



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

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

CONTACT US

Section Chair
Stephen Manning
smanning07@gmail.com

Newsletter Submissions
Eileen M. Keiffer
emkeiffer@gmail.com

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Spotlight on Diversity

By John Gray, 2016-2017 Chair of the Administrative Law Section's Committee on Diversity and Outreach

2016 increased awareness of many of us on the subject of diversity. What does diversity mean for those of us who are WSBA and section members? Here is how the WSBA defines "diversity":

Diversity refers to meaningful representation of and equal opportunities for individuals who self-identify with those groups that are under-represented in the legal profession based upon, but not limited to, disability,

gender, age, familial status, race, ethnicity, religion, economic class, sexual orientation, gender identity and gender expression. Statewide geographic diversity and area of practice shall also be given consideration.¹

The composition of this section, and the WSBA, is as follows, drawn from the WSBA Diversity and Inclusion Annual Report 2015:²

Subject	Administrative Law Section	WSBA
% of Caucasian	87%	89%
% of Color	13%	11%
% of LGBT	5%	1%
% of Gender	57% Male/43% Female	61% Male/39% Female

The WSBA definition of diversity includes geographic diversity and area of practice. I do not have current data showing geographic diversity and area of practice available at the time of this writing, but I recall one interesting fact that for several years - and perhaps to this day - this section had more members from Oregon than from Eastern Washington. Perhaps not surprisingly, most section members are from King and Thurston Counties.

The WSBA policy regarding diversity is also stated on the bar's webpage:

The Washington State Bar Association's mission is to serve the public and the members

of the Bar, ensure the integrity of the legal profession, and to champion justice.

As such, the WSBA is committed to advancing diversity and inclusion within the legal profession, and is dedicated to understanding and responding to the conditions which exist for all lawyers in Washington. In 2013, the Bar approved the Diversity and Inclusion Plan. The plan rests on a fundamental assumption that WSBA's commitment to its own culture of inclusion and cultural competence provides the best foundation for meaningful progress.³

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ADMINISTRATIVE
LAWALTERNATIVE
DISPUTE
RESOLUTION

ANIMAL LAW

ANTITRUST,
CONSUMER
PROTECTION AND
UNFAIR BUSINESS
PRACTICES

BUSINESS LAW

CIVIL RIGHTS
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CRIMINAL LAW

ELDER LAW

ENVIRONMENTAL
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INDIAN LAW

INTELLECTUAL
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PRACTICE

JUVENILE LAW

LABOR AND
EMPLOYMENT
LAWLEGAL
ASSISTANCE
TO MILITARY
PERSONNELLESBIAN GAY
BISEXUAL AND
TRANSGENDER
(LGBT) LAW

LITIGATION

LOW BONO

REAL PROPERTY,
PROBATE AND
TRUST

SENIOR LAWYERS

SOLO AND SMALL
PRACTICE

TAXATION

WORLD PEACE
THROUGH LAW

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Membership in one or more of the WSBA's sections provides a forum for members who wish to explore and strengthen their interest in various areas of the law.

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

Send submissions to: Eileen M. Keiffer (emkeiffer@gmail.com).

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WSBA Sections

sections@wsba.org • www.wsba.org/legal-community/sections

Spotlight on Diversity *continued from page 1*

What does this mean for us? Perhaps the answer is linked to the practice of civility in our profession. In December 2015, this section sponsored a mini-CLE called "Civility Among Lawyers in Administrative Hearings." The speaker was Professor Paula Lustbader, President of Robert's Fund and Professor Emerita at Seattle University School of Law. Robert's Fund⁴ is an organization that promotes increased civility in the legal profession. Some of the pertinent materials are posted online at Robert's Fund.

Take some time to read the materials available online at Robert's Fund. Those materials are both instructive and interesting. For example, there are costs associated with incivility, both financial and personal; i.e., incivility can take a toll on your personal health. Civility goes hand in hand with promoting diversity.

