

*Clarke v. Tri-Cities Animal Care & Control Shelter: How
Did Private Businesses Become Government “Agencies”
Under the Washington Public Records Act?*

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I. INTRODUCTION

In April of 2008, thirty-six years after the Washington Public Records Act became law,¹ Washington courts made an interesting discovery: some private businesses are government “agencies” subject to the Washington Public Records Act (PRA).² The case, *Clarke v. Tri-Cities Animal Care & Control Shelter*, concerned a privately run animal control and sheltering service with which the Animal Control Authority of the Cities of Richland, Pasco, and Kennewick, Washington, contracted to perform animal control services.³ A citizen sued under the PRA after being denied her request to review Tri-Cities Animal Care & Control Shelter’s (TCAC) euthanasia logbooks, and the Washington Court of Appeals, Division III, held that TCAC, a private, for-profit corporation, was an “other local public agency” under the Act.⁴ Thus, for the first time, a privately owned and run business was subject to the government agency requirements of the Washington Public Records Act.

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1. WASH. REV. CODE § 42.56 (2008) (originally enacted as part of the Public Disclosure Act (PDA), WASH. REV. CODE § 42.17 (1972)). In 2005, the Public Records Act (PRA) portion of the Public Disclosure Act was renamed and re-codified as a distinct chapter of the Revised Code of Washington. Thus, PRA and PDA are used interchangeably in this Note—use is determined solely by the date of the reference and not by any substantive difference in law.

2. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 181 P.3d 881 (2008).

3. *Id.* at 188, 181 P.3d 882.

4. *Id.* at 185, 181 P.3d 881.

The *Clarke* court did not issue its holding entirely out of the blue, but instead added to thirty years of evolving Washington PRA jurisprudence. Early decisions considered not whether private entities were covered under the Act, but whether “quasi-governmental agencies” could be exempt from disclosing records.⁵ In the early 1990s, questions arose as to whether “private” entities created by government agencies and led by government officials were subject to the PRA, and the state attorney general introduced a “functional equivalency” analytical framework.⁶ Soon afterward, Washington courts accepted the functional-equivalency concept but expanded the attorney general’s interpretation to include private corporations created and managed by public agencies and officials.⁷ This analysis became known as the *Telford* test.⁸ Within the past few years, parties have challenged the limits of *Telford* to determine whether private corporations providing public services under government contract may also be “agencies” subject to the PRA. In *Spokane Research & Defense Fund v. West Central Community Development Association*,⁹ the court of appeals held that a contracting non-profit provider of government-funded services was not an agency subject to the PDA.¹⁰ One year later, however, that same court held in *Clarke* that a for-profit corporation can be the functional equivalent of an agency and thus subject to the PRA.¹¹ Thus, the PRA’s definition of agency has been turned on its head through incremental actions.

Those who support “open government” may celebrate *Clarke*’s holding because if other Washington courts follow this precedent, government agencies may no longer hide the details of their activities behind the smokescreen of “contracting out” government services. Even those alarmed by *Clarke* may see the result as an aberration whose effects will

5. See *Graham v. Wash. State Bar Ass’n*, 86 Wash. 2d 624, 548 P.2d 310 (1976) (holding that the Washington Bar Association, although statutorily authorized to carry out certain state duties, was not an “agency” subject to the mandatory disclosure of documents).

6. See 1991 Op. Wash. Att’y Gen. No. 5 (introducing a framework borrowed from other states to determine whether an entity was the “functional equivalent” of an agency, opining that the Small Business Export Finance Assistance Center was not equivalent, and thus, the center was not an “agency” subject to the PDA).

7. See *Telford v. Thurston County Bd. of Comm’rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), review denied, 138 Wn.2d 1015, 989 P.2d 1143 (1999) (holding that the Washington State Association of Counties and the Washington Association of County Officials were the functional equivalents of “other agencies” subject to the PDA).

8. See, e.g., *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 192, 181 P.3d 881, 884 (2008); *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 605, 137 P.3d 120, 121 (2006), review denied, 160 Wash. 2d 1006, 158 P.3d 614 (2007).

9. *Spokane Research & Def. Fund v. West Cen. Comm. Dev. Ass’n*, 133 Wash. App. 602, 137 P.3d 120 (2006), review denied, 160 Wash. 2d 1006, 158 P.3d 614 (2007).

10. *Id.* at 602, 137 P.3d at 120.

11. *Clarke*, 144 Wash. App. at 185, 181 P.3d at 881.

be felt only in rare instances where government agencies delegate their responsibilities on a wholesale level to avoid their statutory responsibilities. However, I argue that the *Clarke* court arrived at a deeply flawed decision by misreading both the PRA's statutory text and the applicable case law while defying common sense: by definition, private businesses cannot be government agencies. *Clarke's* precedent is dangerous because it opens the door for citizens to invade the privacy of organizations with which the government does business, increases the potential costs and difficulties of government contracting, and ultimately, harms the democratic process by limiting how our elected representatives can decide whether and how best to provide government services. Finally, even if *Clarke's* specific result—making euthanasia records publicly available—is laudable, the Washington Legislature should carefully amend the PRA to cover such records without fully subjecting private businesses to the extensive and burdensome requirements of the Act.

This Note analyzes the facts and reasoning behind *Clarke's* agency holding, explains how the court was wrong to use and then misapply the *Telford* functional-equivalency test, discusses the consequences of subjecting government contractors to the PRA, and offers solutions to remedy the mistakes in *Clarke*. To begin, Part II reviews the facts of *Clarke* and the requirements of Washington's Public Records Act. Part III then examines the evolution of Washington's *Telford* functional-equivalency test as applied up to, and through, *Clarke*. Part IV explains the several reasons why *Clarke* was wrongly decided and how the result produced a dangerous precedent. Finally, Part V recommends solutions that prevent future holdings similar to *Clarke* while remaining faithful to the PRA's purpose.

II. BACKGROUND

A. *Clarke v. Tri-Cities Animal Care & Control Shelter*

In 1999, Bruce and Sandy Young formed the Tri-Cities Animal Shelter, a Washington non-profit corporation, whose purpose was four-fold: (1) to shelter animals in need for the public good; (2) to promote spay and neutering programs; (3) to educate the public in the hope of ending the need for euthanasia; and (4) to actively prevent cruelty toward animals.¹² One year later, the Youngs formed a for-profit corporation, Tri-City Animal Control & Sheltering Services, Inc., (TCAC), with the stated purpose in its articles of incorporation of engaging in the business

12. *Id.* at 189, 181 P.3d at 881.

of providing animal control and sheltering services for animals in Benton and Franklin counties.¹³

In 2004, TCAC executed a Personal Services Agreement with the Animal Control Authority (ACA) of Richland, Pasco, and Kennewick¹⁴ (the Tri-Cities) for TCAC to provide animal control services for the Tri-Cities area.¹⁵ This contract included numerous animal control duties¹⁶ and required TCAC employees to take oaths of office as animal control officers,¹⁷ but it limited TCAC's police powers.¹⁸ The agreement also required TCAC to "[a]rrange and/or provide for the humane euthanasia and disposal of unwanted animals."¹⁹ TCAC operated in a municipally leased building and paid no rent to the municipality, but it was not permitted to conduct private business at the facility.²⁰ TCAC was also required to keep records and provide monthly reports to the ACA, but it was not subject to annual audits by the State.²¹

Leonora Clarke, a private citizen, thought that TCAC was violating the euthanasia protocol set out in TCAC's contract, and on August 3, 2005, Ms. Clarke made a public records request for all of TCAC's euthanasia logbooks.²² TCAC responded that it was not a public agency subject to the PDA, rejected Ms. Clarke's request, and directed her to the Animal Control Authority.²³ Ms. Clarke's attorney then forwarded her records request to the Kennewick City Attorney. The City responded that it did not possess, and thus could not produce, the logbooks she sought.²⁴

Ms. Clarke then filed suit against both TCAC and the ACA with motions for show-cause hearings.²⁵ Ms. Clarke first alleged that TCAC

13. *Id.*

14. The Cities of Pasco, Kennewick, and Richland formed the Animal Control Authority in 1998 through an interlocal cooperative agreement. *Id.*

15. *Id.* at 189, 181 P.3d at 883.

16. *Id.* TCAC's duties under the contract included:

Apprehension and impound of stray dogs and cats, impound of distressed animals, removal of dead animals from roads, disposal of dead animals, elimination of wild or vicious animals, animal regulation enforcement including citation authority for violation of animal regulatory ordinances, animal sheltering, acceptance and care of animals, reunification, adoption disposal of unclaimed animals, and euthanasia.

Id.

17. *Id.*

18. *Id.* TCAC was not permitted to issue citations for misdemeanor or gross misdemeanor violations. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

was subject to the PDA, but the trial court held that TCAC was not a public agency, either as defined by the PDA or as a functional equivalent under *Telford*.²⁶ Next, Ms. Clarke alleged that the ACA should release the log books, but the trial court found that the log books were not prepared or retained by the ACA, and thus were not covered under the PRA.²⁷ Consequently, the trial court denied Ms. Clarke's motions to show cause and dismissed her PDA action against both TCAC and the ACA.²⁸

Ms. Clarke appealed the trial court's holding that TCAC was not a public agency to the Washington Court of Appeals, Division III, removing the ACA from the case.²⁹ The court of appeals first held that to be considered an agency, TCAC must qualify as an "other local public agency."³⁰ The court then chose to apply the *Telford* functional-equivalency test because it found "other local public agency" to be ambiguous with respect to TCAC.³¹ After balancing the *Telford* factors, the court held that TCAC was subject to the PDA as the functional equivalent of an "other agency."³² Accordingly, the court of appeals held that the trial court erred as a matter of law in denying the motion to show cause, and it remanded the case.³³

B. Washington Public Records Act

1. Purpose of the PRA

For a generation, Washington citizens have been accustomed to the right of free and open access to state and local government records. The Public Records Act (PRA) was originally approved and enacted by Washington voters in 1972 as part of Initiative 276, the Public Disclosure

26. *Id.* at 190, 181 P.3d at 883–84.

27. *Id.*

28. *Id.* at 190, 181 P.3d at 884.

29. *Id.* at 190, 181 P.3d at 883–84.

30. *Id.* at 191, 181 P.3d at 884.

31. *Id.* at 191–92, 181 P.3d at 884.

32. *Id.* at 195, 181 P.3d at 886.

On balance, we conclude TCAC is the functional equivalent of a public agency. While TCAC has some non-public functions and characteristics, the fact that it performs a governmental function dependent upon its relationship with the local government, receives the bulk of its funding from taxpayer money to perform that function, and is subject to regular government oversight, all tip the scale in favor of finding that TCAC is the functional equivalent of a public agency.

Id.

33. *Id.*

Act (PDA),³⁴ and the PRA was renamed and re-codified by the Legislature as a distinct chapter under RCW 42.56 in 2005.³⁵ The PRA clearly directs state and local agencies to make their records freely available for citizens to review because this accessibility serves an essential function in the democratic process:

The people of this state do not yield their sovereignty to the agencies that serve them. . . . The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.³⁶

Washington courts, led by the Washington Supreme Court, have consistently enforced a liberal construction of the PDA.³⁷ Thus, courts will find that agency records must be disclosed for almost any reason held by a requestor³⁸ or for no reason at all.³⁹

2. Requirements for Agencies Under the Washington Public Records Act

The PRA subjects government agencies to a series of requirements. First, agencies must publish and prominently display all agency procedures for public inspection.⁴⁰ Second, agencies must maintain indexes of various records held by the agencies,⁴¹ make these indexes and all agency records not exempt from disclosure available to the public,⁴² provide facilities for viewing and copying public records,⁴³ and establish times

34. WASH. REV. CODE § 42.17 (1976). Initiative 276 also included laws on campaign finance and authorized the creation of a public disclosure commission. *See id.* Statutes governing lobbying and campaign finance remain in § 42.17 today. WASH. REV. CODE § 42.17 (2008).

