Summer 2016
Volume 33, No. 2

Administrative Law

Published by the Administrative Law Section of the Washington State Bar Association

Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter and encourage your feedback.

Please forward our newsletter to your colleagues and encourage them to join the section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

CONTACT US

Section Chair
Gabe Verdugo
gabeverdugo@gmail.com

Newsletter Submissions
Liz De Bagara Steen
liz@washingtonbusinessadvocates.com

Inside This Issue

New PRA Exemption for Body Camera Recordings..... 1

Angela Jones – Public Service Grant Recipient..... 4

Legislative Session Report..... 4

Administrative Appeals Performance Audit..... 6

Summaries of Relevant Cases 8

New PRA Exemption for Body Camera Recordings

by Flannary Collins

Reprinted with kind permission of the Municipal Research and Services Center. Note that although the June 9, 2016 deadline for agencies to adopt a body camera program and take advantage of the exemption has passed, additional details and deadlines still are important to keep in mind, as discussed below.

Thanks to EHB 2362, there's a new Public Records Act (PRA) exemption for body camera recordings. As I discuss below, however, the new exemption only applies to agencies with body camera programs in effect as of June 9, 2016, so act soon if your agency wants to take advantage of it.

Although the legislature did not provide a categorical exemption (as some states have done), EHB 2362 amends RCW 42.56.240 to create an exemption for body camera recordings to the extent that nondisclosure is essential for the protection of any person's right to privacy. So, if a body camera recording meets the two-prong privacy test established in RCW 42.56.050 (disclosure would be highly offensive to a reasonable person and not of legitimate concern to the public), it is exempt from disclosure.

In my experience, the two-prong privacy test can be tricky to apply. Luckily, the new exemption details specific body camera scenarios that are presumed to be highly offensive, thus meeting the first prong of the privacy test. Such scenarios include those body camera recordings depicting:

- The interior of a place of residence where a person has a reasonable expectation of privacy;
- A minor;
- The body of a deceased person; and
- The identity of a victim, or witness, of an incident involving domestic violence or sexual assault.

Of course, an agency will still have to meet the second prong of the privacy test to withhold such recordings, and the highly offensive presumption can be rebutted by specific evidence.

The exemption for body camera recordings contains a number of other unique PRA features:

1. Fees, costs, and penalties aren't awarded to a person who prevails in a PRA lawsuit unless the agency withholds the body camera recording in bad faith or with gross negligence.

2. A person cannot request "all" body camera recordings. Instead, the requestor must provide some identifiers about the specific recording they want, such as: the name of the person or police officer involved in the incident; or the date and location of the incident.

3. An agency can charge redaction costs to the requestor,

(continued on page 3)

WSBA Administrative Law Section Executive Committee Officers & Board of Trustees 2015-2016

Officers

Chair
Gabe Verdugo
gabeverdugo@gmail.com

Chair-Elect
Stephen Manning
stephen.manning@seattle.gov

Secretary/Treasurer
Polly McNeill
pollym@summitlaw.com

Immediate Past Chair
Katy Hatfield
katy.hatfield@atg.wa.gov

Trustees

Paul Brachvogel (2016)
brachvogel1@msn.com

Margie Gray (2016)
graymr2@dshs.wa.gov

Janell Stewart (2016)

Jonathon Bashford (2017)
bashfordj@lanepowell.com

Lisa Malpass (2017)
lam@winstoncashatt.com

Vacant (2017)

Paula Martin (2018)
paula@mheikkala-ps.com

Susan Pierini (2018)
susanp1@atg.wa.gov

Robert Rhodes (2018)
robert@rhodeslegalgroup.com

Committee Chairs

CLE
Suzanne Mager
suzannelmager@gmail.com

Diversity and Outreach
John Gray
john.m.gray@comcast.net

Newsletter
Liz De Bagara Steen
liz@washingtonbusinessadvocates.com

Publications and Practice Manual
Jeffrey B. Litwak*
jeff.litwak@gorgecommission.org

Public Service
Janell Stewart (2016)

Legislative
Richard Potter*
potterre@frontier.com

BOG Liaison
Phil Brady
pbradyiv@gmail.com

Young Lawyer Liaison
Liz De Bagara Steen*
liz@washingtonbusinessadvocates.com

**Non-voting member*

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Liz De Bagara Steen (liz@washingtonbusinessadvocates.com).

