No. 92846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALYNE FORTGANG,

Petitioner/Appellant/Plaintiff,

v.

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

Respondent/Defendant.

PETITION FOR REVIEW

KILPATRICK, TOWNSEND & STOCKTON LLP

Rob Roy Smith, WSBA No. 33798
Christopher Varas, WSBA No. 32875
1420 Fifth Avenue, Suite 3700
Seattle, Washington 98101
Telephone:(206) 467-9600
Facsimile: (206) 623-6793

Attorneys for Petitioner/Appellant/Plaintiff Alyne Fortgang

TABLE OF CONTENTS

Page

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

V. ARGUMENT 7

A. There is a substantial public interest in a ruling by the Supreme Court as to whether the Court of Appeals erred in its narrow interpretation of the *Telford* factors. 8

1. The PRA is a strongly worded mandate for public disclosure that subordinates other statutes to the PRA's provisions and goals. 9

2. The Court of Appeals' narrow interpretation of the *Telford* Factors is inconsistent with the PRA's broad mandate for transparency, and should be reviewed by the Supreme Court. 10

a. The Supreme Court should review the Court of Appeals' ruling that the factor "whether the entity performs a government function" should be read as "whether the entity provides a core function; unique to government; that cannot be wholly delegated to the private sector". 11

b. The Supreme Court should review the Court of Appeals' ruling that the factor "the level of government funding" should be read as "whether a majority of the entity's funding comes from the government." 13

c. The Supreme Court should review the Court of Appeals' ruling that the factor "the extent of government involvement or regulation" should be read as "whether the government's control over the entity is so substantial that its employees are entitled to government employee benefits and the government would be liable for the entity's unlawful acts." 14

d. The Supreme Court should review the Court of Appeals' ruling that the factor "whether the entity was created by the government" should focus exclusively on the origin of the private entity even when the entity assumes management of a facility the government created, managed for over a century and continues to own. 17

VI. CONCLUSION 18

APPENDIX

Court of Appeals, Division One Decision
Dated February 1, 2016 ..... A-1 through A-23

RCW 42.56.520 ..... A-24

RCW 35.64 ..... A-25 through A-26

TABLE OF AUTHORITIES

Page

Cases

Cedar Grove Composting, Inc. v. City of Marysville
188 Wn. App. 695, 354 P.3d 249 (2015) 13

Clarke v. Tri-Cities Animal Care & Control Shelter
144 Wn. App. 185, 181 P.3d 881 (2008) 10, 12, 14

Dolan v. King Cnty.
172 Wn. 2d 299, 258 P.3d 20 (2011) 15

Progressive Animal Welfare Soc. v. Univ. of Wash.
125 Wn.2d 243, 884 P.2d 592 (1994) 10

Sebek v. City of Seattle
172 Wn. App. 273, 290 P.3d 159 (2012) 15

Spokane Research & Defense Fund v. West Central Community Development Association
133 Wn. App. 602, 137 P.3d 120 (2006) 10, 14

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

Worthington v. Westnet
182 Wn. 2d 500, 341 P.3d 995 (2015) 8, 9, 10, 11

Statutes

RCW 35.64.010 ..... 5, 12

RCW 42.56 *et seq.* 2

RCW 42.56.520 4

Other Authorities

Rules of Appellate Procedure 13.4(b)(4) 7

I. IDENTITY OF PETITIONER

The Petitioner is Alyne Fortgang ("Fortgang"), the appellant and plaintiff in the proceedings below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the published decision dated February 1, 2016 in the Court of Appeals, Case No. 72413-4-I ("Decision"). A copy of the Decision is attached as Appendix A-1 through A-23.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in its application of the *Telford v. Thurston County Bd. of Comm'rs,* 95 Wn.App. 149, 974 P.2d 886, *review denied,* 138 Wn.2d 1015, 989 P.2d 1143 (1999) ("*Telford*") functional equivalency analysis where it held that:

a) the first element of the *Telford* test weighs against public disclosure unless the entity at issue provides a core function, unique to government, that cannot be wholly delegated to the private sector;

b) the second *Telford* factor weighs against public disclosure unless a majority of the entity's funding comes from the government;

c) the third *Telford* factor weighs against public disclosure unless the government exercises sufficient control over the entity that the entity's employees are entitled to government employee benefits and the supervising agency would be liable for the entity's unlawful acts; and

d) the fourth *Telford* factor weighs against public disclosure when management of a facility that was created by the government and is still owned by the government is delegated to an existing private entity?

