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Court of Appeals No. 72413-4-I
King County Superior Court No. 14-2-04220-5 SEA

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ALYNE FORTGANG,

Appellant/Plaintiff,

v.

WOODLAND PARK ZOOLOGICAL SOCIETY a/k/a WOODLAND PARK ZOO

Respondent/Defendant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Eight days before the Zoo filed its opposition brief, the Washington Supreme Court reiterated that courts considering whether entities such as the Zoo are subject to Washington's far-reaching PRA must "engage in a practical analysis" and "avoid interpreting the PRA in a way that would tend to frustrate" its essential purpose of "giving interested members of the public wide access to public documents to ensure governmental transparency." *Worthington v. Westnet*, __ Wash.2d __, 341 P.3d 995, 998-99 (Wash. 2015). The strained legal and factual arguments upon which the Zoo relies fall short of the practical analysis required by Washington law.

Try as it might, the Zoo cannot parse its way around the practical reality that it is the functional equivalent of a public agency for purposes of Alyne Fortgang's public records requests. The City created the Zoo more than a century ago. It owns all of the land and buildings to this day. The City required enabling legislation from the state legislature to delegate management of the Zoo to the Woodland Park Zoological Society ("WPZS") and was required to maintain sufficient involvement and oversight to ensure "public accountability" during the term of the agreement. The City exercises extensive control over the Zoo's operations, including the Zoo's policies governing the acquisition, care

and disposition of animals. The City requires extensive reporting from the Zoo, which is subject to both independent *and* government audits. The Zoo even identifies itself as a "City of Seattle facility" in its quarterly "MYZoo" magazine.[1] Given these facts and others discussed below, the Zoo's arguments regarding the individual *Telford* factors fail.

II. ARGUMENT

A. The Zoo's Argument that *Telford's* Government Funding Factor Only Favors Public Disclosure when an Entity Operating a City Facility Receives a Majority of its Funding from Public Sources is Inconsistent with the Plain Language of the *Telford* Decision and the Intent of the PRA.

The Zoo urges this Court to rule that no matter how many hundreds of millions of dollars of taxpayer money are diverted to an entity like the Zoo, *Telford's* "government funding" factor will never favor disclosure unless the entity receives "at least a significant majority of its funds from public sources."[2] (Opposition Brief ("Opp.") 17.) That restrictive interpretation contradicts the intent of the PRA and the plain language of *Telford*, and finds no support in any relevant decision.

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[1] *See* http://www.zoo.org/document.doc?id=1504 (Spring, 2015 issue, p. 3), last visited March 2, 2015.

[2] The Zoo relies on its 2013 budget figures to argue that "74% of WPZS' revenue comes from non-public sources," but does not acknowledge that in prior years public dollars have accounted for as much as 42.4% of its budget. (Opp. 6) (*See* CP 75-96 (summarized at CP 99).)

The Zoo bases its argument on passing references to public funding in *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 164, 974 P.2d 886, 894, *review denied*, 138 Wash.2d 1015, 989 P.2d 1143 (1999) and *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 195, 181 P.3d 881 (2008). (Opp. 16.) While those references support the notion that majority-public funding is *sufficient* for this factor to favor disclosure, nothing in either decision supports the Zoo's argument that it is *necessary*.

Moreover, *Telford* contradicts the Zoo's argument. The Zoo concedes that *Telford* analogized Washington's PRA to the South Carolina public records statute that applies to entities that are "supported in whole or in part by public funds or expending public funds." (Opp. 15, citing *Telford* and *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401, 401 S.E.2d 161, 163 (1991).) The Zoo urges this Court to ignore the substance of *Telford's* discussion analogizing the two statutes, but its argument has no merit.