Desktop Publisher • Ken Yu/Quicksilver • k.yu@earthlink.net

New PRA Exemption for Body Camera Recordings *continued*

such as those for pixelating and distorting the footage, with some exceptions.

4. This exemption includes its own retention period, requiring that body camera recordings be retained for at least 60 days, after which they may be destroyed.

5. Unlike most PRA exemptions, this exemption appears to be mandatory; the language reads that law enforcement "shall not disclose a body worn camera recording to the extent the recording is exempt under this subsection."

Here's the kicker though: the new exemption applies only to body camera programs (including pilot programs) in existence as of June 9, 2016. However, EHB 2362 is a bit unclear as to what exactly an agency must do by the June 9, 2016 deadline to take advantage of the new exemption. Our interpretation is that an agency must have at least one body camera in use and at least some interim policies in place governing camera use by the June 9, 2016 deadline. But, given this lack of clarity, your agency's attorney should be consulted on how to deploy by the deadline.

Agencies deploying body cameras before June 9, 2016 must then adopt formal body camera policies by October 7, 2016 (120 days after the June 9, 2016 effective date). The policies must address various factors including: (a) when a body camera must be activated and deactivated; (b) how officers are to be trained on body camera usage; and (c) security rules to protect the data collected and stored. Although they cannot take advantage of the new exemption, agencies seeking to deploy body cameras on or after June 9, 2016 must also adopt such policies before deploying body cameras.

The exemption also has a sunset date of July 1, 2019. In addition, the legislature created a task force to examine the use of body cameras, with a final report due to the Governor and certain legislative committees by December 1, 2017. The report will address various aspects of body camera programs, including: the redaction costs assessed to requestors, and the use of body cameras for gathering evidence, surveillance, and police accountability. I believe the reasoning behind the July 1, 2019 sunset date is that the task force's recommendations will then take the place of the exemption created by EHB 2362.

So, if your agency is thinking about implementing a body camera program, consider doing so before June 9, 2016! If you wait longer, you won't be able to take advantage of EHB 2362's new body camera recordings exemption.

Have a question or comment about this information? Let me know below or contact me directly at fcollins@mrsc.org.

About the MRSC: The Municipal Research and Services Center (MRSC) is a nonprofit organization that helps local governments across Washington state better serve their citizens by providing legal and policy guidance on any topic. At MRSC, we believe the most effective government is a well-informed local government, and as cities, counties, and special purpose districts face rapid changes and significant challenges, we are here to help.

Administrative Law Section List serve

The Administrative Law Section has a "closed" list serve, which means only current subscribers of the list serve can send an email to the list serve. You can request to receive the list serve messages in a daily digest format by contacting the list administrator below.

Sending Messages: To send a message to everyone currently subscribed to this list, address your message to administrative-law-section@list.wsba.org. The list server will automatically distribute the email to all subscribers. A subject line is required on all email messages sent to the list serve.

Responding to Messages: Use "Reply" to respond only to the author of the email. Use "Reply All" to send your response to the sender and to all members of the list serve.

If you have any questions, wish to unsubscribe, or change your email address, contact the WSBA List Administrator at sections@wsba.org.

Angela Jones – Public Service Grant Recipient

The Administrative Law Section was excited to award last year's law student grant to Angela Jones, who graduated this summer from Gonzaga Law School. Below is a brief summary of Angela's summer experience and the importance of the support that the Section provided.

Angela Jones graduated from Gonzaga University School of Law in May 2016. Angela earned her Bachelor's in English/Language Arts and teaching certificate from Washington State University and her Master of Science in Communications from Eastern Washington University. Prior to law school Angela served as the Director of Employment Services for Spokane Public Schools with oversight of recruitment, hiring, equity services, and as a member of the labor management team.