IV. STATEMENT OF THE CASE

Fortgang filed this suit to hold Respondent Woodland Park Zoo a/k/a/ Woodland Park Zoological Society ("Zoo") accountable to the taxpayers of the City of Seattle ("City") and King County under the Washington State Public Records Act, RCW 42.56 *et seq.* ("PRA").

On November 6, 2013, Fortgang submitted a public records request to the Zoo that asked eight specific questions relating to the public controversy about the Zoo's treatment of elephants housed at the Zoo. (CP 24-25.) Four of these questions are of particular relevance, as follows:

- Fortgang's Request No. 4 stated "Please make available for inspection and copying all records and/or logs that reflect the beginning and ending time of each day that each elephant keeper worked January 1, 2012 – December 31, 2012." (CP 25.) Fortgang noted that this request followed a prior request for "records that reflect when the elephant keepers staff the barn" to which the Zoo had responded that it had no records "that reflect when the elephant keepers staff the barn." (*Id.*)

- Fortgang's Request No. 5 referred to a public statement by the Zoo's Deputy Director Bruce Bohmke that the Zoo had spent at least $480,000 fighting criticism of the Zoo's elephant program and requested that the Zoo produce "the detailed documentation including but not limited to contracts, agreements, invoices, letters, emails, reports or memos between anyone employed by WPZ or acting as its agent and third parties relied upon to arrive at that figure. In addition, please provide copies of all internal records that were relies upon to calculate that portion of the total $480,000 attributable to internal WPZ expenses, including but not limited to salaries and other overhead expenses." (CP 25.)
- Fortgang's Request No. 7 requested that the Zoo produce "the complete Contract, memorandum of understanding, written agreement or similar instrument between Woodland Park Zoological Society and [public affairs consulting firm] Cocker Fennessey entered into for Cocker Fennessey's services related to the Task Force and Elephant Expert Panel." (CP 25.)
- Fortgang's Request No. 8 referred to a KING 5 News report about the controversy surrounding the elephants in which Zoo Board of Directors Chair Nancy Pellegrino responded to criticism by asserting that the results of "our polling and surveying . . . in the

last year" showed support for the Zoo, and requested that the Zoo produce "the survey and polling questions to which she was referring. Please provide, too, all written documents related to the survey and poll, including but not limited to all internal documents disclosing the purpose and intent behind taking a survey or poll, its methodology and implementation, discussion and analysis of the survey and poll results, the raw data collected and statistical assumptions applied to the raw data, and any documents containing or reasonably related to discussions and decisions about the use, including but not limited to release to the public of the poll and survey results, of the survey and poll data collected." (CP 25.)

On November 13, 2013, the Zoo contacted Fortgang in writing acknowledging receipt of the public records request and promising a response by December 20, 2013. (CP 26.) The Zoo sent this letter was within five business days of receipt of Fortgang's public records request, which is the response time mandated by RCW 42.56.520. (*Id.*) (A-24).

The Zoo responded to the substance of Fortgang's requests on December 20, 2013. (CP 27-29.) The Zoo stated that it is "a private company" and is "only required to disclose animal records" but was "responding to your questions despite any legal obligation to do so." (CP 27.)

The Zoo's response addressed each of Fortgang's eight specific requests. (CP 27.) In four cases, the Zoo provided limited substantive responses and/or produced responsive documents. (*Id.*) But the Zoo declined to produce the documents requested in Fortgang's Request Nos. 4, 5, 7 and 8, stating in each case that the requested documents are "not subject to a public disclosure request." (*Id.*)

Fortgang initiated her lawsuit to obtain the requested documents on March 12, 2014. On July 25, 2014, upon hearing cross motions for summary judgment, King County Superior Court concluded as a matter of law that the Zoo is not the functional equivalent of a state or local agency and need not disclose records under the PRA. The trial court reached this conclusion notwithstanding the Zoo's receipt of $108,621,045.00 in taxpayer money since 2002, its reliance on in-kind contributions of use of City parkland, buildings, and animals, and a symbiotic relationship between the Zoo and the City characterized by extensive oversight and control over the Zoo that the City exercises for the express purpose of ensuring "public accountability." RCW 35.64.010(5) (A-25–A-26).