35. WASH. REV. CODE §§ 42.56.010, .020 (2008).

36. *Id.* § 42.56.030. *See also id.* § 42.17.010(2). Initiative 276 also included the following policy statement: “That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” *Id.* (in comments).

37. *See Livingston v. Cedeno*, 164 Wash. 2d 46, 50, 186 P.3d 1055, 1057 (2008) (“It is well settled that a reviewing court interprets the disclosure provisions of the public records act liberally and the exemptions from disclosure narrowly.”).

38. *See Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319, 328, 890 P.2d 544, 549 (1995) (holding that any government expenditure of public funds is within the public interest protected by the PDA).

39. *See Livingston*, 164 Wash. 2d at 50, 186 P.3d at 1057 (“In general, an agency must disclose a public record unless a statutory exemption applies.”).

40. WASH. REV. CODE § 42.56.040 (2008).

41. *Id.* § 42.56.070(3).

42. *Id.* § 42.56.070(1).

43. *Id.* § 42.56.080.

for inspection and copying.⁴⁴ Finally, each agency must appoint and identify a public records officer, whose responsibilities are to serve as a point of contact for members of the requesting public and to oversee the agency's compliance with the PRA.⁴⁵ Once a record has been requested, the agency must respond to the requestor within five business days by (1) providing the requested record; (2) acknowledging receipt of the request and providing a reasonable estimate of the time required to respond to the request; or (3) denying the public record request.⁴⁶

The amount of time and resources required for agencies to fulfill these requests can be extensive.⁴⁷ The financial costs of non-compliance, however, can be even greater if a court awards the requestor attorney's fees, costs, and penalties ranging from five to one-hundred dollars per day.⁴⁸ Faced with the challenges and risks imposed by the PRA, state and local agencies must invest significant resources and effort to fully comply with the Act.⁴⁹

44. *Id.* § 42.56.090.

45. *Id.* § 42.56.580.

46. *Id.* § 42.56.520.

47. Washington state government has not released cumulative totals for the cost of state and local agencies to comply with the Public Records Act. However, anecdotal evidence suggests that this may run into the tens of millions of dollars annually. For example, in 2007, the Washington Department of Corrections spent more than 12,000 hours at a cost of more than \$250,000 to respond to requests from prisoners. Rachel La Corta, *Official: Felons Don't Have Rights to Public Records*, SEATTLE TIMES, at B5, available at 2008 WLNR 10962783. The City of Prosser (population 5,077) estimates that it spent at least \$75,000 and more than 100 working days responding to the requests of a single person. Jim Brunner, *Bills in State Legislature Seek to Rein in Records "Fishing."* SEATTLE TIMES, at B1, available at 2009 WLNR 3455020. To handle PRA requests, the City of Seattle employs fifty-five public disclosure officers representing thirty-seven different departments. Seattle.gov, Public Disclosure Officers (as of Oct. 1, 2009), <http://www.seattle.gov/publicdisclosure/pdo.htm> (last visited Jan. 29, 2010). Multiplied by hundreds of state and local agencies, the total cost spent in cost and employee time complying with the PRA probably runs into the tens of millions of dollars annually.

48. See WASH. REV. CODE § 42.56.550(4) (2008). For example, the Washington Supreme Court ordered King County to pay Armen Yousoufian \$371,340 plus reasonable attorney fees and costs for delay in releasing requested public records. *Yousoufian v. Office of Ron Sims*, No. 80081-2, 2010 WL 1225083, at *12 (Wash. Mar. 25, 2010). An agency also risks lawsuits from third parties if the agency wrongfully discloses records that might violate a person's right to privacy under WASH. REV. CODE § 42.56.050 (2008). See WASH. REV. CODE § 42.56.550(4) (2008); See also *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wash. 2d 199, 189 P.3d 139 (2008) (holding that the identities of teachers against whom allegations of sexual misconduct were made could be released under the PRA only if those allegations were substantiated). Thus, if the school districts in the *Bellevue John Does* case had originally released the identities of those teachers, as many, including three dissenting justices, thought the PRA required, those teachers would have had an actionable tort against the school districts for invasion of their privacy. See *id.*

49. See generally Public Records Act Model Rules, WASH. ADMIN. CODE § 44-14 (2007). The Washington Attorney General promulgated fifty-five pages of model rules for agencies to follow to meet PRA requirements. *Id.* Of particular importance is the training of agency employees:

The [PRA] is complicated and compliance requires training. . . . The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency

III. THE WASHINGTON PUBLIC RECORDS ACT, AS APPLIED TO “OTHER AGENCIES”

A. “Public Agency” Defined

Under the PRA, only public agencies are subject to the Act,⁵⁰ and agencies are defined as follows:

“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.⁵¹

Then, by definition, all entities that are not “agencies” are not subject to the PRA.⁵² This form-over-function distinction creates an apparent bright-line rule that all courts should be able to follow: is the record keeper a governmental entity or not?

The list of state and local entities subject to the PRA is extensive, including many that perform functions also performed by private organizations—education, health care, port management, transportation systems, and utilities, to name a few.⁵³ The strength of using the Act’s “agency” definitional threshold is that requestors are not required to determine whether the records sought concern activities that are, by definition, “governmental.” Thus, a government agency cannot avoid the PRA by claiming that the record requested concerns a “non-governmental enterprise” function.⁵⁴ Conversely, private companies that provide the

staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.

WASH. ADMIN. CODE § 44-14-00005 (2007).

50. See WASH. REV. CODE § 42.56.070(1) (2008). (“Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within . . . specific exemptions.”).

51. *Id.* § 42.56.010(1).

52. See *id.*

53. For example, within Seattle’s city limits exist such “agencies” as the University of Washington, Seattle School District No. 1, University Hospital, Harborview Hospital, Port of Seattle, King County Metro Public Transit and Sewer, Sound Transit, Seattle City Light, and Seattle Public Utilities.

54. For example, Seattle City Light is an electric utility owned and managed by the City of Seattle, and as such, it is an “agency” under RCW 42.56.010(1). Seattle City Light cannot legally assert that its records are exempt from the PRA by claiming that provision of electricity is a “non-governmental enterprise activity” because private utilities also provide this function.

same services as government entities do not fall under the PRA when providing competing “government services.”⁵⁵

However, this rule fails to account for situations in which the distinction between “public agency” and “private entity” appears murky. Examples of such situations may include lawmakers extending statutory authority to private organizations; governments creating “private entities” to conduct only privately allowed activities; or governments contracting agency-level functions to private contractors.⁵⁶ Washington courts have stepped in to fill this gap.

B. The Telford Functional-Equivalency Test

1. Adoption of the Functional-Equivalency Test

The Washington Supreme Court has left it to the Washington Court of Appeals to interpret “ambiguity” in the PRA and establish case law determining whether private organizations may be considered agencies under the Act.⁵⁷ In so doing, the Washington Court of Appeals has instituted a four-factor test to determine on a case-by-case basis whether a private entity is an agency subject to the PRA: (1) whether the entity performs a government function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.⁵⁸ Although the wording of this test has remained constant since it was introduced in the early 1990s, courts’ interpretations of it and the private entities subject to this analysis have evolved over time.

The functional-equivalency test was first applied to the Washington Public Disclosure Act in a 1991 Attorney General Opinion Letter.⁵⁹ In determining whether a non-profit organization authorized by statute fell

55. In contrast to the Seattle City Light example, Puget Sound Energy, one of Washington’s largest private electric utilities, does not fall under the Act because, regardless of whether one defines electricity provision as a governmental function, Puget Sound Energy does not qualify as a state or local agency under RCW 42.56.010(1).

56. See WASH. REV. CODE § 42.56.010(1) (2008).

57. See, e.g., *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 604, 137 P.3d 120, 121 (2006), *review denied*, 160 Wash. 2d 1006, 158 P.3d 614 (2007); *Telford v. Thurston County Bd. of Comm’rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), *review denied*, 138 Wash. 2d 1015, 989 P.2d 1143 (1999). By denying review, the Washington Supreme Court let stand the Court of Appeals’ determination that the definition of agency may be ambiguous with respect to a private entity. See *Telford*, 95 Wash. App. at 156, 974 P.2d at 891.

58. See WASH. ADMIN. CODE § 44-14-01001 (2007) (citing 2002 Op. Wash. Att’y Gen. No. 2; *Telford*, 95 Wash. App. at 149, 974 P.2d at 886; 1991 Op. Wash. Att’y Gen. No. 5).

59. 1991 Op. Wash. Att’y Gen. No. 5. State Senator Ray Moore requested an opinion from the attorney general about whether the Small Business Export Finance Assistance Center, a non-profit organization established by statute and governed and managed by directors appointed by the governor and confirmed by the Senate, was subject to the PDA. *Id.*

under the PDA, the attorney general was unable to find any reported Washington decisions construing the definition of agency under the PDA.⁶⁰ The attorney general then found that other jurisdictions used a “functional equivalency” test and determined that this was consistent with the liberal construction of the PDA and the narrower rationale in *Graham v. Washington State Bar Association*.⁶¹ The attorney general borrowed a four-factor functional-equivalency test from a Connecticut case.⁶² Finally, after applying the four-factor test to the Small Business Export Finance Assistance Center, the attorney general concluded that this entity was not an agency under the PDA and was thus not subject to public records requests.⁶³

2. Judicial Expansion of “Agency” Under *Telford*

The Washington Attorney General’s functional-equivalency analysis was finally tested by Washington courts several years later in *Telford v. Thurston County Board of Commissioners*.⁶⁴ Paul Telford, a private citizen, sued the Thurston County Board of Commissioners, the Washington State Association of Counties (WSAC), and the Washington Association of County Officials (WACO), alleging that they used taxpayer

60. *Id.* The attorney general did comment that “in other situations, the Washington court has stated that the meaning of the term ‘agency’ depends on its context. Accordingly, even though the State Bar Association is declared by the Legislature to be an ‘agency of the state,’ this does not mean all laws referring to ‘state agencies’ are applicable to it.” *Id.* (citing *Graham v. Wash. State Bar Ass’n*, 86 Wash. 2d 624, 548 P.2d 310 (1976)).

61. 1991 Op. Wash. Att’y Gen. No. 5.

62. *Id.* The attorney general took the four-factor functional-equivalency test from *Board of Trustees v. Freedom of Information Comm’n*, 436 A.2d 266 (Conn. 1980), in which a school, established by special corporate charter, was found to be a state agency for purposes of public disclosure laws. *Id.* The Connecticut Supreme Court based its four-part test upon the “major and discrete” criteria employed by the federal courts in Freedom of Information Act cases involving the definition of “agency.” *Id.* Washington courts continue to use the exact language in the test used by Connecticut Court (now referred to in Washington as the *Telford* Test). See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 181 P.3d 881 (2008).