In *Telford*, the entities at issue had argued that the public funds they received should not weigh in favor of applying the PRA because the funds were consideration for services rendered. 95 Wash. App. at 164. The court rejected that argument, emphasizing that the funds were delivered "before services are rendered" and "support the associations'

entire operations, they are not identified for specific goods or services." *Id.* The court then added its *Cf* citation to *Weston* and paraphrased the relevant portion of *Weston* as follows: "FOIA does not apply to business enterprises that receive public money in return for specific goods on an arms-length basis, but when a block of public funds is diverted en masse, the public must have access to records of the spending organization to determine how the funds were spent." *Id.*

Considering the context of the court's citation and the language it used to summarize *Weston*, there is no doubt that the court found the *Weston* court's application of the South Carolina "follow the money" statute analogous to the Washington statute's "strongly worded mandate" for public access in cases where the government diverts public funds *en masse* to a nominally private entity. 95 Wash. App. at 158. The analogy applies with equal force in this case because the City diverts *en masse* blocks of public funds to the Zoo on an annual basis to support the Zoo's general operations. (CP 42-45.) The City even collects public funds for the Zoo via a levy that the City placed on the ballot to fund City programs and facilities like the Zoo. (CP 34.) No other Washington court has discussed this factor in more detail than *Telford*, nor has any Washington court disagreed with *Telford* on this point. *Telford*'s discussion of *Weston* is consistent with the PRA's explicit purpose, the facts of this case

analogous to the facts in *Telford*, and there is no reason for this Court to disregard *Telford's* sound reasoning.

The Zoo's misplaced reliance on *Kubick v. Child & Family Servs. of Michigan, Inc.*, 171 Mich. App. 304, 429 N.W.2d 881 (1988) underscores this point. (Opp. 17.) The Zoo purports to cite *Kubick* as an example of a state court requiring majority-public funding to support public disclosure. But the Zoo leaves out the fact that the Michigan statute at issue in *Kubick* is expressly limited to private entities that are "*primarily* funded by or through state or local authority." *Id.* at 307, quoting Michigan Compiled Laws § 15.232(b)(iv) (emphasis added). The language from *Kubick* quoted in the Zoo's brief simply discusses the plain meaning of the word "primarily," which limits the Michigan statute but does not appear in Washington's PRA.

Kubick is an instructive counterpoint to the broad South Carolina statute that *Telford* found analogous to Washington law. *Kubick* was decided in 1988 and so was available when the *Telford* court issued its ruling in 1999. The fact that *Telford* analogized Washington's statute to South Carolina's "follow the money" statute in *Weston*, rather than the more restrictive Michigan statute in *Kubick*, is further evidence that the Zoo's restrictive "significant majority of funding" standard (which would

set the bar even higher than the Michigan statute) is inconsistent with Washington law.

The Zoo's heavy reliance on *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wash. App. 602, 137 P.3d 120 (2006) is also misplaced. The only discussion of the *Telford* factors in *Spokane Research* was dicta that the court emphasized was included "solely for argument[.]"[3] *Id.* at 608. *Spokane Research* also involved public funding in the form of government grants, which the court emphasized was "a totally different funding stream" from the "dues and assessments" that funded the entities at issue in *Telford. Id.* at 609. In this case, public funding for the Zoo comes from a levy – i.e. an "assessment." By its own terms the *Spokane Research* dicta discussing a charity receiving government grants is irrelevant to this case.

The Zoo also sets up a straw-man argument that this Court should adopt its unsupported "significant majority of funding" standard because the "total dollar amount of public funds received" does not inform the

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[3] The holding in *Spokane Research* was that *Telford* was not implicated because there was "no ambiguity" about the non-governmental status of a charitable association that "simply rents space from the City, administers public and private grants, subleases space for its own benefit, and operates apart from government control" and among other things was not subject to government audits. 133 Wash. App. at 608. The Zoo does not seriously argue, nor could it, that the holding in *Spokane Research* applies to a City facility that operates under the strict City-imposed regulations, reporting and government audit obligations discussed further below.

court about whether "the entity is engaged in the conduct of government" and posits that private entities could be subject to the PRA based "solely on the size of public support received." (Opp. 18-21.) But that argument ignores the fact that courts must consider all four *Telford* factors – including a dedicated inquiry into whether the entity performs a "governmental function." *Telford*, 95 Wash. App. at 162. The plain language of the functional equivalency test defeats the Zoo's hypothetical "parade of horribles" argument.