Fortgang appealed the trial court's ruling to the Court of Appeals, Division One, on August 20, 2014. On February 1, 2016, the Court of Appeals issued its Decision affirming the grant of summary judgment in favor of the Zoo by applying the unduly narrow construction of the PRA

urged by the Zoo that is at odds with the broad purpose of the PRA and *Telford*. The Court of Appeals balanced each of the four *Telford* functional equivalency factors in turn, significantly narrowing the scope of entities that might be subject to the PRA.

With respect to the first *Telford* factor, the Court of Appeals added a requirement that the entity perform a "core function" that cannot be delegated to the private sector. (A-11). In so doing, the appellate court allowed the mere act of executing a contract with a third party, here the City, to immediately reduce public access to information. Second, considering government funding, the Court of Appeals elevated form over function, ignoring the more than $100 Million the Zoo has received in taxpayer funding since 2002 to focus on bare percentage of government funding, thereby allowing the 16% of the Zoo's funding that comes from the City to escape public scrutiny. (A-14). Third, the Court of Appeals redefined the government control factor to conclude that public disclosure is disfavored unless the extent of government "involvement or regulation" is significant enough to qualify the entity's employees for government benefits and to impose municipal liability for the entity's actions. (A-20–A-21). Fourth, the Court of Appeals considered the *Telford* entity origin factor, and again construing *Telford* narrowly, focused on the WPZS in its capacity as a private entity, instead of the Zoo as a municipal entity,

allowing private entities to step into the shoes of the government to operate a municipal facility and avoid public disclosure. (A-22). Because the Court of Appeals' Decision vitiates the PRA's broad mandate for public disclosure to ensure public accountability, this Petition seeks to hold that the Zoo is the functional equivalent of a state or local agency and therefore subject to the PRA's strong mandate for broad disclosure of public records.

V. ARGUMENT

The Supreme Court should accept this Petition for Review of the Court of Appeals' ruling pursuant to RAP 13.4(b)(4) because there is a substantial public interest in the Supreme Court providing clear guidance to ensure that the Public Records Act is interpreted and applied broadly in accordance with the intention of Washington voters. Acceptance of this Petition would serve a substantial interest not only for individuals who may seek disclosure of information under the PRA, but also for public agencies and their growing network of private partners who are taking on an increasing number of functions that have traditionally been handled directly by public agencies. As public functions continue to be contracted out to third party entities, parties and courts will increasingly be called upon to determine the circumstances under which the broad mandate of the PRA applies to a private entity that has assumed functions previously

provided by a government agency. Clear guidance from the Supreme Court regarding application of the PRA in such circumstances will serve a critical public interest by providing clarity for citizens seeking disclosure of documents related to governmental functions as well as to government agencies and their private partners who enter into contracts to carry out those functions.

The Court of Appeals' decision in this case illustrates the need for definitive guidance from this Court, which to date has not squarely addressed the functional equivalence doctrine for purposes of the PRA. The Court of Appeals' narrow interpretation of each and every one of the *Telford* factors is at odds with the fundamental purpose of the PRA, and its application of the factors is inconsistent with the "practical analysis" this Court has held must guide application of the PRA involving organizations that perform public functions. *Worthington v. Westnet*, 182 Wn. 2d 500, 508, 341 P.3d 995, 999 (2015); *see also Telford*, 95 Wn. App. at 161-66.

A. There is a substantial public interest in a ruling by the Supreme Court as to whether the Court of Appeals erred in its narrow interpretation of the *Telford* factors.

The Court of Appeals' ruling in this case is one of the only Washington court decisions to analyze each of the four *Telford* factors in detail. The ruling adopts a narrow view of each and every one of the four factors urged by the Woodland Park Zoological Society. The court

enshrined those positions in purported rules that run counter to the broad mandate of the PRA, severely and arbitrarily restricting access to substantial amounts of information regarding the manner in which public services are provided. There is a substantial public interest in this Court reviewing whether the Court of Appeals' ruling improperly restricts public access to documents and information that fall within the PRA's broad mandate for transparency.