Angela has a passion for serving her community and has done so through various boards and organizations. This passion continued throughout law school and led Angela to secure a summer externship with the Unemployment Law Project (ULP) in Spokane. ULP is a non-profit organization that provides low-cost representation and free advice and counsel to people in Washington state who have been denied unemployment benefits or whose award of benefits is being challenged. The grant from the WSBA Administrative Law Section allowed Angela the financial freedom to serve solely at ULP and not have to work a summer job. During her externship, Angela had the opportunity to meet with clients, prepare for employment hearings, and represent clients in the hearings. The hands-on experience allowed Angela to synthesize the information she learned in the classroom and apply it in real-time – from drafting direct examinations, to cross-examination, objecting on the record, giving closing arguments, drafting legal documents, and filing appeals for clients.

Angela recently accepted the position of Chief of Staff for Eastern Washington University and is currently studying to take the Washington state bar exam. The board of the Administrative Law Section was thrilled to learn about substantive legal experience that Angela had over the summer and wishes her all the best in the start of her career.

Legislative Session Report

by Richard Potter, chair of the Section's legislative committee

Bills Related to Administrative Law That Passed

House Bill 2332 removed an expiration date concerning the filing and public disclosure of health care provider compensation. The bill includes an amendment of Public Records Act (RCW 42.56.400), adding an exemption for documents, materials, or information obtained by the insurance commissioner under chapter 48.05A RCW.

Senate Bill 6171 amended the Open Public Meetings Act to (a) increase the civil penalty from $100 to $500 if a member of an agency-governing body attends a meeting in violation of the Act where agency action is taken and (b) create a $1,000 penalty for subsequent violations.

Senate Bill 2362 amended the Public Records Act (RCW 42.56) and added a new chapter to Title 10 RCW to (a) establish public records provisions governing requests for and disclosure of certain body-worn camera recordings made by law enforcement and corrections officers while in the course of their official duties, (b) require law enforcement and corrections agencies that deploy body-worn cameras to adopt policies covering the use of body-worn cameras, and (c) establish a task force to review and report on the use of body-worn cameras by law enforcement and corrections agencies.

House Bill 2530 requires the Washington State Patrol to create and operate the Statewide Sexual Assault Kit Tracking System and authorizes the Department of Commerce to accept private donations to fund the testing of previously unsubmitted sexual assault kits and training for sexual assault nurse examiners. The bill includes Public Records Act (RCW 42.56) disclosure exemptions for records and information contained within the system.

House Bill 2584 provides that specified categories of information obtained by the Liquor and Cannabis Board in regulating marijuana commerce are exempted from disclosure under the Public Records Act (RCW 42.56), including information pertaining to financial institutions, retirement accounts, building security plans, marijuana transportation, vehicle and driver identification data, and account numbers or unique access identifiers issued to private entities for traceability system access.

House Bill 2663 amends the Public Records Act (RCW 42.56) to repeal exemptions from public disclosure of records of certain defunct programs and reports, including railroad company contracts filed prior to 1991 with the Utilities and Transportation Commission, personal information filed with the Bureau of Statistics, data collected by the Department of Social and Health Services for a 2004 report on the pay-

(continued on next page)

Legislative Session Report *continued*

ment system for licensed boarding homes, and records related to the purchase of alcohol by an individual.

Senate Bill 6170 amends the Public Records Act (RCW 42.56) to exempt from disclosure financial and commercial information relating to a municipal employee retirement board's investment in private funds if disclosure of that information would reasonably be expected to result in a loss to either the retirement fund or to providers of that information. Two types of information are subject to public disclosure: (1) the names of private funds and the amount of retirement fund investment in those funds; and (2) the aggregate quarterly performance results for the retirement fund's investments in a private fund.

Senate Bill 6177 modifies marijuana research license provisions and includes amendment of the Public Records Act (RCW 42.56) to exempt from disclosure proprietary financial, commercial, operations, and technical and research information and data submitted to or obtained by the Liquor and Cannabis Board in applications for marijuana research licenses, or in reports submitted by the licensees.