Telford emphasized that courts must determine "on a case-by-case analysis of various factors, whether a particular entity is the functional equivalent of a public agency for a given purpose." 95 Wash. App. at 161. In light of the PRA's broad mandate for public accountability and the importance of disclosure when the government diverts large blocks of public funds to an entity operating a City facility, a practical analysis of this factor weighs strongly in favor of disclosure.[4] Fortgang submits that for purposes of the specific issue at bar – *i.e.* whether the PRA applies when a citizen submits a document request to a City facility seeking information about that facility's use of resources to conduct a public relations campaign defending its operations – this factor is dispositive.

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[4] The Zoo's decision to cherry-pick its 2013 budget to the exclusion of all other years underscores the gamesmanship that a fixed percentage "bright line" standard would encourage. (Opp. 6, *see also* Opp. 2, 15-16, 34.)

But this Court does not need to reach that question because the Zoo's arguments on the other three *Telford* factors also lack merit.

B. The Zoo's Argument with Respect to *Telford's* "Extent of Government Involvement or Regulation" Factor Misstates Washington Law and Mischaracterizes the Operating Agreement.

1. The Decision in *Sebek v. City of Seattle* is Irrelevant to the PRA's *Telford* Analysis.

The Zoo's argument that *Telford's* "extent of government involvement or regulation" factor weighs against disclosure strains credibility. The Zoo's primary argument is that a decision in the unrelated lawsuit *Sebek v. City of Seattle* "determined as a matter of law" that the City does not exercise enough of a "right of control" over the Zoo for this factor to favor disclosure. (Opp. 21.) But *Sebek* had nothing to do with the PRA or the *Telford* analysis.

Sebek involved an appeal from an order granting a motion to dismiss for lack of taxpayer standing in a lawsuit alleging that the City was liable for the Zoo's allegedly criminal acts. *Sebek v. City of Seattle*, 172 Wash. App. 273, 277-80, 290 P.3d 159 (2012). The language quoted in the Zoo's brief is dicta discussing an "apparent" argument by the appellant that the City exercises such stringent control over the Zoo that it should be vicariously liable for the Zoo's allegedly unlawful acts. *Id.*, discussing *Dolan v. King Cnty.*, 172 Wash. 2d 299, 258 P.3d 20 (2011), *as*

corrected (Jan. 5, 2012). The Zoo has no basis to argue that one paragraph of dicta from a decision that never even mentioned the PRA has any bearing on how the PRA should be applied, much less that it "determined as a matter of law" that this factor weighs against disclosure.

The Zoo argues that this Court should read the "right of control" standard for vicarious liability discussed in the *Sebek* dicta into Washington's PRA because the *Telford* decision used the shorthand "government control" to refer to this factor, notwithstanding the fact that *Telford* explicitly adopted the "extent of government involvement or regulation" standard used by other courts as the relevant inquiry. 95 Wash. App. at 162-63 (Opp. 21-22.) The Zoo's argument fails. If the *Telford* court had intended to replace the "extent of government involvement or regulation" standard used by other courts considering public records disputes with the stringent "government control" standard for vicarious liability discussed in *Sebek* and *Dolan* it would have said so.

The Zoo's proposed "government control" standard finds no support in Washington law. To the contrary, a ruling that the "extent of government involvement or regulation" factor weighs against disclosure unless the City's control is so extensive as to trigger vicarious liability would violate the PRA's mandate that it be "liberally construed" to

promote public accountability. RCW 42.56.030. This Court should reject the Zoo's invitation to commit such an error.

2. The Zoo Materially Misrepresents the City's Level of Involvement and Regulation of its Operations Under the Operating Agreement.