1. The PRA is a strongly worded mandate for public disclosure that subordinates other statutes to the PRA's provisions and goals.

The PRA was enacted through Initiative 276 in 1972 to provide the people of this State with "full access to information concerning the conduct of government on every level." *Telford*, 95 Wn. App. at 158, n.12, quoting former RCW 42.17.010. This Court recently emphasized the importance of the PRA's mandate that Washington citizens have access to information about the way in which public services are rendered. "The PRA . . . is a 'strongly worded mandate' aimed at giving interested members of the public wide access to public documents to ensure governmental transparency. ... [T]he statute unambiguously provides for a liberal application of its terms, explicitly subordinating other statutes to its provisions and goals." *Worthington*, 182 Wn.2d at 506 *quoting Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

The PRA "requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions." *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 250, 884 P.2d 592 (1994). Private organizations that perform public functions are subject to the PRA. *Worthington*, 182 Wn.2d at 508 n.6.

2. The Court of Appeals' narrow interpretation of the *Telford* Factors is inconsistent with the PRA's broad mandate for transparency, and should be reviewed by the Supreme Court.

Courts in Washington have used the four-factor *Telford* test to determine whether the PRA applies when a public records request is directed to a private organization that performs a public function. *See Telford*, 95 Wn. App. at 161-66; *see also Clarke v. Tri-Cities Animal Care & Control Shelter,* 144 Wn. App. 185, 194-95, 181 P.3d 881, 886 (2008); *Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 609-10, 137 P.3d 120, 124 (2006) (decided on other grounds but discussing *Telford* in dicta).

The factors a court considers under *Telford* are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government. *Telford*, 95 Wn. App.

at 162. A court analyzing the *Telford* factors must "engage in a practical analysis" to reach a determination that is consistent with the PRA's broad mandate. *Worthington*, 182 Wn.2d at 508. This Court has not squarely addressed the *Telford* analysis, but it should do so in this case because the Court of Appeals' restrictive interpretation of the *Telford* factors is neither practical nor consistent with the PRA's purpose.

a. The Supreme Court should review the Court of Appeals' ruling that the factor "whether the entity performs a government function" should be read as "whether the entity provides a core function; unique to government; that cannot be wholly delegated to the private sector".

The first *Telford* factor is "whether the entity performs a governmental function." 95 Wn. App. at 162. The Court of Appeals read a substantially higher standard into this factor, concluding that it weighs against disclosure unless the entity at issue performs a "'core government function' that could not be wholly delegated to the private sector." (A-13). The court reasoned that "[o]perating a zoo does not necessarily implicate any function unique to government" and went on to observe that private zoos have existed alongside public zoos. (A-10). Thus, the Court of Appeals held that the factor originally expressed as "whether the entity performs a government function" has now become "whether the entity

performs a core function; unique to government; that cannot be wholly delegated to the private sector."

The Court of Appeals based its ruling on *Telford* and *Clarke*, both of which involved private entities that performed "essential government functions." (A-12). But while the nature of the services at issue in those cases was certainly sufficient for this factor to favor disclosure, nothing in the decisions or in Washington law supports making them necessary. Under the Court of Appeals' reasoning, the mere act of executing a contract with a third party immediately reduces public access to information about the vast majority of services traditionally provided by governments (accounting for a massive amount of taxpayer money), simply because same or similar services might also be available in the private sector. The Court of Appeals' restrictive interpretation cannot be squared with the PRA's strongly worded mandate for transparency and wide access to public documents.

Finally, it is noteworthy that as in *Telford* and *Clarke*, the City required enabling legislation to delegate management of the Zoo to WPZS. *See* RCW 35.64.010 (A-25–A-26) (imposing obligations to maintain public accountability, limiting the term of the Operating Agreement, imposing public hearing and comment obligations and other restrictions); *see also Telford*, 95 Wn. App. at 164; *Clarke*, 144 Wn. App.

at 194. Importantly, the enabling legislation in this case prohibited the City from "wholly delegating" operation of the Zoo to the private sector. Thus, this case is far more analogous to *Telford* and *Clarke* than the Court of Appeals acknowledged.

b. The Supreme Court should review the Court of Appeals' ruling that the factor "the level of government funding" should be read as "whether a majority of the entity's funding comes from the government."