63. 1991 Op. Wash. Att’y Gen. No. 5. In applying the test, the attorney general determined that although the Small Business Export Finance Assistance Center “performed a governmental function,” participated in some “government involvement” (because its officers were appointed by the governor), and was “created by government,” the legislature kept the state out of the Center’s operation “to a degree sufficient to render . . . the public records provisions of the Public Disclosure Act inapplicable.” *Id.*

64. *Telford*, 95 Wash. App. 149, 974 P.2d 886 (1999), *review denied*, 138 Wash. 2d 1015, 989 P.2d 1143 (1999). For a detailed analysis of this case, see Leslie L. Marshall, Note, *Telford: Casting Sunlight on Shadow Governments—Limits to the Delegation of Government Power to Associations of Officials and Agencies*, 24 SEATTLE U. L. REV. 139 (2000). Beyond the establishment of a court-approved “functional equivalency” test, the significance of this case centered upon the ability of governmental agencies to form “private organizations” that would enable the governmental agencies to circumvent laws and engage in otherwise prohibited activities. See *Telford*, 95 Wash. App. at 149, 974 P.2d at 886.

money on state ballot measures, contributed to political campaigns, and refused to disclose information about these activities,⁶⁵ all illegal acts under the PDA.⁶⁶ The Washington Court of Appeals, Division II, first held that the Act was ambiguous as applied to WSAC and WACO because to fit the statutory definition of agency, WSAC and WACO must qualify as “other local public agenc[ies], which are not defined.”⁶⁷ The court then determined that the attorney general’s functional-equivalency analysis was the correct test to determine whether WSAC and WACO were agencies under the Act.⁶⁸ This test is now referred to in Washington courts as the *Telford* test.⁶⁹ After balancing the facts upon its application of the four-factor test, the court determined that these private, non-profit corporations were agencies subject to the PDA.⁷⁰ In so doing, the court emphasized the importance of the PDA’s purpose,⁷¹ rejecting the Attorney General’s Office’s view that WSAC was a private corporation and not an agency under the PDA.⁷² Thus, the court significantly ex-

65. *Telford*, 95 Wash. App. at 151–52, 974 P.2d at 888.

66. *Id.* The Public Disclosure Act (PDA) under RCW 42.17, in addition to at that time inclusion of public records laws, also included state campaign finance and lobbying regulations. The PRA definition of agency under RCW 42.56.010(1) was taken verbatim from RCW 42.17.020(2), and the definition applied uniformly to all sections of the PDA.

67. *Telford*, 95 Wash. App. at 156, 974 P.2d at 891.

68. *Id.* at 156–63, 974 P.2d at 891–94. Applying rules of statutory construction, the court then determined that a case-by-case functional-equivalency test developed by federal courts to determine whether entities were subject to the Freedom of Information Act would be consistent with Washington Law. *Id.* at 156–61, 891–93. The court finally reviewed the Connecticut and Oregon supreme courts’ respective functional-equivalency tests and agreed with the state attorney general in Att’y General Op.1991, No. 5 that Connecticut’s four-factor test was more relevant within the context of the PDA. *Id.* at 893–94..

69. *See, e.g., Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 181 P.3d 881, 884 (2008); *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 604, 137 P.3d 120, 121 (2006), *review denied*, 160 Wash. 2d 1006, 158 P.3d. 614 (2007).

70. *Telford*, 95 Wash. App. at 165, 974 P.2d at 895.

Although WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency. They serve a public purpose, are publicly funded, are run by government officials, and were created by government officials. Analyzing these factors in the context of the intent of the PDA and other relevant statutes reinforces the conclusion that the associations are public.

Id.

71. *See id.* (“The PDA is to be construed broadly to promote disclosure and accountability. The WSAC/WACO statutes are intended to restrict public funding of the associations to statutorily mandated services. Allowing WSAC/WACO to use their public funds to support private political agendas would contravene both policies.”).

72. *Telford v. Thurston County Bd. of Comm’rs*, No. 96-2-04116-2 at 6 (Wash. Supr. Ct. Thurston County, Oct. 29, 1997) (mem.). Paul Telford had asked the Washington State Attorney General to enforce the PDA against the WSAC, but the attorney general’s office informed Mr. Telford by letter that a “prior AG found WSAC to be a private corporation.” *Id.*

panded the type of organizations subject to the PDA beyond what the attorney general intended.⁷³

3. The Limits of “Functional Equivalency” Under the *Telford* Test

The question of agency ambiguity as applied to a “private entity”—calling for *Telford*’s functional-equivalency test—was not considered again in a published Washington court decision until 2006, in *Spokane Research & Defense Fund v. West Central Community Development Association*.⁷⁴ Even then, the balancing test was performed only as dicta.⁷⁵ The entity in question was the West Central Community Development Association (WCCDA), a private, non-profit corporation that provided grant-funded community services to benefit low-to-moderate-income residents and leased a community center building located in a public park for \$1 per year from the City of Spokane.⁷⁶ The Spokane Research & Defense Fund (SRDF) alternatively claimed that the WCCDA was part of the Spokane Parks Department or the functional equivalent to a local agency, and was thus subject to the PDA either way.⁷⁷

The court of appeals upheld the trial court’s summary judgment for the WCCDA, first rejecting the plaintiff’s claim that because the WCCDA was located in a city park, the WCCDA was part of the city’s park department.⁷⁸ The court next rejected the plaintiff’s assertion that the functional-equivalency test in *Telford* applied to WCCDA because the court could find no facts that could make the WCCDA fit within the plain language definition of “state agency” or “other local agency” under the PDA.⁷⁹ In other words, the court held that the *Telford* test applies

73. See *Telford*, 95 Wash. App. at 162, 974 P.2d at 893. Although the court agreed with the attorney general’s opinion letter that the four-factor functional-equivalency test from *Board of Trustees v. Freedom of Information Comm’n*, 436 A.2d 266 (Conn. 1980) was appropriate to determine whether non-profit corporations were agencies under Washington’s PDA, the court rejected the attorney general’s interpretation about how the Board of Trustees test was to be applied:

The attorney general opinion cites *Board of Trustees*, 436 A.2d at 270-71, for the proposition that all four factors must be met. The *Board of Trustees* case merely states that all of the factors were met in that particular case and goes on to note that a case-by-case “application of the factors” is most appropriate. *Id.*

74. *Spokane Research & Def. Fund v. West Cen. Comm. Dev. Ass’n*, 133 Wash. App. 602, 137 P.3d 120 (2006), review denied, 160 Wash. 2d 1006, 158 P.3d 614 (2007).

75. *Id.* at 606–610, 137 P.3d at 122–23.

76. *Id.* at 604–605, 609, 137 P.3d at 120–21, 123.

77. *Id.* at 606, 137 P.3d at 121–22. Although this decision occurred after the PRA was recodified, the complaint originated when the public records component was still part of the PDA. *Id.*

78. *Id.* at 606, 137 P.3d at 121. The court held that the SRDF “did not provide reasoned argument connecting the Spokane Parks and Recreation Department and the [WCCDA].” *Id.* The court then noted that tenants located in publicly owned structures on public land, such as tenants of municipally owned industrial parks, do not automatically become public agencies. *Id.*

79. *Id.* at 608, 137 P.3d at 122 (“Said differently, the facts summarized below create no ambiguity as to the [WCCDA’s] non-governmental status. The facts do not raise the PDA law. There-

only if there is some ambiguity about whether a private entity is an agency under the Act.⁸⁰

The court of appeals then proceeded to apply the *Telford* analysis “solely for argument” and arrived at the same result as its holding.⁸¹ The court determined that the WCCDA met none of the four balancing *Telford* factors that would make it functionally equivalent to a local agency and subject to the PDA: (1) *Entity’s function*: WCCDA’s function (providing social programs and serving public interests) is “not the exclusive domain of the government . . . that may be ‘delegated to the private sector’”;⁸² (2) *Amount of government funding*: the WCCDA receives about 25% of its funds from private sources;⁸³ (3) *Amount of government control*: there is no visible outside government control of the WCCDA;⁸⁴ (4) *Entity’s origin*: although the city was involved in developing the community center, it was the city’s intent from the beginning for WCCDA to independently administer the community center’s programs.⁸⁵

4. A Private Business as a Local Agency: the *Telford* Test in *Clarke*

In light of the restrictive reading of the *Telford* functional equivalency-test in *Spokane Research & Defense Fund*, it appeared that the court of appeals had set a very high bar to establish that a private, non-governmentally run organization is an agency subject to the PDA/PRA.

fore, we need not apply *Telford*’s functional equivalent analysis.”). The court then proceeded to distinguish the WCCDA as a private entity from WSAC and WACO in *Telford*:

Unlike the *Telford* entities, the [WCCDA] was not created to fulfill a legislative mandate . . . does not make policy or legislate . . . does not execute law or regulate law . . . does not adjudicate disputes . . . is not controlled by elected or appointed county officials, is not government audited, and its employees are not paid by a government or enjoy government health or retirement benefits. In short, the [WCCDA] possesses no material governmental attributes or characteristics. The [WCCDA] simply rents space from the City, administers public and private grants, subleases space for its own benefit, and operates apart from governmental control.

Id. at 608, 137 P.3d at 123.

80. *See id.* at 608, 137 P.3d at 122.

81. *Id.* at 608, 137 P.3d at 123.

82. *Id.* at 609, 137 P.3d at 123 (quoting *Telford*, 95 Wash. App. at 164, 974 P.2d at 894).

83. *Spokane Research*, 133 Wash. App. at 602, 137 P.3d at 123. Also, in downplaying City financial contributions, the Court noted:

[The WCCDA] subleases space, using the income for operational purposes. The nominal lease payment to the City is merely part of the contract consideration. [The WCCDA] administers programs as an independent contractor, relieving the City of dealing with potential faith based programs barred to the City under separation of church and state principles. Government grant receipt does not mandate FOIA application.

Id.

84. *Id.* at 609, 137 P.3d at 123 (“The City is not involved in the day-to-day [WCCDA] operations. Further, when the City contracts with the [WCCDA], it typically includes an independent contractor clause . . .”).

85. *Id.* at 609–10, 137 P.3d at 123.

However, that same court of appeals, Division III, held two years later in *Clarke v. Tri-Cities Animal Care & Control Shelter* that a for-profit business contracting to carry out governmental services can be considered an “agency” under the Act.⁸⁶

The Animal Control Authority (ACA) of Richland, Pasco, and Kennewick (the Tri-Cities) contracted with a private business, Tri-Cities Animal Care & Control Center (TCAC), to provide animal control services for the Tri-Cities area.⁸⁷ The plaintiff, Ms. Clarke, believed that TCAC was violating euthanasia protocol and made a records request for all euthanasia logbooks maintained by TCAC.⁸⁸ TCAC responded that it was not a public agency under the PDA and directed Ms. Clarke to request records from the ACA.⁸⁹ After the City of Kennewick responded that it did not possess the records, Ms. Clarke filed suit, and the trial court held both that TCAC was not a public agency as defined by the PDA and that TCAC did not engage in the type of agency activity present in *Telford*.⁹⁰

The court of appeals reversed the trial court’s decision, first holding that, unlike the WCCDA in *Spokane Research & Defense Fund*, there was ambiguity about TCAC’s status as an “other local public agency,” and thus, the *Telford* analysis did apply.⁹¹ The court then determined that TCAC, on balance, was functionally equivalent to an “other local agency” and subject to the PDA.⁹² (1) *Entity’s function*: TCAC undertook police power functions established by statute, these powers implicated state actor due process concerns, and thus, local governments could not delegate away their responsibilities under the PDA⁹³; (2) *Amount of*

86. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 181 P.3d 881 (2008).