The Zoo's factual arguments regarding the extent to which the City is involved in and regulates its operations are also meritless, and in some cases cross the line into outright misrepresentation. Most notably, the Zoo tries to shoehorn itself into the facts of *Spokane Research* by repeatedly asserting that it is "not government audited." (Opp. 11; *see also* Opp. 6, 25, 26.) That is simply false. The Operating Agreement explicitly states that the Zoo must allow "the City and the State Auditor to perform audits of the use and application of all revenues, grants and fees, all City funds, except for private fundraising activities and donor information, received by WPZS during the current and preceding year, including Zoo operations and management." (CP 55.) The obligation to comply with requests for government audits is *in addition to* the City's mandate that the Zoo conduct an independent annual audit *and* deliver an original signed copy of the audit to the Superintendent of the City's Department of Parks and Recreation. (CP 54.)

The Zoo also asserts that "WPZS retains all admission proceeds and spends them at its discretion." (Opp. 6.) That is also not true. The

City requires the Zoo to spend "All revenue collected by WPZS associated with the Zoo . . . exclusively for purposes related to Zoo operations and development." (CP 39, 52.) Far from "retention" and "discretion," the City requires the Zoo to put every penny it collects back into operating the City facility to which Fortgang's document requests were directed.

The Zoo even goes so far as to characterize itself as "formerly public" notwithstanding the City's mandate that the 90+ acres of City parkland on which the Zoo operates must be maintained "*solely* for the operation of a *public* zoological gardens." (Opp. 29; CP 41 (emphasis added).) These misrepresentations underscore the Zoo's inability to dispute City's extensive "involvement [and] regulation" of its operations.

Even when the Zoo does not misrepresent its relationship with the City, its only strategy is to ask the Court to ignore key parts of the Operating Agreement. For example, the Zoo does not deny that the City regulates its acquisition, care, sale and disposition of animals by incorporating: 1) the Long Range Plan adopted "by the City"; 2) third party guidelines adopted by the American Zoo and Aquarium Association ("AZA"); and 3) additional "acquisition and disposition policies approved by the City." (CP 47, 49.) The Zoo urges the Court to ignore all of these City-imposed regulations, arguing that they "do not evince City Control." (Opp. 23.) That argument fails at every level. The Zoo does not explain

how mandatory compliance with the Long Range Plan adopted "by the City" "does not evince City control." It tries to dismiss the mandatory compliance with AZA regulations by arguing that "zoos are independently obligated to follow all federal, state and local laws in order to maintain AZA accreditation," but ignores the fact that the City *requires* the Zoo to maintain the accreditation in the first place. (CP 47, 49.) The Zoo tries to dismiss the fact that it must comply with additional City-specific "acquisition and disposition policies" for the animals based on the bald assertion that the City has not yet exercised that authority. (CP 49; Opp. 23, n. 11.) That assertion would not reduce the "extent of government involvement or regulation" of the Zoo even if there were evidence to support it (which there is not) because City has the undisputed unilateral right, at any time, to impose whatever additional restrictions on the Zoo's acquisition and disposition of animals it sees fit.

The City's extensive control over the Zoo's acquisition, care and disposition of the animals also fatally undermines the Zoo's reliance on the Operating Agreement's language purporting to transfer temporary "ownership" of the animals to the Zoo. (Opp. 5, 23.) The Washington Supreme Court's recent *Worthington* decision emphasized that a court's "practical analysis" of whether the PRA applies in a particular case "cannot rely solely on the self-imposed terms" of the contract at issue.

341 P.3d at 999-1000. Reliance on such self-imposed terms rather than the reality of the parties' conduct is reversible error. *Id.* In this case, the use of the word "ownership" in the Operating Agreement is belied by the City's mandate that the Zoo acquire, use, care for and dispose of the animals in accordance with the City-adopted Long Range Plan, standards set by the AZA and additional standards set by the City. (CP 47, 49.) Moreover, "ownership" of the animals automatically reverts to the City when the Operating Agreement expires or is otherwise terminated. (CP 39, 49; *see also* RCW 35.64.010(1) (limiting the term of the Operating Agreement.) That is not "ownership" by any practical standard.