This short article took me a long time to write. We are all aware of Charleston, Orlando, San Bernardino, and too many others. We are also aware of the increased visibility of white supremacists and even Nazis in the United States. I wondered for some time how to write this article. After some time passed, I think the answer (at least part of the answer) to the question "what does diversity mean for us," in a professional organization, goes back to civility. Further, you can still do your job as an advocate for your clients. "Zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility."⁵

The Administrative Law Section has a committee on Diversity and Outreach. I am the 2016-2017 chair of that committee. My short-term goal is to produce a mini-CLE, perhaps along the lines of this article. My long-term goal is to assist this section in its support of the WSBA's goal to promote diversity within the WSBA.

1 Adopted by the WSBA Board of Governors in March 2010. <http://www.wsba.org/About-WSBA/Diversity>

2 <http://www.wsba.org/~media/Files/About%20WSBA/Diversity/2015%20WSBA%20Diversity%20and%20Inclusion%20Annual%20Report.ashx>

3 <http://www.wsba.org/About-WSBA/Diversity>

4 For more about Robert's Fund, visit <http://www.robertsfund.org>.

5 *In re Kocontes*, 244 Cal. App. 4th 1229 (2016).

Legislative Update

By Richard Potter

During the 2017 legislative session, the Administrative Law Section's Legislative Committee reviewed over 40 bills (not counting companion bills). For most of the bills, the Committee advised the WSBA Legislative Affairs group that the Section had no position. However, for several bills the Section provided technical drafting comments (which were passed on to legislators and staff), and in three cases the Section's Board took a formal position (which WSBA passed on to legislators and staff).

The following bills reviewed by the Section were enacted:

- Substitute Senate Bill 5207 amends the Public Records Act, RCW 42.56.250 (employment and licensing), to change "electronic mail" to "email" and to exempt from disclosure GPS data indicating the location of the residence of any public employee or volunteer. This is an expansion of a disclosure exemption enacted in 2015 concerning GPS data indicating the residence of a criminal justice agency employee.
- Engrossed Substitute House Bill 1465 amends the Public Records Act, RCW 42.56.430 and RCW 77.12.885, to exempt from disclosure several types of information concerning persons involved in preventative measures regarding wolf interactions, or responding to reported wolf depredations. The exemptions would expire in 2022. The Sunshine Committee must make recommendations to the Legislature by 2021 as to whether the exemptions should be extended.
- Engrossed Substitute House Bill 1594 makes several changes to the Public Records Act that are intended to improve the administration of the Act, including enhancement of training and the use of best practices, providing grants to local agencies for improving their records administration technology, and studying the feasibility of establishing a statewide Internet portal for public records management.
- Engrossed House Bill 1595 amends the Public Records Act with regard to charges allowed for the production and paper and electronic records. It also allows the rejection of "bot requests" and requires that requests be for "identifiable records."
- House Bill 1043 adds a new chapter to RCW 48.02 prohibiting the Insurance Commissioner from disclosing nonpublic personal health information except in furtherance of regulatory or legal ac-

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Legislative Update *continued*

tion brought as part of the Commissioner's official duties. The Section advised the legislature that the Public Records Act should also be amended to expressly refer to this new disclosure prohibition, but the legislature did not insert such a provision before passing the bill.

- House Bill 1829 amends the Public Records Act, RCW 42.56.420, to specify that the existing disclosure exemption applies to "(i) information regarding the public and private infrastructure and security of computer and telecommunications networks."
- Engrossed Senate Bill 5761 amends the Public Records Act, RCW 42.56.430, to exempt from disclosure certain information regarding tribal fish and shellfish harvests and commercial shellfish harvests that has been shared with the Department of Fish and Wildlife.
- Second Substitute House Bill 1120 amends two sections in the Regulatory Fairness Act (RCW Chapter 19.85) and one section in Title 43 RCW (Executive). It provides that the Regulatory Fairness Act does not apply to the adoption of a rule if an agency is able to demonstrate that the proposed rule does not affect small businesses. It requires a proposing agency to consider mitigation options if a proposed rule affects only small businesses; requires the Office of Regulatory Innovation and Assistance to act as the central entity to collaborate with and provide support to state agencies in meeting the requirements of the Regulatory Fairness Act; and requires the State Auditor to conduct a performance review of agency compliance with the Regulatory Fairness Act. The bill states that it is null and void if specific appropriations for its implementation are not approved.
- House Bill 1352 requires numerous reviews and reports concerning the impact of administrative rule enforcement actions, especially on small businesses.
- Senate Bill 5039 adds a new chapter to RCW Title 1 (General Provisions) adopting the Uniform Electronic Legal Material Act. The new law applies to issues of the Washington State Register since May 7, 2008, and it will apply to certain other legal material published in electronic form on or after January 1, 2018. The new law does not apply to court documents.
- House Bill 1728 was initially of interest to the Section because it would have allowed prosecuting