The second *Telford* factor is "the level of government funding." 95 Wn. App. at 162. Unlike public records statutes in other states, the PRA is silent about the level of government funding that is necessary to cause this factor to weigh in favor of disclosure. The Court of Appeals found that the "rule" in Washington is that this factor weighs in favor of disclosure "only when a majority of the entity's funding comes from the government." (A-13, A-15). The court cited *Telford*, *Clarke* and *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 720, 354 P.3d 249, 260 (2015), as well as *Spokane Research*. (A-13–A-15).

The Court of Appeals was incorrect. The "majority funding" rule is not found in the cases or in the PRA. While *Telford*, *Clarke* and *Cedar Grove* made passing references to public funding, none of them can reasonably be read to state a rule that disclosure is disfavored unless an entity receives a majority of its funds from the government. *Telford*, 95

Wn. App. at 164; *Clarke*, 144 Wn. App. at 195. In *Spokane Research*, the court emphasized that public funding in the form of government grants – as opposed to tax levy funds at issue here – did not weigh in favor of disclosure. 133 Wn. App. at 609.

Contrary to the Court of Appeals' characterization of the prior cases, this is the first PRA decision to hold that disclosure is automatically disfavored unless government funds comprise "a majority" of the entity's funds, no matter how many tens of millions of taxpayer dollars the entity receives. The court's arbitrary rule runs counter to the PRA's explicit mandate that it be interpreted broadly to favor disclosure, and reduces this Court's "practical analysis" requirement to a binary decision subject to the vagaries of competing methods of accounting.

c. The Supreme Court should review the Court of Appeals' ruling that the factor "the extent of government involvement or regulation" should be read as "whether the government's control over the entity is so substantial that its employees are entitled to government employee benefits and the government would be liable for the entity's unlawful acts."

The third *Telford* factor is "the extent of government involvement or regulation." 95 Wn. App. at 162. The Court of Appeals analogized this factor to the "analysis of government control" found in dicta in *Sebek v. City of Seattle*, 172 Wn. App. 273, 290 P.3d 159 (2012). (A-20, n. 14).

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. 172 Wn. App. at 277-80. The Court of Appeals concluded that the plaintiff lacked standing, and then briefly discussed 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. The court observed that the level of government control necessary for such liability would need to rise to the level at issue in *Dolan v. King Cnty.*, 172 Wn. 2d 299, 258 P.3d 20 (2011), *as corrected* (Jan. 5, 2012), in which the Supreme Court ruled that employees of four nonprofit public defender organizations were entitled to be enrolled in the Public Employees Retirement System. *Id.*

It is certainly true that this factor will not weigh in favor of disclosure in every case involving any amount of government involvement. But the Court of Appeals' conclusion that disclosure is disfavored unless the extent of government "involvement or regulation" is significant enough to qualify the entity's employees for government benefits and to impose municipal liability for the entity's actions is inconsistent with the PRA's broad mandate for public disclosure. The Court has allowed municipalities to contract around the PRA.

In this case for example, the Operating Agreement purports to grant WPZS control over the Zoo's daily operations, but the City (among other things) retains ownership of the Zoo facilities, restricts WPZS' use of the land and requires extensive auditing and reporting requirements, establishes comprehensive operational standards for the Zoo by incorporating the policies of the American Zoo Association into the Operating Agreement and retains authority to approve or reject the Zoo's policies governing acquisition and disposition of the animals. (CP 33-74; A-16–A-17). The City is sufficiently involved in the Zoo's operations for this factor to favor disclosure. In any event, guidance from this Court regarding the level of governmental involvement or regulation that is sufficient to cause this factor to weigh in favor of disclosure would serve a substantial public interest and provide much-needed clarity following the Court of Appeals' ruling that this factor is analogous to the standard for imposing municipal liability, a higher bar indeed.

d. The Supreme Court should review the Court of Appeals' ruling that the factor "whether the entity was created by the government" should focus exclusively on the origin of the private entity even when the entity assumes management of a facility the government created, managed for over a century and continues to own.