87. *Id.* at 189–90, 181 P.3d at 883.

88. *Id.* at 190, 181 P.3d at 883.

89. *Id.*

90. *Id.* at 190, 181 P.3d at 883–84.

91. *Id.* at 192, 181 P.3d at 884. TCAC argued “that since the legislature used the term ‘private corporation’ in the definition of person, it would have used the term in the definition of ‘agency’ as well if it intended to include private corporations as agencies.” *Id.* The court rejected this argument as non-responsive to the fundamental question at hand because “[t]his argument still does not explain what precisely constitutes an ‘other local public agency,’ which is essentially the question *Telford* sought to answer . . .” *Id.*

92. *Id.*

93. *Id.* at 192–194, 181 P.3d at 885–86. The court rejected *Telford*’s analysis that hinged on whether the entity’s duties could be delegated to the private sector:

In short, while the local government can delegate the performance *authority* for this public function to a private entity, it cannot delegate away its statutory *responsibility* to perform within PDA legal requirements. . . . Said another way, were we to conclude that TCAC is not a functional equivalent of a public agency, we would be setting a precedent that would allow governmental agencies to contravene the intent of the PDA and the Pub-

government funding: nearly all of TCAC's operating budget came from public money, and TCAC operated in office space that not only was rent-free (subsidized by government), but TCAC was prohibited from using the facility for anything other than its contracted animal control services⁹⁴; (3) *Amount of government control*: Although TCAC was in control of its day-to-day operations, maintained its own insurance, and its employees were not considered public employees with local government benefits, TCAC was subject to a "notable degree of government control."⁹⁵ Factors implying "government control" included restrictions on how TCAC could use its government-provided facilities; TCAC could provide euthanasia services only in a manner approved by the ACA, and TCAC was required to keep records and submit monthly reports to the ACA;⁹⁶ (4) *Entity's origin*: the court weighed this factor in favor of TCAC because TCAC was formed as a private corporation by private citizens and was thus not an entity created by government.⁹⁷ The court found that although TCAC had some non-public functions and characteristics, on balance, TCAC was the functional equivalent of a public agency.⁹⁸

IV. *TELFORD* AND THE PUBLIC RECORDS ACT SHOULD NOT BE APPLIED TO PRIVATE CONTRACTORS

The *Clarke* court and the *Spokane Research* court (in dicta) were wrong to apply the *Telford* functional-equivalency test to determine whether private organizations that provided government services were agencies under the PRA. Those who would differ with this assertion might reasonably ask how one would know whether these organizations are agencies without performing some kind of test, like *Telford*.⁹⁹ Skeptics might also point out that the result in *Clarke* appears to support the Act's integrity and purpose: TCAC exercised governmental powers that affected citizens' constitutional rights;¹⁰⁰ the ACA's privatization of its

lic Records Act by contracting with private entities to perform core government functions.

Id. at 194, 181 P.3d at 885–86.

94. *Id.* at 194–195, 181 P.3d at 886.

95. *Id.* at 195, 181 P.3d at 886.

96. *Id.*

97. *Id.*

98. *Id.*

99. The *Clarke* court made this point when it rejected TCAC's assertion that the legislature never intended private corporations to be considered "other local public agenc[ies]." *See id.* at 192, 181 P.3d at 884.

100. *See id.* at 193, 181 P.3d at 885. The local government granted TCAC the ability to execute police powers that "implicate due process concerns" and that require animal control officers to comply with the same constitutional and statutory restrictions imposed on law enforcement officers.

core governmental functions allowed the ACA to avoid its responsibilities under the PRA;¹⁰¹ the court had no other apparent means to require the release of the requested records;¹⁰² and the decision can be narrowly construed to cover rare instances where government agencies have contracted out nearly all of their responsibilities.¹⁰³ This part, however, explains (1) why the *Clarke* court badly misinterpreted the statute and prior case law when arriving at its agency definition, and (2) how *Clarke*'s precedent damages the PRA's ultimate purpose of better and more accountable government by restricting the elected officials' options.

The *Clarke* court was wrong to apply the *Telford* functional-equivalency test for several reasons: (1) private organizations are not agencies under Washington courts' correct application of the rules for statutory construction; (2) *Telford* was meant to apply to governmental entities masquerading as "private organizations," not to actual privately controlled and operated organizations performing services under government contracts; (3) *Telford* is superfluous because a correct application will necessarily produce the result that private contractors are not agencies; (4) *Telford*, as applied in *Clarke*, is arbitrary and does not get behind the true purpose of the PRA; and (5) *Telford*, as applied in *Clarke*, produces an unreasonably burdensome and ultimately undemocratic result.

A. Private Organizations Are Not "Agencies" Under the Washington Public Records Act

The Public Records Act defines agency not by what it is (i.e. an office exercising governmental authority vested to it by the Washington State Constitution), but instead, by the types of agencies it includes (i.e.

Id. More simply stated, TCAC could, under "police powers," take one's most precious possession, one's pet, and kill it. *See id.*

101. *Id.* at 194, 181 P.3d at 885–86. The court distinguished between government's delegation of *authority* to a private entity, which it can do, from its delegation of statutory *responsibility* to perform within PDA legal requirements, which it cannot do. *Id.* A contrary decision would seemingly enable public agencies to escape the public accountability (and associated costs) that the PRA was designed to ensure.

102. *See id.* at 190, 181 P.3d at 883. The court noted that the ACA would have been required to produce the records, even if the records were no longer in the ACA's possession, if the ACA had *used* these records, but it was not clear from the trial court record whether the ACA had used the logbooks in question. *Id.*

103. *See id.* at 192, 181 P.3d at 884. By accepting *Spokane Research*'s holding that there was "no ambiguity as to the Association's nongovernmental status" without even analyzing that court's application of *Telford*, *Clarke*'s holding with regard to TCAC appears narrowly construed to situations where private organizations execute police powers or where government agencies have entirely delegated away their statutory responsibilities. *Id.*

“State Agency,” or “Local Agency”).¹⁰⁴ This checklist approach makes it easier for citizens and courts to recognize the broad assortment of governmental entities that are covered by the PRA.¹⁰⁵ While the qualification of “agency” by the word “other” has the positive benefit of not creating a bright line that government agencies can finagle their way around,¹⁰⁶ this definition removes any legislative boundary that such a bright line provides. Also, defining “agency” as any “other local or state agency” is circular and subject to the judiciary’s discretion. Just what is an agency?—whatever a court proclaims one to be.

Application of Washington’s accepted rules of statutory construction quickly reveals that the legislature had no intention to subject private corporations to the Public Records Act. Under the first consideration of statutory construction, courts determine whether the statute is unambiguous,¹⁰⁷ and courts have reasonably held that these “other agency” definitions are ambiguous with respect to certain private corporations.¹⁰⁸ However, when the statute is ambiguous, courts must first give a term its plain and ordinary meaning by reference to a standard dictionary.¹⁰⁹ The plain and ordinary meaning of agency is a “governmental body with the authority to implement and administer particular legislation.”¹¹⁰ Even in rare situations, like *Clarke*, where private entities have the authority to

104. See WASH. REV. CODE § 42.56.010(1) (2008). Thus, “‘Agency’ includes all state agencies and all local agencies. . . . ‘State Agency’ includes every state office, department, division, . . . or other state agency. . . . ‘Local Agency’ includes every city, town, municipal corporation . . . or other local public agency.” *Id.*

105. For example, as of January, 2009, Washington had 1,646 special purpose districts, which include the following categories: county airport districts, park and recreation service areas, public transportation authorities, county rail districts, cultural arts, stadium, and convention districts, drainage, diking, or sewerage improvement districts, emergency medical service districts, emergency service communication districts, flood control districts, flood control zone districts, health districts, intercounty weed districts, library capital facility areas, bridge and road service district, solid waste disposal districts, television reception improvement districts, transportation benefit districts, unincorporated transportation benefit areas, and weed control districts. Municipal Research and Services Center of Washington, Number and Types of Special Districts in Washington, <http://www.mrsc.org/Subjects/Governance/spd/SPD-Number.aspx> (last visited Jan. 29, 2010). The PRA definition of “Agency” includes “special purpose districts,” making it clear to citizens that these less prominent government bodies are also covered by the Act. See WASH. REV. CODE § 42.56.010(1) (2008).

106. See, e.g., *Telford v. Thurston County Bd. of Comm’rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), review denied, 138 Wash. 2d 1015, 989 P.2d 1143 (1999).

107. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 59 P.3d 655, 663 (2002) (“In interpreting a statute, the primary objective of the court is to ascertain and carry out the intent and purpose of the Legislature in creating it. To determine legislative intent, this court looks first to the language of the statute.”).

108. See, e.g., *Telford*, 95 Wash. App. at 158, 974 P.2d at 891.

109. *Fraternal Order of Eagles*, 148 Wash. 2d at 239, 59 P.3d at 663.

110. BLACK’S LAW DICTIONARY 67 (8th ed. 2004).

“administer particular legislation,”¹¹¹ private entities are not governmental bodies,¹¹² and thus do not fall under the plain language definition of agency.¹¹³

Next, single words in a statute must be interpreted within the context of surrounding words,¹¹⁴ and no other word under the PRA’s definition of agency supports the inclusion of private entities under “other agency.” All of the specific types of agencies listed under “State agency” are governmental agencies, not private corporations.¹¹⁵ Thus, to be consistent with the preceding wording, “other state agency” should include only state governmental agencies that are not a “state office, department, division, bureau, board, [or] commission”¹¹⁶ Similarly, none of the listed “local agencies” include private organizations,¹¹⁷ and thus, no inference should be made to allow “other local public agency” to include private organizations.

111. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 189–90, 181 P.3d 881, 883 (2008) (TCAC *administer[ed]* particular legislation in this case: animal control laws.).

112. “Government” is defined as follows:

1. The structure of principles and rules determining how a state or government is regulated. 2. The sovereign power in a nation or state. 3. An organization through which a body of people exercise political authority; the machinery by which sovereign power is expressed <the Canadian government>. In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with.

BLACK’S LAW DICTIONARY 715–16 (8th ed. 2004). The first two definitions are abstract conceptions of government that do not apply to organizations. Under the third definition, even if a private organization can be considered part of the “machinery by which sovereign power is expressed,” a private organization cannot be considered a “political organ.” A private organization answers to and is controlled by its owners, not an elected political body.

113. As previously discussed, the *Spokane Research* court rejected out-of-hand any notion that the definition of “other local public agency” was in any way ambiguous with regard to the WCCDA because that association “possesse[d] no material governmental attributes or characteristics.” *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 608, 137 P.3d 120, 122–23 (2006), *review denied*, 160 Wash. App. 1006, 158 P.3d 614 (2007).

114. See *State v. Roggenkamp*, 153 Wash. App. 614, 634, 106 P.3d 196, 205 (2005) (“a single word in a statute should not be read in isolation and that ‘the meaning of words may be indicated or controlled by those with which they are associated.’” (quoting *State v. Jackson*, 137 Wash. 2d 712, 729, 976 P.2d 1229 (1999))).

115. See WASH. REV. CODE § 42.56.010(1) (2008) (“‘State agency’ includes every state office, department, division, bureau, board, [or] commission”).

116. See *id.*

117. See *id.* (“‘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”). Even *Clarke* did not attempt to reason that TCAC was a “division” of the ACA, but instead considered TCAC solely as an “other local public agency.” *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 191, 181 P.3d 881, 884 (2008).