attorneys to issue "administrative subpoenas" to obtain subscriber information in investigations involving the sexual exploitation of children. However, as enacted the bill establishes a "special inquiry judge process" for the issuance of such subpoenas.

- Substitute House Bill 1417 amends the Open Public Meetings Act to allow the use of executive sessions (which are not open to the public) to address certain computer and telecommunications system security issues.

All of these bills will become effective on July 23, 2017. The full text of the new laws is available at <http://app.leg.wa.gov/billinfo>.

The Section also offered comments on the following legislation, which did not successfully pass the regular or first two special sessions. (As of the date of preparation of this update, the third special legislative session was still pending. Please check the Washington Legislature's webpage for the most up-to-date information on bill status.)

- The Section's Board formally opposed Senate Bill 5057, citing numerous practical problems with the bill's proposal to amend the Administrative Procedure Act to allow any party to "remove an adjudicative proceeding" from an agency's hearing officer to an Office of Administrative Hearings officer. The bill died in committee.
- The Section's Board also formally opposed Senate Bill 5350 as drafted. The bill would have established a two-year deadline for issuing final decisions in adjudicative cases. The Board explained several practical problems with the bill and offered to work on revisions that could address the specific situation that prompted the bill. The bill sponsor did not respond to the Section's offer. The bill died.
- Senate Bill 5211 was the same as Substitute Senate Bill 6019 from the legislature's 2015-2016 session, which the Section formally opposed due mainly to its proposed elimination of initial orders and its requirement that all orders be "final." The Section's Board advised WSBA that its prior opposition statement applies to Senate Bill 5211. The new bill passed out of committee but then died.

Caselaw Update

Abdullatif Arishi v. Washington State University, 196 Wn. App. 878 (2016)

By Chad Standifer

Abdullatif Arishi challenged his expulsion from WSU's doctoral program in education, claiming the university failed to afford him a full adjudicative proceeding required by the Washington Administrative Procedure Act, chapter 34.05 RCW (APA). Division III of the Court of Appeals agreed, invalidating a brief adjudication conducted by Washington State University (WSU) and remanding the matter for a full hearing. The court also held that because the agency was not substantially justified in providing a brief adjudication, Mr. Arishi was entitled to award of attorney fees on appeal under the Equal Access to Justice Act (EAJA), RCW 4.84.340-.360.

Upon learning of Mr. Arishi's arrest for third-degree rape and molestation of a 15-year-old girl, WSU notified him it was charging him with violating WSU's standards of student conduct. WSU's administrative regulation, WAC 504-04-010, provided that student conduct proceedings, without exception, "are matters to be treated as brief adjudications pursuant to RCW 34.05.482 through 34.05.491." Over Mr. Arishi's objection, WSU denied him a full adjudication and conducted a one-hour hearing before a student conduct board, which the court characterized as a "hybrid" process falling somewhere between brief and full adjudication. Under the university's student conduct procedure, at hearing the rules of evidence were not applied, only board members could question witnesses, proposed student questions had to be submitted in writing to a board member who would decide whether or not to ask them, and the student had no opportunity to subpoena witnesses or documents. In a written decision WSU found Mr. Arishi responsible for all violations, expelled him, and trespassed him from the WSU campus until January 1, 2020.