Taken together, the City's extensive control over the Zoo's operations is the very essence of government "involvement or regulation," and exactly what one would expect of an agreement to have a nominally private entity manage a City facility that remains subject to the PRA's broad mandate for public disclosure.

3. The Zoo's Argument that its Reporting and Audit Requirements do not Evidence "Government Involvement or Regulation" of its Operation Fails.

The Zoo tries to dismiss its extensive monthly, quarterly and annual reporting and audit obligations to the City by arguing that they do not evidence government involvement or regulation because they are "no

more than statutorily-required oversight measures[.]" (Opp. 24.) The argument that reporting obligations imposed by a City government in a contract to manage a City facility do not evidence "government involvement or regulation" because they are "statutorily-required" makes no sense. The argument makes even less sense in light of the fact that the statute at issue requires the City to remain involved in the Zoo's operations to ensure "public accountability." RCW 35.64.010(5).

It appears the Zoo may be arguing that contractual obligations relating to public accountability required by RCW 35.64.010(5) should be excluded from the Court's consideration of government involvement or regulation for purposes of the PRA. The Zoo cites no authority for this circular argument, which also fails because the PRA "unambiguously provides for a liberal application of its terms *explicitly subordinating other statutes to its provisions and goals*." *Worthington*, 341 P.3d at 999 (emphasis added). Under any practical analysis, the extensive reporting requirements imposed by the City weigh heavily in favor of finding that the Zoo must comply with the PRA.

The Zoo cites *Dolan* and *Brock v. Chicago Zoological Soc.*, 820 F.2d 909 (7th Cir. 1987) but these cases are just as irrelevant as *Sebek* in the context of the PRA. (Opp. 24-25.) In *Dolan*, the court affirmed a judgment that nominally independent organizations were "employers" and

"agencies" of the government as those terms are defined for purposes of determining whether their employees were eligible to enroll in the Public Employees Retirement System. 172 Wash.2d at 320. The language from *Dolan* quoted in the Zoo's brief relates to the same vicarious liability standard discussed in *Sebek*. *See Sebek*, 172 Wash. App. at 279-80 (discussing *Dolan*). That standard does not apply in the PRA context, as discussed above. *Brock* is similarly inapposite. The language the Zoo quotes from *Brock* deals with the standard for determining whether an employer is liable for citations issued by the Occupational Safety and Health Administration. 820 F.2d at 910-11. It is telling that, despite the numerous federal and state court decisions discussing the functional equivalency analysis in public records cases, the Zoo could not locate a single case involving public records to support its position.

4. The Facts of this Case Contrast Sharply with the Complete Lack of "Outside Government Control" Discussed in *Spokane Research*, and are Even more Compelling than the Facts in *Clarke*.

The Zoo concludes its discussion of the "extent of government involvement or regulation" factor by trying to compare the facts at bar with *Spokane Research*. (Opp. 26.) The comparison does not bear scrutiny. The dicta in *Spokane Research* emphasized that "No outside government control of the Association is visible here." 133 Wash. App. at

609. In this case, the City controls or is involved in regulating every significant aspect of the Zoo's operation, including but not limited to where the Zoo is located and how its City parkland can be used (including a prohibition on any capital improvements or alterations that are inconsistent with the City-approved Long Range Plan), how the Zoo acquires, cares for and disposes of animals, how the Zoo must spend all revenues it collects, board membership, increases in admission fees and naming rights for the Zoo and its related facilities. (CP 40, 41, 42, 47, 48, 52, 55.)