The final *Telford* factor is "whether the entity was created by the government." 95 Wn. App. at 162. This case highlights the need for guidance from the Supreme Court with respect to this factor as well. The Court of Appeals ruled that this factor weighs against disclosure because the government was not involved in creating WPZS, which was founded as a private organization in 1965. (A-22). However, the Woodland Park Zoo was created by the government, and was operated by the City of Seattle for more than a century before the City and WPZS executed the Operating Agreement. (CP 33-35).

The distinction is significant because Fortgang requested information pertaining to the operation of the municipal Zoo. She did not request information pertaining to WPZS in its capacity as a private entity. The Court of Appeals' ruling that this factor weighs against disclosure even when a private entity steps into the shoes of the government to operate a municipal facility and a citizen requests records pertaining to the operation of the municipal facility is inconsistent with the PRA's mandate,

and make it too easy for public agencies to hide behind private contracts to avoid public disclosure.

In sum, the Court of Appeals' restrictive interpretation of all four *Telford* factors will severely restrict public access to information about public services whenever a governmental agency contracts with a non-governmental service provider. The ruling comes at a time when public-private partnerships are becoming an increasingly integral part of public services. Insofar as this Court has not squarely addressed the functional equivalence doctrine as it applies to the PRA, and given the extraordinary restrictions imposed by the Court of Appeals, there is a substantial public interest in Supreme Court review.

VI. CONCLUSION

This Court has never squarely addressed application of the four functional equivalence factors identified in *Telford.* Fortgang respectfully submits that there is a substantial public interest in the Supreme Court providing dispositive guidance regarding this issue. For the foregoing reasons, Fortgang asks the Court to accept review and reverse the Court of Appeals' Decision shielding the Zoo from the transparency required under the PRA.

DATED March 2, 2016.

RESPECTFULLY SUBMITTED,

Rob Roy Smith, WSBA No. 33798
Christopher Varas, WSBA No. 32875
Attorneys for Petitioner/Appellant/Plaintiff Alyne Fortgang

PROOF OF SERVICE

I certify that on March 2, 2016, I caused to have served an original and one copy upon the Supreme Court Clerk's Office, and one true and correct copy upon Gregory J. Wong and Paul J. Lawrence of the following **PETITION FOR REVIEW** by the method(s) indicated below:

Supreme Court Clerk's Office Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	X _____ _____ _____	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile
Gregory J. Wong Paul J. Lawrence Pacifica Law Group LLP 1191 Second Avenue, Suite 2100 Seattle, WA 98101	X _____ _____ _____	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

Attorneys for Respondent/Defendant

DATED this 2nd day of March, 2016, ~~at~~ Seattle, Washington.

KILPATRICK TOWNSEND & STOCKTON LLP

Rob Roy Smith, WSBA No. 33798
Christopher Varas, WSBA No. 32875
Attorneys for Petitioner/Appellant/Plaintiff Alyne Fortgang

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WOODLAND PARK ZOO a/k/a WOODLAND PARK ZOOLOGICAL SOCIETY, Respondent, v. ALYNE FORTGANG, Appellant.	)	NO. 72413-4-I DIVISION ONE PUBLISHED OPINION FILED: February 1, 2016

LAU, J. — Alyne Fortgang sued the Woodland Park Zoological Society (WPZS) under the Washington Public Records Act (PRA) seeking documents related to WPZS' operation of the Woodland Park Zoo. She appeals the trial court's order granting WPZS' motion for summary judgment and dismissing her claims, arguing that under the Telford[1] factors, WPZS is the functional equivalent of a government agency subject to the PRA. Applying Telford's four-factor analysis here, we conclude these factors weigh against concluding that WPZS is the functional equivalent of a government agency subject to the PRA. We affirm the order granting summary judgment in favor of WPZS.

[1] Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 974 P.2d 886 (1999).

FACTS

For 100 years, the City of Seattle (the City) owned and managed the Woodland Park Zoo (the Zoo) directly through the Department of Parks and Recreation. In 2000, the Washington State Legislature enacted Senate Bill 6858, codified at RCW 35.64.010, which governs city contracts "with one or more nonprofit corporations or other public organizations for the overall management and operation of a zoo . . . ." RCW 35.64.010(1). In 2002, the City entered into a 20-year operations and management agreement granting the Woodland Park Zoological Society exclusive authority to manage and operate the Zoo. WPZS is a nonprofit corporation formed in 1965 "for charitable, scientific and educational purposes for the study and promotion of zoology and wildlife conservation and for the education and recreation of the public." Clerk's Papers (CP) at 33.