RCW 34.05.582(1)(d) provides that an agency may use a brief adjudicative proceeding if "the issues and interests involved in the controversy do not warrant" a full adjudication. This was a matter of first impression, as no court had construed RCW 34.05.582(1)(d). As background to its decision, the court cited to the Model State Administrative Procedure Act, which provides for less than a full adjudication in disciplinary sanctions against students only where the expulsion or suspension is for 10 days or less. Applying the United States Supreme Court's due process jurisprudence, the court found that, "(p)ivate interests may warrant full adjudication where the severity of a deprivation—its length, a resulting stigma, or its impact on a person's life or liberty—justify additional safeguards for the individual affected." The court held that a brief adjudication was inadequate given the issues and interests in Mr. Arishi's case, which included

the risk of losing his financial and personal investment in three years of doctoral education, his lawyer's representation that he would not be able to complete the program, the damage to his personal reputation, and the loss of his visa and his ability to remain legally in the United States.

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

By Ann Marie Soto

After almost 20 years of silence, the Washington state Supreme Court finally adopted what has become known as the "Telford test,"¹ a four-factor test to determine whether a private or quasi-private entity is an "agency" subject the Public Records Act (PRA), Chapter 42.56 RCW. In *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509 (2017), Fortgang sought records concerning elephants at the Woodland Park Zoo under the PRA from the Woodland Park Zoo Society (WPZS). WPZS responded to the request by providing some records in the interest of transparency, but asserted much of the requested information was not subject to public disclosure under the PRA. Fortgang filed a lawsuit alleging the WPZS violated the PRA. After the trial court granted summary judgment in favor of WPZS—and the Court of Appeals affirmed—on the basis that WPZS is not an "agency" for purposes of the PRA, the Supreme Court granted Fortgang's petition for review.

WPZS is a private nonprofit organization that operates the Zoo through an Operations and Management Agreement with the City of Seattle. The Agreement defines the parties' legal relationship and outlines the parties' responsibilities.

In adopting the *Telford* test, the court declined to limit its application to entities with "material government attributes" as suggested by WPZS and amici groups.² Nonetheless, the court applied each of the four *Telford* factors to determine whether WPZS is an "agency" or the "functional equivalent of an agency" for purposes of the PRA's disclosure requirements.

The *Telford* test outlines four factors relevant to deciding when a private entity is treated as the functional equivalent of an agency: (1) whether the entity performs a government function, (2) the extent to which the government funds the entity's activities, (3) the extent of government involvement in the entity's activities, and (4) whether the entity was created by the government.

The court found the first, third, and fourth factors weighed *against* PRA application in this case. First, although RCW 35.64.010 authorizes cities to contract with nonprofits to operate a zoo, zoo operation is not an "inherently governmental function" and nothing in state law requires cities to operate zoos.³ Second, the City of Seattle lacks sufficient

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Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Eileen M. Keiffer emkeiffer@gmail.com.

Administrative Law Section Homan Award

By Marjorie Gray

The [Frank Homan Award](#) is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member. Nominations for 2017 closed on June 30, 2017.

It's not too early to nominate for 2018! Nominations can be made by sending an email to schaergirl@comcast.net. Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

Prior Recipients

2016 — John F. Kuntz
 2015 — Ramsey Ramerman
 2015 — Eric Stahl
 2013 — Alan D. Copsy
 2011 — Larry A. Weiser
 2010 — Jeffrey Goltz
 2008 — Kristal Wiitala
 2007 — C. Dean Little
 2006 — William R. Andersen
 2005 — Bob Wallis

Caselaw Update *continued*

authority over the Zoo's "day-to-day operations," such as pricing, personnel, vendor contracting, animal exhibits, and other facilities.⁴ And, third, the creation, or "origin," of WPZS is not attributed to special legislation or other governmental action. Instead, the WPZS was incorporated solely by private individuals. Thus, even though the court found the second factor—the nature and percentage of government funding—inconclusive, balanced as a whole, the court held WPZS is *not* the functional equivalent of an agency and, therefore, not subject to public disclosure requirements. This holding is in line with the PRA's broad mandate for open government, and protects the public's interest in government transparency by keeping governments from operating in secret through private entities.

1 Division II of the Court of Appeals originally adopted the test in *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149 (1999), derived from case law interpreting the federal Freedom of Information Act. The other two divisions adopted the *Telford* test years later. *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 716–20 (Div. I 2015); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192 (Div. III 2008).

2 *Id.* at 522.

3 *Id.* at 526-27.

4 *Id.* at 530.

Join Our Section!

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

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


Administrative Law Section List Serve

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