Senate Bill 6356 amends the Public Records Act (RCW 42.56) to exempt from disclosure the following information relating to a private cloud service provider that has entered into a Criminal Justice Information Systems (CJIS) agreement with the FBI: personally identifiable information of employees and other security information of the cloud service provider.

Senate Bill 6534 establishes a maternal mortality review panel (subject to being funded), and includes an amendment to the Public Records Act (RCW 42.56) to exempt from disclosure information, documents, proceedings, records, and opinions related to the panel. It also provides that such materials are exempt from discovery or introduction into evidence in civil or criminal actions and that the panel and the Secretary of Health may only retain information identifying facilities related to occurrences of maternal deaths for the purpose of analysis over time.

Bills of Interest That Did Not Pass

The Administrative Law Section's Board of Trustees formally opposed **House Bill 2311** and **Senate Bill 6456**, which would have amended the Administrative Procedure Act (RCW 34.05) to provide that "No policy of any agency may be enforced" unless the agency has first embodied that policy in a rule and filed the rule with the code reviser. The Section's comments made several points, including that the bills would be a major change to the APA and would conflict with current law that provides for "interpretive and policy statements" adopted by agencies to be filed with the Code Reviser, and that provide a process for petitioning to convert policies to formal rules.

In the 2015 legislative session the Administrative Law Section's Board formally opposed **Senate Bill 6019**. The bill was not passed in that session, but it was carried over and heard in the 2016 session. As in the prior year, the bill passed the Senate, the House passed a significantly amended version, the Senate refused to concur in the House amendments, and the bill died. The Senate bill would have amended the Administrative Procedure Act to provide that (a) a presiding officer for an internal state agency administrative hearing must issue final orders and (b) an administrative law judge at the Office of Administrative Hearings must issue final orders, and (c) to prohibit ex-parte contacts including "communication with an agency employee that requires as part of an employment evaluation that a presiding officer shall decide cases according to the agency head's unwritten policies." The bill as amended by the House would have deleted the provisions concerning initial and final orders and prohibited an employee or consultant of the agency from coercing or improperly influencing a presiding officer of an adjudicative proceeding under the Administrative Procedure Act, but specified that an agency head's expectation that a presiding officer will consider written agency policies during his or her decision making is not coercion or improper influence. The Section's comments pointed out a number of statutory conflicts that would be created by the bill's passage and described several practical problems that would be created for the conduct of agencies' business. Testimony by several agencies made similar points. While the billed again failed to be enacted, the sponsor plans to pursue the issues during the interim between the 2016 and 2017 sessions. The Administrative Law Section will work with the WSBA lobbyist to stay involved in that process.

Senate Bill 6464 would have amended the Administrative Procedure Act to establish a two-year deadline for issuing final decisions in adjudicative cases and would have added extensive verbiage to the APA concerning "judicial review" of an agency's failure to meet the deadline. While the Section's Board did not issue a formal position statement on the bill, it worked closely with the WSBA lobbyist to explain several conceptual and drafting problems with the bill that would have created significant confusion in the statutes.

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Liz De Bagara Steen at liz@washingtonbusinessadvocates.com.

Administrative Appeals Performance Audit

By Richard Potter, chair of the Section's legislative committee

On May 11, 2016, the Washington State Auditor's Office released an extensive performance audit report on administrative appeals in the state. The audit report is available here: http://www.sao.wa.gov/state/Documents/PA_Administrative_Appeals_ar1016691.pdf.

Overview of the Audit Report

The Executive Summary of the audit report explains that two issues have generated particular controversy among stakeholders in the administrative appeals process:

- Who should have final order authority, and what degree of influence should an agency have on the decision-maker, who is usually a hearing officer?
- How should agency policies that are not reflected in its rules (often referred to as "informal guidance") be considered in a hearing officer's decisions?

The audit team sought to answer three questions to address these issues:

1. Are administrative appeals processes understandable?
2. Do administrative appeals processes appear impartial?
3. How can the state strengthen the appearance of impartiality?

The audit team identified 28 agencies that provide pre-judicial review "appeal" opportunities to parties to agency actions and proceedings. It selected nine appeal processes for a more in-depth review.