Also in sharp contrast to the lack of any reporting requirement in *Spokane Research*, the Zoo must submit to the City an annual plan and at least *seventeen* reports to the City every year, present the City with an original signed annual audit and submit to audits by the City and State Auditors. (CP 53-55.)

Far from being comparable to *Spokane Research*, the extensive regulation and control at issue here are several orders of magnitude beyond the limited restrictions, regulation and monthly reporting requirements that caused this factor to cut in favor of public disclosure in *Clarke*. *See* 144 Wash. App. at 195 (finding "some restrictions on how the facilities can be used", incorporation of third party regulations governing the disposition of animals and "monthly reports" to be "a notable degree

of governmental control" that "weighs in favor of finding that TCAC is the functional equivalent of a public agency" for purposes of the PRA.).

Clarke also disposes of the Zoo's argument that this factor should weigh against disclosure because the Zoo manages certain aspects of its day-to-day operations. (Opp. 22.) As the *Clarke* decision makes clear, managing a facility's day-to-day operations does not weigh against disclosure where – as here – the government restricts how the facilities can be used, regulates key aspects of how services are provided (such as the treatment and disposition of animals) and imposes reporting requirements. *Clarke*, 144 Wash. App. at 195. A practical analysis of the "government involvement or regulation" factor, particularly in light of *Spokane Research* and *Clarke*, leaves no doubt that this factor weighs heavily in favor disclosure.

C. The Zoo's Argument that Contracting to Operate a City Facility is not Performing a Governmental Function for Purposes of the PRA Lacks Merit.

The Zoo's argument that stepping into the City's shoes to operate a public City of Seattle facility is not a "governmental function" for purposes of the PRA is inconsistent with any practical analysis of the relevant facts. The Zoo's primary argument is that this factor only favors disclosure when the City does not have authority to "wholly" delegate the function at issue to the private sector. (Opp. 26-29.) Fortgang does not

concede that this factor of the *Telford* analysis is that restrictive, but this Court need not reach that issue because this case satisfies the Zoo's proposed standard.

The Zoo derives its proposed standard from the fact that, in *Telford* and *Clarke*, the delegation of authority to the nominally private entities required enabling legislation. *See Telford*, 95 Wash. App. at 164; *Clarke*, 144 Wash. App. at 194. That is the case here as well. The Operating Agreement concedes that the it exists because RCW 35.64.010 affirmatively "authorize[d] certain cities, including the City, to enter into contracts with non-profits or other public organizations for the overall management and operation of a zoo[.]" (CP 34.) But for the enabling legislation, the Operating Agreement could not exist and the Zoo could not operate under even nominally private management. In the succinct words of *Clarke*, the Zoo's "performance depends on its contract with the [City] [citation to enabling statute.] Thus, [the Zoo] is performing a governmental function that can never be wholly delegated to the private sector." 144 Wash. App. at 194.

This point is amplified by the fact that the enabling legislation expressly prohibits the City from wholly delegating the governmental function of managing the Zoo to WPZS, or any other entity, in a manner that would frustrate the strong public policy enshrined in the PRA relating

to public accountability. The legislative history of the statute is explicit that any contract to delegate Zoo management must "provide for oversight of the managing and operating entity *to ensure public accountability*." Washington Final Bill Report, 2000 Reg. Sess. S.B. 6858 (emphasis added). That requirement was codified at RCW 35.64.010(5).[5]

Here, again, the relevant facts contrast sharply with *Spokane Research*, in which no enabling legislation or public accountability requirement existed. 133 Wash. App. at 604-05. Accordingly, this case is on all fours with both *Telford* and *Clarke* and contrasts with *Spokane Research*. This factor weighs in favor of public disclosure even under the Zoo's proposed standard.