Finally, courts must also interpret statutory language in harmony with similar provisions in the same statute,¹¹⁸ and when one reads the PRA as a whole with its companion statute, the Public Disclosure Act (PDA),¹¹⁹ a private corporation is inconsistent with the definitions of agency. The PDA's definition of "person" includes both "private corporation" and, separately, "state, or local governmental entity or agency however constituted."¹²⁰ Because the legislature felt it necessary to separately list "private corporation" as distinct from "state or local governmental entity or agency," it is clear that the legislature did not mean to include private corporations under the definition of agency.

B. The Functional-Equivalency Test Applied in Telford Was Not Meant to Apply to Private Contractors

The *Telford* functional-equivalency test was meant to apply to governmental entities masquerading as private organizations, not to privately controlled and operated organizations performing services under government contracts. In *Telford*, the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO) were required by state law to coordinate statewide county administrative programs, and counties were required to use WSAC and WACO to fulfill certain county statutory duties.¹²¹ The real question for the court was whether WSAC and WACO could negate their PDA responsibilities as government-recognized and -funded public agencies controlled by local government officials by incorporating as non-profit corporations and carrying out other nominal, non-statutorily related functions.¹²² The *Telford* court applied the functional-equivalency test suggested by the Washington Attorney General opinion letter because that opinion considered whether a similarly constructed entity, the Small Business Export Finance Assistance Center (EAC), was an agency sub-

118. See *Roggenkamp*, 153 Wash. 2d at 634, 106 P.3d at 205 (2005) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." (quoting *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318 (2003))).

119. WASH. REV. CODE § 42.17. Prior to 2006, the Public Records Act was part of the broader Public Disclosure Act. Although the PRA was split from the PDA, its definitional language (and most of the Act's other language) remained unchanged.

120. *Id.* § 42.17.020(36) ("'Person' includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.").

121. See *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 159–60, 974 P.2d 886, 892–93 (1999), review denied, 138 Wash. 2d 1015, 989 P.2d 1143 (1999).

122. See *id.* at 165–66, 974 P.2d at 895.

ject to the PDA.¹²³ Thus, the *Telford* court considered whether governmental bodies can organize themselves in forms (as private corporations) that are exempt from public disclosure laws.

While the *Telford* court reviewed a question of semantic trickery, the *Spokane Research* and *Clarke* courts considered a very different and more substantive issue: whether governmental bodies can contract their responsibilities to independent private entities.¹²⁴ In *Spokane Research*, the court recognized the fundamental difference between “quasi-governmental” agencies like WSAC/WACO and private contracting organizations like the West Central Community Development Association (but wrongly performed the *Telford* test anyway in dicta).¹²⁵ The *Clarke* court ignored *Spokane Research*’s understanding of these differences, and in its application of *Telford*, proceeded to treat TCAC as if it were a quasi-governmental body.¹²⁶ Thus, the *Clarke* court inappropriately transformed *Telford*’s original question—whether government agencies were pretending to be private in order to get around the PRA—into a completely different question—whether private contractors perform enough of a government function to be considered a “public agency” under the PRA.¹²⁷ The *Clarke* court should never have applied the *Telford* test.

123. See *id.* at 161, 974 P.2d at 893. Although the Small Business Export Finance Assistance Center was established by state law and was “governed and managed” by seventeen directors appointed by the governor and confirmed by the senate, the attorney general opined that the EAC was not an agency under the PDA. 1991 Op. Wash. Att’y Gen. No. 5.

124. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 181 P.3d 881 (2008); *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 137 P.3d 120 (2006), *review denied*, 160 Wash. 2d 1006, 158 P.3d 614 (2007).

125. See *Spokane Research*, 133 Wash. App. at 608, 137 P.3d at 122–23.

The facts as summarized below create no ambiguity as to [WCCDA]’s non-governmental status. . . . Therefore, we need not apply *Telford*’s functional equivalency analysis. The [WCCDA] is incorporated as a conventional Internal Revenue Code 503(c)(3) charity. . . . [WCCDA] does not make policy or legislate. [WCCDA] does not adjudicate disputes. [WCCDA] is not controlled by elected or appointed county officials, is not government audited, and its employees are not paid by a government or enjoy government health or retirement benefits. In short, [WCCDA] possesses no material governmental attributes or characteristics.

Id. By applying *Telford* “solely for argument,” the court appears to use the test to quash the notion that private contractors can fall under the PDA as “other agencies.” See *id.* at 609–10, 137 P.3d at 123.

126. See *Clarke*, 144 Wash. App. at 193, 181 P.3d at 885. Although the court recognized the *Spokane Research*’s holding, the court failed to distinguish how TCAC was different from WCCDA or why the definition of “other local agency” was ambiguous with respect to TCAC and not to WCCDA. See *id.*

127. See *id.*

C. Private Contractors Are Not Agencies When Correctly Applying Telford's Functional Analysis

When properly applied, *Telford's* functional analysis will necessarily produce the result that private contractors are not the functional equivalents of agencies. Thus, the *Clarke* court was not only wrong to apply *Telford* to TCAC, but the court also bungled its application of the test.

Telford's first factor is “whether the entity performs a governmental function,”¹²⁸ and the principal consideration is whether those “duties could be delegated to the private sector.”¹²⁹ Basic logic dictates that private contractors cannot perform duties that “cannot be delegated to the private sector.” Thus, it should be impossible for a court to find otherwise (unless, as in rare situations like *Telford*, the entity is “private” in name only but owned and managed by government agencies and officials).¹³⁰

The *Clarke* court arrived at a contrary, and incorrect, conclusion when it found that TCAC performed a “governmental function.”¹³¹ When considering whether TCAC’s animal-control function could be delegated to the private sector, the court determined that although the ACA could “delegate the performance *authority* for this public function to a private entity, it cannot delegate away its statutory *responsibility* to perform with PDA legal requirements.”¹³² This analysis is wrong for two reasons. First, state law clearly allows the animal-control function to be delegated to the private sector.¹³³ This should thus settle the issue that TCAC is not performing a “governmental function” under *Telford*. Second, the statutory language of the PDA mentions nothing about delegating PDA authority to private entities—the court simply made up this requirement. Finally, if the contract between the ACA and TCAC violated the PDA, the contractual remedy is for the court to void the contract, not for TCAC to assume the ACA’s statutory PDA duties.

Telford's second factor is “the level of government funding,”¹³⁴ and the *Telford* court distinguished between county membership dues, which it found to be “government funding,”¹³⁵ and government payments for

128. *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 162, 974 P.2d 886, 893 (1999), *review denied*, 138 Wash. 2d 1015, 989 P.2d 1143 (1999).

129. *See id.* at 163–64, 974 P.2d at 894.

130. *See id.*

131. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 194, 181 P.3d 881, 885–86 (2008).

132. *Id.* at 194, 181 P.3d at 885.

133. *See id.* (citing several chapters in WASH. REV. CODE § 16.52).

134. *Telford*, 95 Wash. App. at 162, 974 P.2d at 893.

135. *See id.* at 164, 974 P.2d at 894–95 (finding that membership dues were for WSAC/WACO’s general operations, which included activities the court already held to be “government functions”). This was important because WSAC could not identify payments from these dues

specific goods or services, which fell outside “government funding.”¹³⁶ In Washington, private contractors must provide specific goods and services in return for government money received;¹³⁷ these contracts are subject to a myriad of state laws.¹³⁸ Private contractors would never have the ability to pool and allocate blocks of government funds at their discretion that would constitute “government funding” under *Telford*.¹³⁹

By contrast, the *Clarke* court ignored *Telford*’s determination of what constitutes “government funding.”¹⁴⁰ The *Clarke* court wrongly asserted that because almost all of TCAC’s operating budget came from public money, this factor weighed in favor of TCAC falling under the PDA (ignoring the fact that these were contractual payments for animal control services rendered and were not membership dues or other government payments that could be used at TCAC’s discretion).¹⁴¹ Under *Clarke*’s precedent, the “government funding” factor now weighs against any business whose primary revenue comes through government work.

Telford’s third factor is “the extent of government involvement or regulation,”¹⁴² or in other words, “government control,”¹⁴³ and the principal disqualifying consideration is whether there is “private sector involvement or membership.”¹⁴⁴ This factor gets to the heart of the “shell-game” problem where government officials form a private corporation that those officials control and with whom they contract to escape regulations that would otherwise affect their operations. Unless private con-

as being directed toward specific goods and services provided to the counties that may have been outside the scope of “government functions.” *See id.*

136. *See id.* Government payments for specific goods and services performed at arm’s length are not considered “government funding” as long as these payments are not disbursed en masse to be spent at the discretion of the contracting body. *See id.*

137. *See* WASH. CONST. art. VIII, § 7 (“No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation . . .”).

138. *See* generally, WASH. REV. CODE § 39 (2008), for Washington laws regarding contracting and purchasing. Other RCW titles cover the contracting and purchase of specific types of goods and services. For example, sections 16.52.015–.025 of the Revised Code of Washington authorize private corporations to organize as humane societies and municipalities to enter into contracts with these corporations to enforce animal-control laws.

139. *See Telford*, 95 Wash. App. at 162, 974 P.2d at 893.

140. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 194–95, 181 P.3d 881, 886 (2008).

141. *See id.*

142. *Telford*, 144 Wash. App. at 162, 974 P.2d at 893.

143. *Id.* at 165, 974 P.2d at 895.

144. *See id.* (holding that WSAC/WACO were under “government control” because they were “completely controlled by elected and appointed county officials . . . [and there was] no private sector involvement or membership.”).

tractors are managed by government employees or officials,¹⁴⁵ they cannot be under government control with respect to the PRA.¹⁴⁶

When the *Clarke* court held that TCAC was under “government control”, it simply ignored *Telford*’s interpretation of “government control.”¹⁴⁷ The court conceded that TCAC was in control of its day-to-day operations, that it maintained its own insurance, and that TCAC’s employees were not considered public employees.¹⁴⁸ However, the court held TCAC to be under government control because TCAC was restricted in its use of government facilities, TCAC was “only permitted to provide euthanasia services in a manner approved by the ACA,” and TCAC was “required to keep records and submit monthly reports to the ACA.”¹⁴⁹ The *Clarke* court completely failed to appreciate the difference between actual day-to-day operational control by government officials (as the *Telford* court considered), and compliance with the terms of contracts and regulations. Using the court’s rationale, any highly regulated business that is required to provide services and maintain records according to government laws and rules would be under government control.

Telford’s final factor is “whether the entity was created by government,”¹⁵⁰ and the principal disqualifying consideration is whether the entity is created by private citizens.¹⁵¹ Private contractors, almost by definition, are created by private citizens, not by government officials, and thus *Telford*’s fourth factor will almost never be satisfied with respect to private contractors.¹⁵²

The *Clarke* court grudgingly admitted that “TCAC was formed as a private corporation, by private citizens, and was not an entity created by

145. The *Spokane Research* court determined that “government control” meant day-to-day involvement by the government body over the contracting entity’s operations. *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 609, 137 P.3d 120, 123 (2006), review denied, 160 Wash. 2d 1006, 158 P.3d 614 (2007).

146. See *Telford*, 95 Wash. App. at 165, 974 P.2d at 895.

147. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 195, 181 P.3d 881, 886 (2008).

148. *Id.*

149. *Id.*

150. *Telford*, 95 Wash. App. at 162, 974 P.2d at 893.