The team's recommendations are as follows:

> Based on our review, we recommend the Legislature clarify statutory provisions relating to permissible communications with judges and the role of informal guidance in appeals.
>
> We also offer recommendations specific to each agency reviewed, as well as suggestions for enhancing public perceptions while facilitating access to appeals.
>
> We also identified noteworthy practices, both within Washington and in other states, that agencies should consider implementing.

On the first recommendation, regarding statutory revisions, the audit report identifies RCW titles and chapters where amendments could be placed, but the report does not include specific language. It does present some agencies' internal practices on the subject, with the implication that they are good models for addressing "permissible communications with judges" and/or "the role of informal guidance in appeals."

The report makes it clear that the audit team did not try to determine whether administrative appeal decisions were in fact "impartial." The report focused on processes, on "transparency," and on public information matters that it thinks affect the "appearance of impartiality."

The Report's Three-Part Model of Agency Appeals Processes

The audit report categorizes agency appeals processes as being "internal," "external," or "mixed." The identity of the person/agency that issues the initial decision and the final decision determines the process's category. In an "internal process," an in-house agency hearing officer or the agency head issues the decisions. In an "external" process a hearing officer from the Office of Administrative Hearings (OAH) or a separate review body (*e.g.*, Board of Tax Appeals or Board of Industrial Insurance Appeals) issues the final decision. In a "mixed" process, an OAH hearing officer issues the initial decision and the agency head (or delegate) issues the final decision.

The report does not tie these categorizations to the "independence" and "impartiality" issues that are significant to evaluating the lawfulness and propriety of agency efforts to influence appeal officers' decisions.

"Impartiality" and "Independence"

The audit report does not directly address the legal and policy question that underlies reported stakeholder

(continued on next page)

Administrative Appeals Performance Audit *continued*

concerns with the current administrative appeals process. That is, should the person(s) with final decision authority and responsibility (*i.e.*, agency "heads"—director, commissioner, etc.) be able to direct or influence appeal officers'[1] decisions in any manner?

In other words, how "independent" should appeal officers be in relation to agency heads? Appeal officers are not legally independent in the same way courts are. Rather, they are creatures of the legislative authority and mission of the agencies whose cases they handle, and they (even the "external" appeal bodies) are supposed to implement agency policy. A concern evident in the audit report is how such policies are communicated to appeal officers and whether they are made known to case parties and to the general public.

Recommended Legislation

Regarding specific recommendations, the report provides:

> To improve perceptions of fairness and hearing officers' impartiality, both within the agencies and among stakeholders, we recommend the Legislature:
>
> - Amend RCW 34.05.455 regarding ex parte communications with hearing officers by clarifying:
>   - What types of communication between management and hearing officers are allowed
>   - When and in what capacity managers may provide direction regarding a hearing officer's performance
> - Amend Chapter RCW 51.52 regarding ex parte communications with hearing officers by clarifying:
>   - What types of communication between management and hearing officers are allowed
>   - When and in what capacity managers may provide direction regarding a hearing officer's performance
> - Add a new section to either Part II or Part IV of Chapter RCW 34.05 regarding the role of informal guidance by clarifying:
>   - In what circumstances hearing officers may apply informal guidance in developing administrative decisions
>   - Whether managers may require hearing officers to apply informal guidance
>   - If hearing officers may apply informal guidance, clarify whether the hearing officers may apply written guidance, unwritten guidance, or both.

Statements Regarding Specific Appeal Processes

The audit report sets forth information about the nine appeal processes on which the audit team focused, ending with recommendations for each agency. For seven of the appeal processes the audit report makes the same recommendation[2] as the following guidelines for the Department of Revenue (DRS):

> Whether or not statute is amended in response to our recommendations, DRS could benefit by developing internal guidance clarifying:
>
> - What types of communication between management and hearing officers are allowed
> - When and in what capacity managers may provide direction regarding a hearing officer's performance
>
> Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

The audit report does not explain, however, what the substance of the "clarification" should be.