The Zoo urges this Court to raise the standard even higher, arguing that even when enabling legislation is required, the "governmental function" factor should still weigh against disclosure unless the entity at issue is performing a "core" government function that is "incumbent upon the government to deliver." (Opp. 26-32.) This argument fails under the plain language of the *Telford* analysis, which explicitly adopted the

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[5] The City erroneously claims that the enabling legislation authorized the City to "privatize" the Zoo. (Opp. 31.) No interpretation of the statute could support that conclusion. In addition to the obligation to maintain public accountability, the enabling statute also limits the term of the Operating Agreement, imposes public hearing and comment obligations on all initial and renewal contracts and imposes other restrictions. *See* RCW 35.64.010.

standard formulated by other courts in public records cases, namely "whether the entity performs a government function[.]" *Telford*, 95 Wash. App. at 162. If the *Telford* court believed this factor should be limited to "core" or "incumbent" government functions under Washington law it would have said so.

The Zoo cites to *Clarke* but its reliance is misplaced. In *Clarke*, the entity at issue had been delegated certain police powers, and the court simply noted that its ruling implicated "core government functions." 144 Wash. App. at 194. Nothing in *Clarke* suggested that access to documents under the PRA is limited to "core" or "incumbent" functions. Such a ruling would contradict the PRA's explicit mandate that it be "liberally construed" to facilitate "full access to information concerning the conduct of government on every level." RCW 42.56.030; *Telford*, 95 Wash. App. at 158, n. 12.

The Zoo also argues that this factor should cut against disclosure because neither the enabling statute nor the Operating Agreement expressly reference the PRA. (Opp. 31-32.) This argument fails as well. Both the plain language of RCW 35.64.010(5) and the statute's legislative history require the City to be sufficiently involved in the operation of the Zoo to ensure public accountability. *See* Washington Final Bill Report, 2000 Reg. Sess. S.B. 6858. The Zoo's argument that the enabling

legislation somehow preempted the PRA has no merit. By explicitly requiring "public accountability" the legislature made clear its intent that entities like the Zoo be subject to all relevant Washington public accountability laws, including but not limited to the PRA, without adding a laundry list of specific statutes that would need to be amended every time a new statute touching on "public accountability" is enacted.

The Zoo's argument is even more meritless because "public accountability" is the very core of the PRA's broad mandate for public access to information. *See Telford*, 95 Wash. App. at 159. Moreover, the PRA itself "explicitly subordinat[es] other statutes to its provisions and goals," stating, "'*In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.*'" *Worthington*, 341 P.3d at 999 (emphasis in original) (quoting RCW 42.56.030). Thus, even if one could interpret RCW 35.64.010(5) in the exclusionary way urged by the Zoo, such an interpretation would impermissibly violate the PRA's express mandate. The Court should reject the Zoo's invitation to commit such an error.

The fact that the Operating Agreement does not expressly reference the PRA also does not help the Zoo. The Operating Agreement broadly incorporates the PRA and other relevant statutes by requiring the Zoo to comply with all applicable laws. (CP 62.) This broad language

defeats the Zoo's argument that the Zoo need not comply with statutes that are not specifically referenced in the agreement.

Moreover, the "self-imposed terms" of the Operating Agreement do not govern whether the PRA applies in any event. *Worthington*, 341 P.3d at 999. This Court's determination must be based on a "practical analysis" of the parties' relationship and behavior, which in this case leave no doubt that the Zoo stepped "into the shoes of" the City to continue operating a City facility. *Id.*, *Clarke*, 144 Wash. App. at 194. Accordingly, this factor weighs in favor of disclosure.

D. The Zoo's Argument that this Court's Analysis of the Final *Telford* Factor Should Focus on WPZS Rather than the "City of Seattle Facility" it Manages is Inconsistent with the Intent of the PRA.

The final *Telford* factor is "whether the entity was created by government." 95 Wash. App. at 162. The Zoo urges this Court to limit its analysis of this factor to WPZS in its capacity as a private 501(c)(3) entity, and to disregard the zoological facility the City created and operated for more than a century before delegating its day-to-day management to WPZS. (Opp. 32-33.) Fortgang respectfully submits that the Court's analysis of this factor should focus on the Zoo itself rather than the entity that stepped into the City's shoes to manage it.