151. See *id.* at 164, 974 P.2d at 894–95. The court rejected WSAC/WACO’s assertions that they were “created by private citizens interested in the efficient functioning of county government” because “they were formed by county officials acting in their official capacities in the furtherance of county business . . . [and] the associations were then recognized by the Legislature as coordinating agencies to carry out state policy.” *Id.*

152. Theoretically, a government official may set up a private business and contract with the public agency he works for, although such self-dealing is, in most instances, banned by government ethics codes and regulations. No such allegation was made regarding TCAC. See *Clarke*, 144 Wash. App. at 195, 181 P.3d at 886.

government.”¹⁵³ The court stated: “Although it could not perform its function without its relationship to the local government, this factor weighs against PDA application.”¹⁵⁴

The *Clarke* court held that “on balance,” TCAC was functionally equivalent to an agency,¹⁵⁵ but there was nothing for the court to balance: all four *Telford* factors weighed heavily against functional equivalency for TCAC because, with proper *Telford* application, no private, independent company can be equivalent. Thus, the danger of applying *Telford*’s four-factor functional-equivalency balancing test to private contractors is not the use of this test itself, unless the contractor is a government agency masquerading as a private contractor. The real danger is that courts, like *Clarke*, will creatively misapply *Telford* to construct a body of case law that pulls even more public contractors within the PRA’s jurisdiction.

D. The Result of Telford, As Applied to Private Contractors, Can Be Arbitrary and Does Not Get Behind the True Purpose of the Public Records Act

Under Washington courts’ application of the *Telford* functional-equivalency test, some private contractors are subject to the Public Records Act, and some are not.¹⁵⁶ The decision in *Clarke* implied that the central distinction between TCAC and the WCCDA in *Spokane Research* was TCAC’s assumption of police powers.¹⁵⁷ However, this distinction ignores the PRA’s central purpose: to make government transparent so that citizens “[remain] informed so that they may maintain control over the instruments that they have created.”¹⁵⁸ Citizens may want to

153. *See id.*

154. *Id.*

155. *Id.*

156. *See, e.g., Clarke*, 144 Wash. App. at 155, 181 P.3d at 881 (holding that TCAC was subject to the PRA); *Spokane Research*, 133 Wash. App. at 602, 137 P.3d at 120 (holding that WCCDA was not subject to the PRA).

157. *See Clarke*, 144 Wash. App. at 193–94, 181 P.3d at 885. In *Clarke*, the court made no direct *Telford* comparison between TCAC and *Spokane Research* and did not distinguish why it held that the definition of “other public agency” was ambiguous with regard to TCAC while accepting *Spokane Research*’s holding that there was no definitional ambiguity with respect to WCCDA. *See id.* at 884. However, the main part of *Clarke*’s *Telford* discussion focused on TCAC’s enforcement powers, a contractual duty that WCCDA never performed. *See id.* at 193, 181 P.3d at 885.

158. WASH. REV. CODE § 42.56.040 (2008). *See also* *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994).

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. . . . Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests.

maintain control over government institutions for different reasons, whether for lawmaking,¹⁵⁹ the exercise of police power,¹⁶⁰ or the expenditure of public funds.¹⁶¹

By focusing on an “other agency’s” form rather than impact (or by a court selecting which “impact” will qualify a contractor as an “other agency”), *Telford*’s functional-equivalency test arbitrarily ignores the purpose of the PRA. Why should the PRA not apply to *Spokane Research*’s WCCDA but instead to *Clarke*’s TCAC when WCCDA has more discretion on how it uses government funds,¹⁶² controls and expends more government resources,¹⁶³ and impacts a larger, more diverse community?¹⁶⁴ The consequence of courts applying *Telford* is that citizens of the Tri-Cities can monitor their private animal-control provider by requesting and receiving records, but citizens of Spokane’s West Central Community cannot do the same with their community center. For consistency’s sake, it would make more sense to follow other states’ public access laws that either limit requests to recognized government agencies or subject all recipients of government funds to disclosure.¹⁶⁵

Id.

159. See WASH. REV. CODE § 42.30.010 (2008). The Legislative Declaration for the Open Public Meetings Act includes the same language as the Public Records Act construction section. See *Id.*

160. See, e.g., *Clarke*, 144 Wash. App. at 155, 181 P.3d at 881.

161. See *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319, 328, 890 P.2d 544, 549 (1995) (“Certainly, there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly.”).

162. See *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass’n*, 133 Wash. App. 602, 604, 137 P.3d 120, 123 (2006), *review denied*, 160 Wash. 2d 1006, 158 P.3d 614 (2007). In addition to receiving 75% of its funding from public sources, the WCCDA rented its facility from the city for one dollar per year and was allowed to sublease the facility to other organizations at a higher rent and then keep the profits for its own programs. *Id.* Thus, WCCDA had the discretion to use these “public funds” to provide community services including the Woman, Infant, and Children Nutrition Program, Head Start, Deaconess Women’s Clinic, Learning Skills Center, and before- and after-school programs. *Id.* at 605, 137 P.3d at 121. Further, WCCDA was created, in part, to relieve the city of dealing with potential faith-based programs barred to the city under separation of church and state principles. *Id.* at 609, 137 P.3d at 123. Compare *Clarke*, 144 Wash. App. at 185, 181 P.3d at 881. Although TCAC, as a for-profit business, was not limited on how it could spend its profits, the money received was for specific animal-control activities and no more. See *id.* at 193, 181 P.3d at 885. There was no tacit agreement that the profits would be spent for other public services that the contracting agency otherwise chose not to or constitutionally could not do. See *id.*

163. See *Spokane Research*, 133 Wash. App. at 602, 604–05, 137 P.3d at 121, 123. The decision did not disclose the amount of public money received and expended by WCCDA, but one can infer that the substance and breadth of the many programs provided were significantly greater than TCAC’s animal-control responsibilities. See *id.*

164. See *id.*

165. For a compendium of all states’ public records laws, including how these laws pertain to government contractors, see THE OPEN GOVERNMENT GUIDE (The Reporters Comm. for Freedom of the Press ed., 5th ed. 2006).

E. Telford, As Applied in Clarke and Future Cases, May Produce Unreasonably Burdensome and Undemocratic Results When Courts Determine That Private Contractors Are "Agencies"

If the purpose of the Public Records Act is to produce better government, then subjecting private government contractors to the requirements of the Act defeats this very purpose. Productive and innovative private organizations may choose not to pursue government contracts to avoid the invasion of privacy, the added work, and the expense required to comply with the PRA. In turn, governments may choose not to contract for services because of the extra costs and fewer willing contracting parties, with the result that some services may no longer be provided. The consequence may be to deter democratically elected governments from working with the private sector to provide more creative, effective, and cheaper ways to provide public services.

For the past thirty years, scholars and politicians have fiercely debated the merits of privatizing government services.¹⁶⁶ Privatization is accomplished by deliberate delegation of authority, in the form of some legal instrument—usually a contract—by a formally constituted entity of traditional government.¹⁶⁷ Outside of Washington, many state and local governments have privatized important government services,¹⁶⁸ and critics have complained that this type of contracting hurts government workers, reduces public oversight, damages affirmative action goals, and often costs more than it would for that agency to perform the work itself.¹⁶⁹

Outright privatization in Washington is rare, and most government contracting is not controversial. Governments usually contract with private companies or organizations to perform services that support the agency's existing body of work when that agency lacks the expertise, efficiency, or resources to best complete the task itself.¹⁷⁰ In Washing-

166. See generally Chris Sagers, *The Myth of "Privatization,"* 59 ADMIN. L. REV. 37 (2007) (reviewing the existing "privatization" literature, the author counted over 600 law review or journal articles that used the terms "privatize" or "privatization" in their titles).

167. *Id.* at 39.

168. See Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law,* 27 FLA. ST. U. L. REV. 825, 829 (2000). Examples of local privatization include fire protection, transportation, jails, and health care facilities. *Id.*

169. *Id.* at 832.

170. Most government purchasing and public works contracting falls under this category. For example, when faced with constructing a bridge, a municipal transportation department may lack in-house resources to complete the job itself, contract with a civil engineering firm to design the bridge, and contract with a bridge construction firm to build the bridge. This type of contracting is different from the more controversial "complete" outsourcing because contracted work is done under some supervision of in-house departmental engineers and project managers, and once the project is complete, the bridge is part of the municipally managed road network.

ton, most government grants must also be in the form of contracts to pass state constitutional muster.¹⁷¹ Public-private partnership grants are conceptually popular with both progressives and conservatives: progressives are happy that additional public services are provided, while conservatives prefer using the private sector to perform this work.¹⁷²

The different contracting situations, not the proper application of *Telford*, probably determined the respective PRA holdings in *Clarke* and *Spokane Research*. In *Clarke*, the court criticized the concept of privatization where the municipal animal-control agency could escape its responsibilities by contracting out almost all of its functions, despite state law explicitly allowing the agency to do just that.¹⁷³ In *Spokane Research*, the court extended tacit support for Spokane's public-private partnership with WCCDA by minimizing any connection between the city's public support—grants of free rent, on top of other funding—and the WCCDA's use of these resources.¹⁷⁴ However, the *Telford* functional-equivalency test makes no distinction between wholesale contracting-out and contracting by grants, and the *Spokane Research* court could have creatively used *Telford* to determine that WCCDA was an agency if the court, for some reason, disapproved of this contractual arrange-

171. See WASH. CONST. art. VIII, § 7 (“No county, city, town or other municipal corporation shall hereafter give any money, or property . . . to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm . . .”). Thus, grants usually require consideration (in the form of contracts), although courts will not inquire as to the consideration's adequacy. See *King County v. Taxpayers of King County*, 133 Wash. 2d 584, 597, 949 P.2d 1260, 1267 (1997).

172. For a history of the development of government/private partnerships through grants, see Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859 (2007). Guttman points out that the impetus for such contracting came not from the conservative right but instead from New Deal progressives, and the growth of “grant” contracting was the product of a bipartisan deal to maximize the services provided by government without increasing the size of the government workforce. *Id.* at 862.

173. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 194, 181 P.3d 881, 885–86 (2008). The court stated:

Said another way, were we to conclude that TCAC is not a functional equivalent of a public agency, we would be setting a precedent that would allow governmental agencies to contravene the intent of the PDA and the Public Records Act by contracting with private entities to perform core government functions.

Id. Although the court factored privatization against TCAC under *Telford*'s “function” step, as previously discussed, the court had no legitimate basis to do this. See *id.*

174. See *Spokane Research & Def. Fund v. West Cent. Cmty. Dev. Ass'n*, 133 Wash. App. 602, 608, 137 P.3d 120, 123 (2006), *review denied*, 160 Wash. 2d 1006, 158 P.3d 614 (2007). The court downplayed WCCDA's provision of services in return for “grants”: “In short, the [WCCDA] simply rents space from the City, administers public and private grants, [and] subleases space for its own benefit . . .” *Id.* The court also uncritically accepted the WCCDA's status under these contracts as an “independent contractor.” *Id.* at 609, 137 P.3d at 123.

ment.¹⁷⁵ Thus, most contractors that receive substantial public funding may fall under the PRA if judges choose to follow *Clarke*'s example.