The audit report repeatedly references a well-publicized 2014 controversy at the Office of the Insurance Commissioner (OIC), which involved a hearing officer's disagreement with a supervisor about whether it was appropriate to discuss agency policy matters that could influence appeal decisions. No recommendations are provided in the audit report for OIC, however, which already had taken steps to address concerns about independence of hearing officers:

> OIC developed and implemented a screening protocol designed to eliminate any potential or perceived conflict of interest or ex parte communications; it also designated cases that would be routinely shifted to the OAH or specially assigned to the Commissioner or a special appointment. The screening protocol provides administrative controls regarding access restrictions to the hearing officer and hearing-related information, and describes responsibilities for the various types of appeals. In addition, the OIC recently updated hearing officer expectations, incorporating management's stated expectation that "businesses and individuals regulated by the OIC have an opportunity to a fair hearing and impartial review of decisions made by the Insurance Commissioner and his staff.

(continued on next page)

Administrative Appeals Performance Audit *continued*

Agency Response to Recommendations

The audit report includes a letter from the Director of the Office of Fiscal Management (OFM), which provides a "consolidated response" to the audit report on behalf of OFM, the Board of Industrial Insurance Appeals, Board of Tax Appeals, Health Care Authority, Office of Administrative Hearings, and the departments of Employment Security, Retirement Systems, Revenue, and Social and Health Services. The letter states that the agencies "do not believe a statutory change is warranted. The Administrative Procedures Act (APA) sufficiently and clearly addresses ex parte communications between management and hearings officers regarding a case." The response goes on to describe the agencies' current and soon-to-be-in-place policies and practices that address the *ex parte* communication and "informal guidance" issues. It also addresses the non-legislative recommendations made by the audit team.

1 While the audit is limited to the "appeals" process, this same question can be asked in relation to initial administrative hearings.

2 The audit report has some additional recommendations for Medicaid benefit appeals concerning keeping current and publishing "significant decisions."

Join Our Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include a subscription to this newsletter and networking opportunities in the field of administrative law. **Click here to join!**

The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

Summaries of Relevant Cases

Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 372 P.3d 97 (2016)

By Katy Hatfield

In this Public Records Act (PRA) case, the Supreme Court upheld a $500,000+ penalty against the Department of Labor and Industries (L&I) and addressed two novel questions about the PRA. First, the Supreme Court determined that a trial court has discretion to calculate penalties for non-disclosure on a per-page basis by defining the term "record" to mean a single page. Second, the Supreme Court determined that L&I does not qualify for the investigative records exemption unless L&I can show that non-disclosure of a specific document is essential for effective law enforcement.

This case stemmed from a records request made by *The Seattle Times* to L&I regarding L&I's then-pending investigation of lead exposure to workers remodeling Wade's Eastside Gun Shop. L&I responded within the required five days and explained that the records were part of an open investigation and would not be available until the investigation closed. L&I did not disclose all the responsive documents until almost eight months later. The trial court imposed penalties against L&I for five separate periods of time: (1) the period of time between *The Seattle Times*' PRA request and the date that L&I's investigation closed ($0.02 per page per day); (2) the period of time between when the investigation closed and when L&I notified the investigated companies of the PRA request ($0.25 per page per day); (3) the period of time between when L&I sent notice to the investigated companies and the deadline L&I set for those companies to obtain a protective order ($0.01 per page per day); (4) the period of time between L&I's deadline for the companies and the superior court's order mandating disclosure ($1.00 per page per day); and (5) the period of time between when the superior court mandated disclosure and the date that L&I actually produced the records ($5.00 per page per day).

The Supreme Court affirmed the trial court's PRA penalties for each of the five periods. In so doing, the Supreme Court determined that it was not an abuse of discretion for the trial court to determine that a single page met the broad definition of the term public record, which includes "any writing." The Supreme Court also determined that L&I's investigation did not qualify for the investigative records exemption because L&I's investigation was dissimilar to an open criminal investigation where legitimate reasons might exist to withhold information. Rather, businesses being investigated by L&I know of the investigation.

(continued on next page)

Summaries of Relevant Cases *continued*

Woodland Park Zoo v. Fortgang, 192 Wn. App. 418, 368 P.3d 211 (2016), *as corrected* (Feb. 3, 2016)

by Jeff Litwak

Division I applied the *Telford* factors to the Woodland Park Zoological Society (WPZS) and concluded that the WPZS is the functional equivalent of a government agency subject to the PRA.