The PRA must be "liberally construed . . . to assure that the public interest will be fully protected." RCW 42.56.030. As the court noted in *Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n*, 181 Conn. 544, 551, 436 A.2d 266, 269 (1980) (which *Telford* cited as one of the cases supporting adoption of the functional equivalency test in Washington), "a policy of liberal access to public records would necessarily be thwarted if 'public agencies' were given a narrow construction." The PRA's liberal construction requirement would likewise be thwarted if this Court were to adopt an unduly narrow construction of the word "entity" under the facts of this case. *See Telford*, 95 Wash. App. at 161 (emphasizing that courts applying the functional equivalency test must conduct "a case-by-case analysis" of all four factors.)

There is ample support in the record for this Court to rule that in the context of this case the final *Telford* factor relates to the Zoo itself rather than to WPZS. As the discussion in the foregoing sections makes clear, the Operating Agreement did not bring about any material change in the municipal function the Zoo had performed for more than a century. To the contrary, the Zoo grounds and buildings remain City property. WPZS is technically a 501(c)(3) but is bound to maintain the City park land on which it operates "solely for the operation of a public zoological gardens

and related and incidental purposes and programs" subject to extensive regulations imposed by the City, must carry out the Long Range Plan adopted by the City and is subject to extensive reporting and oversight requirements. (CP 41, 47.) The Zoo remains a City of Seattle facility in every sense. Moreover, the document request that triggered this lawsuit was directed specifically to documents relating to the operation of the Zoo itself. (*See* Opening Brief, 3-4.)

All of the material facts in this case relate to the public facility of the Zoo, not to WPZS in its capacity as a private 501(c)(3) entity. Courts considering disputes over the application of public disclosure statutes "have consistently rejected formalistic arguments [that seek] to make determinative [an organization's] nominal status" as a private concern when such arguments would frustrate the crucial public policy favoring public accountability. *Bd. of Trustees of Woodstock Acad.*, 181 Conn. at 553-54. This Court should rule that the final *Telford* factor weighs in favor of disclosure because this case involves documents that relate to the operation of a zoological facility the City created more than a century ago, and which remain "public zoological gardens" to this day. (CP 41.)

III. CONCLUSION

All four *Telford* factors weigh heavily in favor of disclosure in this case. The City diverts millions of taxpayer dollars to the Zoo every year

to fund its general operations and also supports the Zoo with in-kind support including free use of more than ninety acres of City parkland. The City is extensively involved in and regulates the Zoo's operation and imposes extensive reporting and audit obligations on the Zoo. The City could not wholly delegate operation of the Zoo to the private sector, and in fact the enabling legislation specifically requires the City to remain involved in the Zoo's operation to ensure public accountability. Finally, all of the facts in this case relate to the Zoo as a public zoological facility and have nothing to do with WPZS' technical 501(c)(3) status.

Applying a practical analysis and weighing all four *Telford* factors, this Court should reverse the superior court and rule that the Zoo is the functional equivalent of a public agency for purposes of Fortgang's public records request. Fortgang respectfully requests that the Court reverse the trial court and grant the relief she has requested.

DATED March 2, 2015.

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

I certify that on March 2, 2015, I caused to have served an original and one copy upon the Clerk of the Court of the Court of Appeals – Division I, and one true and correct copy upon Gregory J. Wong and Paul J. Lawrence of the following **REPLY BRIEF OF APPELLANT** by the method(s) indicated below:

Gregory J. Wong Paul J. Lawrence Pacifica Law Group LLP 1191 Second Avenue, Suite 2100 Seattle, WA 98101 *Attorneys for Respondent/Defendant*	X _____ _____ _____	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile
Clerk of the Court Court of Appeals - Division I One Union Square 600 University St Seattle, WA 98101-1176	X _____ _____ _____	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

DATED this 2nd day of March, 2015, at Seattle, Washington.

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