The Operations and Management Agreement[2]

Under the management agreement, the City transferred control of the Zoo to WPZS: "by virtue of its purposes, interests and past successes, [the Zoo Society] is both experienced and well suited to administer, plan, manage, and operate the Zoo through an agreement with the City . . . ." CP at 34. WPZS exercises authority over nearly every aspect of operating the Zoo, including:

- Authority to set prices for admission, memberships, merchandise, and other Zoo-related sales.
- Authority to "make such capital improvements and alterations to the Premises and the Zoo facilities as WPZS shall determine in its reasonable discretion are necessary." CP at 48.

[2] The opinion refers to the operations and management agreement interchangeably as "agreement" or contract".

- Authority regarding care of the animals, including the authority "to acquire or sell or otherwise dispose of Zoo animals in the course of WPZS's operation of the Zoo." CP at 49.

- Authority to "manage, supervise . . . direct . . . hire, fire, and otherwise discipline" Zoo employees. CP at 50.

The agreement also transferred all personal property necessary to operate the Zoo to WPZS, including the animals. The agreement also assigned all Zoo-related contracts to WPZS: "[t]he City shall assign all such existing leases, agreements, and arrangements affecting the Zoo . . . to [WPZS] and [the Zoo Society] shall have the exclusive option . . . of renewing such agreements." CP at 42.

WPZS receives funding from the City. The City distributes $2,500,000 to WPZS under a City sponsored "Neighborhood Parks, Green Spaces, Trails and Zoo" levy. CP at 37, 44. The agreement grants WPZS the right of termination if the City chooses not to renew the levy. WPZS also receives an annual payment from the City's general fund, which started at $5,000,000 in the first year of the agreement and increases each year by 70% of the increase in the "Consumer Price Index for Urban Wage Earners and Clerical Workers for the Seattle-Tacoma-Bremerton area." CP at 42. The City also provides annual maintenance payments of $500,000. WPZS can apply for grants for which it might otherwise be ineligible if it obtains approval from the superintendent of the Parks Department or the City Council. Despite this city funding, taxpayer money accounts for a minority of WPZS' revenue. For example, in 2013, only 16 percent of its revenue came from public funds. WPZS earns most of its revenue from private donations, investments, and selling Zoo-related goods and services (admission revenue, memberships, souvenirs, concessions, private events, etc.).

The City retains some oversight authority via contract over certain aspects of Zoo management. For example, although WPZS has almost complete control over Zoo operations, including the authority to acquire or dispose of an animal. The agreement requires that any animal acquisition or disposition "shall be made in strict accordance with . . . existing and any adopted acquisition and disposition policies approved by the City." CP at 49. The City retains ownership of the Zoo premises and facilities in addition to "all appurtenances, fixtures, improvements, equipment, additions and other property attached or installed in the Premises during the Term" of the agreement. CP at 48. It also retains the naming rights for the Zoo and Zoo facilities. Further, the mayor, the Parks Department superintendent, and the City Council Park Committee, are each authorized to appoint one person to WPZS' Board of Directors, for a total of three City-appointed board members. As of 2014, 38 members served on WPZS' Board of Directors.

The agreement requires WPZS to comply with several reporting measures. For example, WPZS must provide the Parks Department Superintendent (1) an annual report, (2) an annual plan, and (3) monthly finance reports. The annual report must "provide a general summary of the Zoo's operations and will include a complete financial accounting for all funds, including use of Levy proceeds, use of major maintenance funding, and a listing of all capital investments made at the Zoo." CP at 53. WPZS must also submit monthly reports to the superintendent detailing the Zoo's finances. The annual plan must "present the one-year capital improvement plan for the Zoo, a description of major programmatic changes planned at that time for the ensuing year and any proposed changes in fees at the Zoo." CP at 53. WPZS must provide

quarterly reports to the Parks Board "setting forth a summary of the operations of the Zoo." CP at 54. Separate quarterly reports must be provided to the Oversight Committee "monitoring expenditure of Levy funds." CP at 54. WPZS must perform an independent audit every year and provide a copy of the audit to the superintendent. The agreement requires WPZS to submit to an audit by the City, if the City requests.