In 2002, Seattle entered into a 20-year operations and management agreement, granting the WPZS exclusive authority to manage and operate the Zoo. WPZS is a non-profit corporation formed in 1965 "for charitable, scientific and educational purposes …." The agreement does not require WPZS to comply with the PRA, except that "records pertaining to the veterinary management and treatment of Zoo animals in its care" must be disclosed. The agreement also requires public participation in various reports, plans and capital projects, and requires notice and opportunity for public participation for regularly scheduled WPZS Board meetings.

Fortgang sent a letter to WPZS requesting certain records pursuant to the PRA. Some of the requests sought records relating to medical care and general treatment of the Zoo's elephants. Other requests sought internal documents about a public relations campaign WPZS undertook to counteract criticism of its elephant program. WPZS provided documents related to its treatment of the elephants, acknowledging that it is required to disclose animal records under the agreement. It declined to respond to the other requests, asserting it is not a government entity and therefore not subject to the PRA.

The court started its analysis by citing *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 161 (1999), which held that a nongovernment entity may be subject to the PRA if it is "the functional equivalent of a public agency for a given purpose." In *Telford*, the court adopted a four-factor balancing test for determining whether a nongovernment entity is the functional equivalent of a public agency for purposes of the PRA: "(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." 95 Wn. App. at 162. Analysis under *Telford* must be grounded in the unique factual circumstances present in each case.

Regarding the government function factor, the court quickly concluded that operating a zoo does not necessarily implicate any function unique to government, noting that the Cougar Mountain Zoo in Issaquah has been privately owned and operated. The court did explain that WPZS shares some nominal similarities to a government agency given its commitment to the public interest, but that was not sufficient to conclude WPZS performs a government function.

Regarding the government funding factor, the court noted that WPZS receives some funding from the City from a levy, the general fund, and grants; but this is not the majority of its funds. In 2013, taxpayer money accounted for only 16 percent of WPZS's revenue. WPZS earns most of its revenue from private donations, investments, and selling Zoo-related goods and services. The court then noted that Washington courts have consistently concluded that the government funding factor weighs in favor of applying the PRA only when a majority of the entity's funding comes from the government.

Regarding the government involvement and regulation factor, the court explained that the City retains some oversight authority over certain aspects of Zoo management, including animal acquisition and disposition; the City retains ownership of the Zoo premises and facilities in addition to "all appurtenances, fixtures, improvements, equipment, additions and other property attached or installed in the Premises during the Term" of the agreement. It also retains the naming rights for the Zoo and Zoo facilities. Further, the mayor, the Parks Department superintendent, and the City Council Park Committee, are each authorized to appoint one person to WPZS's Board of Directors, for a total of three City-appointed board members. As of 2014, only three of the 38 members of the WPZS Board of Directors were appointed by government.

Finally, regarding the government creation factor, the court quickly noted that the WPZS is a non-profit corporation created by private citizens; as such, the government played no role in WPZS's creation.

Perhaps goading the Washington Supreme Court a bit, the Court of Appeals noted in a footnote, "We note the Washington Supreme Court has yet to apply the *Telford* test. *See Worthington v. Westnet*, 182 Wn.2d 500, 508, 341 P.3d 995 (2015) (stating that the *Telford* factors, though instructive, had limited applicability in determining whether a multijurisdictional drug task force was subject to the PRA)." Not surprisingly, Fortgang did file a petition for review at the Supreme Court (Wash. Sup. Ct. No. 928461, filed Mar. 2, 2016). Stay tuned to see if the Supreme Court accepts the Court of Appeals' invitation.

(continued on next page)

Summaries of Relevant Cases *continued*

Washington Trucking Ass'ns v. State, 192 Wn. App. 621, 369 P.3d 170 (2016)

By Gabe Verdugo

A trucking trade association and trucking carriers sued the Employment Security Department (ESD) after the department conducted audits and concluded that owner/operators of trucking equipment leased by the carriers were the carriers' employees. Based on this determination, the ESD assessed additional unemployment taxes. The association and carriers alleged that the ESD targeted the trucking industry and rigged the audits, requiring auditors to find an employment relationship and additional tax liability. The trial court dismissed the lawsuit.