Although the impact of *Clarke* may not be apparent from the text of the decision,¹⁷⁶ the potential effect on a contractor found to be an "agency" is severe because that contractor is subject to the same public records laws as government agencies.¹⁷⁷ Complying with the PRA will require a significant investment of time, training, and resources: the contractor must appoint a public records officer,¹⁷⁸ maintain an index of all records,¹⁷⁹ make records available for public review,¹⁸⁰ respond to all requests within five days,¹⁸¹ and properly exempt records from disclosure.¹⁸² Records subject to public scrutiny will include much that private organizations normally prefer to keep private, including financial data, employee information,¹⁸³ and in the case of non-profits, private donor identities when their gifts are intermingled with public funds.¹⁸⁴ Finally, contractors will be obligated to fulfill all requests, even those that are overwhelming or harassing, because a requestor's identity and motiva-

175. If the court in *Spokane Research* had been hostile to the WCCDA's grant contracting, the court could have easily used *Telford* to conclude that the WCCDA was an "other local public agency" subject to the PDA: the WCCDA provided social programs that municipalities often offer, the WCCDA received most of its funds from the government, it operated from government facilities subject to some form of government control, and the WCCDA was originally created and run by a city employee acting in his official capacity. See *Spokane Research*, 133 Wash. App. at 609–10, 137 P.3d at 123.

176. Ms. Clarke's request for euthanasia logbooks was targeted and necessary to determine whether TCAC was following the euthanasia protocol set out in its contract with the animal-control authority. See *Clarke*, 144 Wash. App. at 190, 181 P.3d at 883. The court made no mention of any larger consequences than the release of these specific records. See *id.*

177. Almost all records related to the contractor's public work would be releasable because public records are defined as "any writing containing information relating to the conduct of government . . ." See WASH. REV. CODE § 42.56.010(2) (2008). Further, Washington courts interpret the Act "liberally and the exemptions from disclosure narrowly . . . [and] [i]n general, an agency must disclose a public record unless a statutory exemption applies." *Livingston v. Cedeno*, 164 Wash. 2d 46, 50–51, 186 P.3d 1055, 1057 (2008).

178. WASH. REV. CODE § 42.56.580 (2008).

179. *Id.* § 42.56.070.

180. *Id.* §§ 42.56.080–.090.

181. *Id.* § 42.56.520. Failure to comply may result in penalties, attorney's fees, and court costs. *Id.* § 42.56.550(4).

182. *Id.* §§ 42.56.050, 210–.480. Proper exemption often necessitates expert legal advice, especially when disclosure might invade privacy and require preventative agency-initiated court action under § 42.56.540 of the Revised Code of Washington.

183. For example, this may include employee names, birthdates, salaries, and information about their dependents, among other things. See WASH. REV. CODE § 42.56.250(3) (2008).

184. See *id.* § 42.56.010(2); *Livingston v. Cedeno*, 164 Wash. 2d 46, 50–51, 186 P.3d 1055, 1057 (2008).

tion under the PRA are irrelevant.¹⁸⁵ As hard as it may be for government agencies to comply with the PRA, these agencies usually have ready access to expert legal advice¹⁸⁶ and training.¹⁸⁷ Contractors do not enjoy access to these same resources, and thus PRA compliance is much tougher for them.

The end result of subjecting private government contractors to the PRA is to discourage government contracting overall. For contractors, complying with the PRA will make their services more expensive, and in some cases, cause them to entirely forgo public contracts.¹⁸⁸ Contractors that perform significant amounts of government work may also reorganize their operations to avoid falling under the PRA.¹⁸⁹ Government costs will rise and contracting choices will decrease accordingly, causing governments to either increase their own headcount by doing the services themselves,¹⁹⁰ or more likely, choose not to provide that public service at all.¹⁹¹ Subjecting contractors to the PRA also complicates grants that originate with the state or federal government but are passed through local governments for matching and disbursement.¹⁹² Thus, designating

185. *See* WASH. REV. CODE § 42.56.080 (2008). *See also* *Zink v. City of Mesa*, 140 Wash. App. 328, 340, 166 P.3d 738, 744 (2007) (holding that there is no limit to the number of requests that one can make under the PRA).

186. For example, state agencies have ready legal representation through the Washington State Attorney General's Office, and many local agencies are represented by their in-house legal departments (e.g. city attorney's office).

187. For example, the Association of Washington Cities provides training sessions for its member cities. *See* Association of Washington Cities (AWC) Home Page, <http://www.awcnet.org> (last visited Jan. 29, 2010).

188. Forgoing public contracts may not be an option for some organizations, especially non-profits, that receive most of their revenue through public funding. The overhead expense of complying with the PRA, however, may result in more expensive contract bids or fewer services delivered.

189. For example, a company that does most of its work through government contracts may choose to separate the government and non-government functions by incorporating into multiple companies, thus preventing general corporate records or names of specific donors from being publicly accessible.

190. Part of the efficiency of contracting is that the agency pays only for services when needed, rather than keeping employees and equipment on hand to perform these services as needs arise.

191. For example, Washington municipalities may use law enforcement instead of animal control agencies to enforce animal control laws. *See* WASH. REV. CODE § 16.52.015 (2008). The quality of animal control services would generally be much poorer under such a scenario because law enforcement agencies have greater priorities.

192. For an example of such "pass-through" or block grant funding, see The City of Seattle 2009–2012 Consolidated Plan for Housing and Community Development, http://www.seattle.gov/humanservices/community_development/conplan/plan/default.htm (last visited Jan. 29, 2010). Under this plan, the City selects recipients and disburses grants to non-profit organizations from the United States Department of Housing and Urban Development, including a Community Development Block Grant (\$12 million to \$13 million per year), HOME Investment Partnership (about \$5 million annually), Housing Opportunities for Persons with AIDS (about \$1.6 million annually), and the Emergency Shelter Grant Program (about \$540,000 annually). *Id.* Under

government contractors as agencies under the PRA harms the public interest by increasing the costs of government and limiting what services governments provide.

Imposing the PRA on government contractors damages democracy itself. By making it harder and expensive for government agencies to contract for services they otherwise cannot or are unwilling to do, local elected bodies lose the ability to respond to and enact policies that citizens elected them to do. Also, if the citizens of Richland, Pasco, and Kennewick want animal-control services without increasing the size of government and state law allows the municipalities to do this, why is a judge imposing her own policy choice about what duties an agency may delegate through contract?¹⁹³ By creatively misapplying *Telford* to impose unnecessary burdens on government contracts, courts are, in effect, legislating from the bench and improperly stripping policy-making authority away from Washington's state and local legislative bodies.

Dire predictions aside, *Clarke*'s holding may be an anomaly, and courts may rule that only the most extreme cases of privatization will subject a contractor to the Public Records Act. However, two factors suggest that courts will apply *Clarke*'s expansive interpretation of *Telford* to other types of contractors: public concern over how government money is spent and political pressure imposed on elected judges by newspapers and other "open government" advocates.

Citizens are legitimately concerned about how government funds are spent,¹⁹⁴ the PRA was intended to enable people to act on this concern,¹⁹⁵ and judges may decide that this policy is more important than competing principles. Other states subject private recipients of public funds to public records laws,¹⁹⁶ either by statute,¹⁹⁷ or by case law.¹⁹⁸

Clarke's holding, the recipients might fall under the PRA, even though little funding originates from the City of Seattle itself.

193. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 194, 181 P.3d 881, 885–86 (2008) (distinguishing between delegating "performance authority" and "statutory responsibility").

194. See *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319, 328, 890 P.2d 544, 549 (1995).

195. See *id.*

196. See The Reporters Comm. for Freedom of the Press, *supra* note 165.

197. See, e.g., ARK. CODE ANN. § 25-19-103(5)(A) (2008) ("[Records of] any . . . agency wholly or partially supported by public funds or expending public funds [are subject to the FOIA]"); MICH. COMP. LAWS § 15.232(d)(iv) (2008) ("[P]ublic body [includes] [a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority").

198. See, e.g., *Cavey v. Walrath*, 598 N.W.2d 240, 242 (Wis. Ct. App. 1999) (holding that a nonprofit legal aid society receiving more than 50% of its funds from a county is subject to Wisconsin's Open Records law); *Nw. Georgia Health Sys., Inc. v. Times-Journal, Inc.*, 461 S.E.2d 297,

Because judges may consider Washington a laggard behind other states' open records laws, judges could use *Telford* to expand the PRA's definition of "agency."¹⁹⁹ However, Washington's PRA is open in ways that other states' are not.²⁰⁰ For example, many states limit the large categories of records available for public inspection.²⁰¹ Washington, however, narrowly exempts classes of records, resulting in most records being available to the public.²⁰² Thus, subjecting Washington contractors to the PRA will create a result experienced by those in few other states: contractors will be required to release records even marginally related to activities paid for with public funds.

Judges are also likely to expand, or at least not overrule, *Clarke*'s holding to avoid angering the news media and other open government advocates. Open government advocates are vigorously trying to amend the Public Records Act to make more records available for public inspection.²⁰³ Although subjecting certain contractors to the PRA might appear unreasonable to some judges, they also know that ruling otherwise will antagonize powerful open government advocates²⁰⁴ and risk their chances for reelection.²⁰⁵ Also, Washington courts are exempt from the PRA,²⁰⁶ and judges may not fully appreciate the efforts often required to comply with the Act.²⁰⁷ Therefore, judges may continue to push case law forward until eventually all government contractors fall under the PRA.

To conclude, the court of appeals badly erred in its *Clarke* decision by (1) failing to apply the correct rules of statutory construction to the

299–300 (Ga. Ct. App. 1995) (holding that any entity, business or organization that serves a public function, including a non-profit hospital, is subject to the [Georgia Open Records Act]).

199. WASH. REV. CODE § 42.56.010(1) (2008).

200. See The Reporters Comm. for Freedom of the Press, *supra* note 165; THE BGA-ALPER INTEGRITY INDEX (Better Government Assn. ed., 2008) (ranking Washington public records laws sixteenth out of the fifty states for openness).

201. See The Reporters Comm. for Freedom of the Press, *supra* note 165.

202. See WASH. REV. CODE § 42.56.040 (2008).

203. For example, the Seattle Times, Washington's largest newspaper, published twenty-four separate editorial or opinion articles within the past thirty-six months either urging for the expansion of the PRA or criticizing courts or public officials' narrower interpretations of the Act.

204. For example, the Seattle Times endorsed the challenger to a sitting justice, Mary Fairhurst, in part because the newspaper disagreed with Justice Fairhurst's PRA rulings that sided with government agencies. Editorial, *The Times Recommends . . . Bond and Johnson for Supreme Court*, SEATTLE TIMES, at B10, available at 2008 WLNR 14510533.

205. In Washington, judges are elected by the people. WASH. CONST. art. IV, §§ 3, 5, 30.

206. The Washington Supreme Court has determined that the judicial branch is exempt from the Public Records Act. *City of Federal Way v. Koenig*, 167 Wash. 2d 341, 346, 217 P.3d 1172, 1174 (2009) ("[T]he courts are not included in the definition of agency, and thus, the PRA does not apply to the judiciary.").

207. Aside from the basic inconsistency that the judicial branch of government does not consider itself an "agency" while concluding, at least in *Clarke*, that private businesses may be, judges are never required to experience firsthand any inconveniences caused by the Act or by their PRA case law.

term “agency”; (2) wrongfully choosing to apply the *Telford* four-factor test to a privately owned and operated organization; and (3) bungling its application of *Telford*, which, if properly performed, would necessarily find that an independent business cannot be an agency under the Act. *Clarke*’s precedent also intrudes on the democratic process and, if allowed to remain and if extended, will limit the means by which local legislative bodies can innovate and improve government services. For these reasons, judicial and legislative actions are required.

