorney’s fees and costs to the Union; and (4) Denying the Strands’ Motion for Reconsideration.

Dated this 16th day of January, 2019.

POWELL, KUZNETZ & PARKER, P.S.

By 
Larry J. Kuznetz, WSBA #8697

By 
Sarah N. Harmon, WSBA #46493

Attorneys for Respondents

Certificate of Service

I HEREBY CERTIFY that on the 16th day of January, 2019, I caused a true and correct copy of the Brief of Respondents, to be sent by the method indicated below to:

Palmer & Patricia Strand
P.O. Box 312
Nine Mile Falls, WA 99026

XX U.S. Mail
 Hand Delivery
 Facsimile Transmission
XX Email
pnstrand@hotmail.com

DATED at Spokane, WA this 16th day of January, 2019.

Mary E. Zanck