On review, the court of appeals considered whether the doctrine of exhaustion of administrative remedies applied. Administrative remedies must be exhausted if the relief sought can be obtained through an exclusive or adequate administrative remedy. The court found that the available administrative process provided a sufficient remedy for the carriers' tortious interference claim to the extent that the claim was based on the allegation that the reclassification of owner/operators was improper. However, the court also held that the applicable remedy provision of the Employment Security Act did not provide an exclusive remedy for determining whether the ESD had an improper purpose or used improper means in imposing the tax assessments. Thus, the court concluded that the exhaustion of remedies doctrine did not bar the carriers' tortious interference claims to the extent that the claims were based on allegations that the ESD had an improper purpose or exercised improper means in reclassifying owner/operators.

State v. Doe I, 192 Wn. App. 612, 369 P.3d 166 (2016)

By Stephen Manning

This case required Division III of the Court of Appeals to analyze the Public Records Act (PRA) in relation to sex offender registration laws. On the one hand, a person convicted of a sexual offense has a duty to register with local law enforcement. The Washington State Patrol is then required to maintain a central registry of all sex offenders. However, the State Patrol is not permitted to release the names of level one sex offenders, which is considered the category of those least likely to re-offend, provided that the offender follows certain registration obligations. Any offender who satisfies the statutory requirements can be relieved of the obligation to register by filing an action in superior court. In a companion case, Donna Zink had requested, via a PRA request, sex offender registration information in order to post the names of all level one sex offenders living in Benton County. John Doe is one of the John Does who obtained a permanent injunction against the release of records maintained by the State Patrol. In the companion case, the permanent injunction was granted at the trial court level, but then later overturned at the Supreme Court (No. 90413-8).

After the permanent injunction, Doe filed a motion to redact all identifying information from the registration documents or in the alternative, to seal the court file. His argument was that the statutory protection from disclosure of his level one status will be undone by his statutory right to seek relief from that status. That is, his right to seek relief from his level one sex offender designation could only be done via filing a petition in court, which normally keeps files open to the public. Whether a file can be sealed or redacted depends on the following five factors: (1) the proponent of closure must show a compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary. The Court of Appeals reversed the trial court on the first factor, and found that Doe had shown a compelling need due to Ms. Zink's ongoing efforts to learn his identity—that is, his right to obtain relief from registration has been chilled by the threat of the possible disclosure of his identity by the trial court. However, because the trial court had found that there was no compelling interest, it did not consider the other factors and thus, did not consider the weights of the individual and public interest in releasing the documents. As a result, the court remanded to the trial court to balance these factors.

myWSBA

Manage your membership anytime, anywhere at www.mywsba.org! Using myWSBA, you can:

- View and update your profile (address, phone, fax, email, website, etc.).
- View your current MCLE credit status and access your MCLE page, where you can update your credits.
- Complete all of your annual licensing forms (skip the paper!).
- Pay your annual license fee using American Express, MasterCard, or Visa.
- Certify your MCLE reporting compliance.
- Make a contribution to the Washington State Bar Foundation or to the LAW Fund as part of your annual licensing using American Express, MasterCard, or Visa.
- Join a WSBA section.
- Register for a CLE seminar.
- Shop at the WSBA store (order CLE recorded seminars, deskbooks, etc.).
- Access Casemaker free legal research.
- Sign up for the Moderate Means Program.

Information for Your Clients

As a service to its members and the public, the WSBA publishes consumer information on various legal topics in English and Spanish topics:

Alternatives to Court
Consulting a Lawyer
Criminal Law
Dissolution of Marriage (Divorce)
Landlord/Tenant Rights
Law School
Lawyers' Fund for Client Protection
Legal Fees
Probate
Revocable Living Trusts
Signing Documents
Trusts
Wills

Go to www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/Consumer-Information or contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.