V. RECOMMENDATIONS

The Washington Court of Appeals wrongly decided *Clarke*, in part, because the court saw no other means to force TCAC to provide Ms. Clarke with records that would help determine whether TCAC followed the required euthanasia protocols.²⁰⁸ All attempts to remedy *Telford*’s misapplication should recognize the *Clarke* court’s dilemma by fixing *Clarke*’s mistaken precedent and by ensuring that records that are created to document government-funded activities are made available. Three actions to undo *Clarke* should be taken. First, forcefully defend all challenges using *Telford* against public contractors to obtain “public” records. Next, amend the Washington Public Records Act’s definition of agency to exclude all private organizations not formed by and comprised of government officials. Finally, amend the PRA’s definition of “public records” to include records funded by public agencies and produced in the performance of a governmental function.

A. Forcefully Defend Against Future *Telford* Cases

Fortunately, in the two years since *Clarke* was decided, the case’s precedent has made little noticeable effect on government contracting in Washington. Courts have not revisited *Telford* or *Clarke*—either by limiting the holding to certain types of contractors or by expanding the PRA’s reach to include more expenditures of public funds. Nor is much anecdotal evidence available indicating that PRA requestors have so far used *Clarke* to obtain previously unavailable records from contractors. However, *Clarke* has opened the door to government contractors being declared agencies under the Act. It is only a matter of time before citizens request any and all records in the possession of these contractor agencies, including personnel and payroll records, business plans, and other private records even marginally related to the contractors’ public

208. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 190, 181 P.3d 881, 883–84 (2008).

contracting function.²⁰⁹ Also, citizens and lawyers may use the PRA as a weapon to harass or extract statutory damages against contractors ill-equipped to follow the Act's extensive requirements.²¹⁰ Contractors should refuse to comply with such *Telford*-based requests and vigorously defend such refusals in court.

Unfortunately, defending *Telford* PRA actions in court may not be worth the effort of individual contractors, and concerted action may be necessary. This may be why TCAC chose not to challenge the *Clarke* ruling to the Washington Supreme Court, despite the flimsiness of the appeals court's holding.²¹¹ Contractors will find that it is almost always cheaper to provide records than to challenge requests in court.²¹² However, private organizations and companies that accept public contracts and cumulatively absorb PRA costs should contribute money and resources to fight further *Telford* PRA challenges.

B. Amend the Public Records Act's Definition of "Agency"

The Washington legislature should amend the Washington Public Records Act's definition of agency to exclude all private organizations not formed by and made up of government officials. The *Telford* functional-equivalency analysis is proper and effective to expose government agencies masquerading as private organizations.²¹³ Thus, amending the PRA's definition of agency²¹⁴ to preclude all private corporations not composed of or managed by government officials will prevent such masquerades as were challenged in *Telford*.

209. Washington law exempts some narrowly defined subclasses of records, such as certain personal records, plans, financial information, preliminary drafts, health care records, and criminal investigative information. *See* WASH. REV. CODE §§ 42.56.230–.480 (2008). Additionally, certain exemptions apply in statutes outside of the PRA, such as the protection of trade secrets. *Id.* §§ 4.24.601, 19.108. However, agency records are to be made available to the public unless a *specific exemption applies*, and even then, exemptions are to be *construed narrowly*. *Id.* §§ 42.56.030, .070(1). For example, a trade secret may be withheld only if it meets the strict requirements of the Uniform Trade Secrets Act. *See id.* § 19.108.

210. *See* Parts II.B.2 & IV.E, *supra*.

211. *See Clarke*, 144 Wash. App. at 185, 181 P.3d at 881. For the purposes of appeal, the parties agreed to dismiss the Animal Control Authority of the Cities of Richland, Pasco, and Kennewick from the lawsuit. *Id.* at 188, 181 P.3d at 882. Thus, TCAC would have continued to be on its own for a Washington Supreme Court appeal. *See id.*

212. This is especially true in cases where the contracting agency is not a co-party and thus does not assist in providing the defense.

213. *See Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), *review denied*, 138 Wash. 2d 1015, 989 P.2d 1143 (1999) (holding that the Washington State Association of Counties (WSAC) and the Washington Association of County Officials (WACO) are "other local agencies" under the Public Disclosure Act).

214. WASH. REV. CODE § 42.56.010(1) (2008).

The Washington legislature should redefine “agency” by borrowing from other states’ statutes. Mississippi offers an excellent example of an agency definition because it clearly defines the public bodies covered by the Act,²¹⁵ covers “pretend” private organizations WSAC and WACO,²¹⁶ and excludes private organizations and corporations.²¹⁷ Thus, the definition of agency under the Act should limit “other agencies” to those “created by the Constitution or by law, executive order, ordinance or resolution.”²¹⁸

C. Amend the Public Records Act’s Definition of “Public Record”

Finally, the legislature should amend the Public Records Act’s definition of “public record”²¹⁹ to include records “paid for to comply with [the] public contracting requirements” of any state or local agency.²²⁰ This would ensure that records relevant to publicly funded work are available for inspection by the public without opening up broader categories of records that “agencies” under the Act are required to provide. Also, records would be made available through the contracting agency, not the contractor itself.

If this amended PRA definition of “public record” had been in place when *Clarke* was decided, the court would have never performed a *Telford* functional-equivalency test or found that TCAC was an “other local public agency.”²²¹ Instead, the Animal Control Authority of Rich-

215. MISS. CODE ANN. § 25-61-3(a) (2008) (“‘Public body’ shall mean any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation and any other entity created by the Constitution or by law, executive order, ordinance or resolution.”).

216. WSAC and WACO were created by state law. *Telford*, 95 Wash. App. at 154, 974 P.2d at 889–90.

217. Private entities not “created by the Constitution or by law, executive order, ordinance or resolution,” are not covered by Mississippi’s public records laws. See MISS. CODE ANN. § 25-61-3(a) (2008).

218. The definition of “agency” under WASH. REV. CODE § 42.56.010(2) would be amended to: “Agency” shall include all state agencies and all local agencies. “State agency” includes every . . . or other state agency *created by the Constitution or by law, executive order, ordinance or resolution*. “Local agency” includes every . . . or other state agency *created by the Constitution or by law, executive order, ordinance or resolution*. (Amended language in italics.)

219. WASH. REV. CODE § 42.56.010(2) (2008) (“‘Public Record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency . . .”).

220. The definition of “public record” under WASH. REV. CODE § 42.56.010(2) would be amended to: “‘Public Record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, retained, *or paid for to comply with public contracting requirements* by any state or local agency . . .” (Amended language in italics.)

221. See *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 190, 181 P.3d 881, 883 (2008). The court considered whether the Animal Control Authority of Richland,

land, Pasco, and Kennewick would have been required to obtain the euthanasia logbooks from TCAC and provide copies to Ms. Clarke.

This proposed amendment limiting disclosure to actions “paid for” by public funds and done in the performance of contracted governmental work benefits all parties (requestor, contractor, and contracting government agency) for several reasons. First, courts will properly exclude all records held by the contractor not directly related to the governmental function.²²² Next, contractors will not be required to interact directly with PRA requestors.²²³ Instead, requests will be funneled through the contracting agency, and the contractor will be responsible only for sending copies of responsive records directly to that agency.²²⁴ This process is already followed by agencies that have “used” records possessed by private entities.²²⁵ Third, under the amended public record definition, contractors will face few of the effects of being designated a public agency, and thus, they will incur far fewer costs in time, training, and resources. Although this change may create some conflicts between contractors and contracting agencies,²²⁶ the benefits to the contractor far

Pasco, and Kennewick had *used* the euthanasia records in question. *Id.* The court found, however, that “[i]t is not clear from the record whether ACA used the records in question preparing its summary statistics of TCAC’s activity.” *Id.* If the court had instead inquired whether the logbooks had been paid for with public funds and related to the performance of a contracted-for government function, the court would have answered yes and required the record’s release.

222. Records held by the contractor but not directly related to carrying out the contracting function, including the company’s accounting information, personnel files, trade secrets, etcetera, would not be designated as “public records” under the amended definition. Thus, contractors would not be required to provide access to all records as they would be required to do under current PRA language if found to be an “other local public agency.”

223. See WASH. REV. CODE §§ 42.56.070–.080 (2008).

224. See *id.* Under my proposed amendments, contractors do not fall under the requirements of WASH. REV. CODE §§ 42.56.070–.080 because they are not “agencies,” and thus, they are not required to maintain indexes, respond directly to non-agency requestors, or make their records publicly available to requestors. See *id.* The contracting public agency would instead be responsible for this, as they already do for their existing PRA requests.

225. See *id.* § 42.56.010(2). The Washington Supreme Court determined that private records that are submitted to a public agency concerning some government action may become “public records” subject to the Act if they are “used” by that public agency in the “conduct of government.” *The Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wash. 2d 734, 958 P.2d 260 (1998). The court also determined that records in the possession of private entities may fall under the PRA if they were “used” by an agency and impacted the agency’s decision-making process, even if the records were never in the agency’s possession. *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark County*, 138 Wash. 2d 950, 983 P.2d 635 (1999). For an in-depth analysis about the impact of these decisions, see Michael R. Kenyon & Stephen R. King, *Government Contractors and the Washington Public Disclosure Act: When Private Documents Become Public Records*, 509 MUN. RES. & SERVICES CENTER WASH. INFO. BULL. 8a-1, 8a-5 (2001).

226. For example, contractors may not want to provide contracting agencies access to certain records that may be exempt, and challenges by the agency (or citizen through the agency) might create complications. Also, the contracting agency might use this amendment to audit the contractor in ways that the contractor did not anticipate upon execution of the contract.

outweigh the alternative ramifications of being designated a “public agency.” Finally, the PRA’s purpose and integrity will be maintained because citizens will be able to oversee how government money is spent and how work is performed, regardless of the type of government function²²⁷ or if the function was performed by a government agency or contractor. The *Clarke* court should not have misapplied *Telford* to “solve” a perceived lack of open government, and other private contracting entities should fight hard to prevent any further cases from reaching a similar conclusion. However, a more effective and permanent solution to this apparent lack of transparency is for the legislature to amend the PRA’s “agency” and “public record” definitions so that records relating to public services provided by private contractors are considered public records, but citizens will need to request these records from the contracting agencies. This solution provides government accountability without holding private contractors to legal responsibilities and consequences that they are ill-equipped to handle.

VI. CONCLUSION

The Washington Court of Appeals decision in *Clarke* misapplied the precedent in *Telford* to achieve an absurd result that the drafters of the original Public Records Act never intended: designating private companies as public agencies. On the surface, *Clarke*’s result may seem fair and true to the PRA’s purpose because the ruling granted citizens the ability to monitor how their government exercised police powers by euthanizing animals. However, *Clarke*’s precedent, if allowed to expand, threatens to pull all public contractors within the Public Records Act’s reach. Does the public really want all private social service agencies, public works contractors, humane societies, and other private entities with which governments contract to be subject to the Act regardless of the government-related content of their records? Is there a better way of protecting the public’s right to know how their state and local governments operate and allocate resources without declaring that all government contractors are agencies under the PRA? Would the public prefer the legislature, not the courts, to set this policy? By amending the Public Records Act to consider the governmental nature of records rather than the status of an entity as a state or local agency, the Washington legislature would protect the integrity of the Act while eliminating *Clarke*’s potentially harmful effects on government contractors and agencies.

227. This amendment removes the inconsistent result whereby one contractor, such as the Tri-Cities Animal Care and Control Shelter, is subject to the PRA while another contractor, such as the West Central Community Development Association, is immune from the Act.