No provision of the agreement requires WPZS to comply with the Public Records Act (PRA). It does require WPZS to provide some information to the public. The only Zoo-related records that the agreement explicitly states must be disclosed are "records pertaining to the veterinary management and treatment of Zoo animals in its care." CP at 54. WPZS must make these records available to the superintendent or a member of the public if requested. WPZS must also provide the public with an opportunity to review and comment on its annual reports and annual plans. Similarly, for major capital projects, WPZS must "develop . . . a process for public involvement that is consistent with the Parks Department's Public Involvement Policy." CP at 55. The agreement requires notice and opportunity for public participation for regularly scheduled WPZS Board meetings.

The Records Request and Ensuing Litigation

In November 2013, Alyne Fortgang, concerned taxpayer and co-founder of Friends of Woodland Park Zoo Elephants (FWPZE), sent a letter to WPZS requesting certain records pursuant to the Washington Public Records Act. Some of the requests sought records relating to medical care and general treatment of the Zoo's elephants. Other requests sought internal documents about a public relations campaign WPZS undertook to counteract criticism of its elephant program. The request sought copies of

contracts or agreements between WPZS and public affairs consulting firm Cocker Fennessey, invoices or calculations of the total cost of the public relations campaign, and documents related to any public polling or survey results collected. WPZS provided documents related to its treatment of the elephants, acknowledging that it is required to disclose animal records under the agreement. It declined to respond to the other requests, asserting it is not a government entity and therefore not subject to the PRA.

In March 2014, Fortgang sued WPZS, alleging it violated the PRA by withholding the requested documents. On cross-motions for summary judgment, the trial court ruled WPZS is not the functional equivalent of a government agency under Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 974 P.2d 886 (1999), and consequently outside the scope of the PRA. Fortgang appeals.

ANALYSIS

Standard of Review

We review a trial court's order granting summary judgment de novo. Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Here, the parties agree there are no disputed material issues of fact. The key issue presented here is whether WPZS is the functional equivalent of a government agency for purposes of the PRA. We apply Telford's four-factor test to resolve this issue.

Whether WPZS Constitutes the Functional Equivalent of a Government Agency

The PRA "is a strongly worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). It advances a broad public policy for transparency at all levels of government, stating:

> (2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings.
>
> . . .
>
> (4) That our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure of their financial and business holdings, provided those officials deal honestly and fairly with the people.
>
> (5) That public confidence in government at all levels is essential and must be promoted by all possible means.
>
> (6) That public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions.

RCW 42.17A.001. Courts must liberally construe the PRA "to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030. "While these declarations of policy do not have any independent operative effect, they 'serve as an important guide in determining the intended effect of the operative sections' of the PRA." Cedar Grove Composting, Inc. v. City of Marysville, 188 Wn. App. 695, 709, 354 P.3d 249 (2015) (quoting Hearst Corp., 90 Wn.2d at 128).

Under the PRA, any government agency "shall make available for public inspection and copying all public records" upon request unless those records fall into certain specific exemptions. RCW 42.56.070(1). The PRA defines "agency" as any state or local government agency. RCW 42.56.010(1).

The Telford Four-factor Analysis

Even a nongovernment entity may be subject to the PRA if it is "the functional equivalent of a public agency for a given purpose." Telford, 95 Wn. App. at 161. In Telford, the court adopted a four-factor balancing test for determining whether a nongovernment entity is the functional equivalent of a public agency for purposes of the PRA: "(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government." Telford, 95 Wn. App. at 162.[3] "Under Telford, each of these criteria need not be equally satisfied but rather the criteria on balance should suggest that the entity in question is the functional equivalent of a state or local agency." Clarke v. Tri-Cities Animal Care & Control Shelter, 144 Wn. App. 185, 192, 181 P.3d 881 (2008) "In determining whether a particular entity is subject to the PRA, courts engage in a practical analysis." Worthington v. Westnet, 182 Wn.2d 500, 508, 341 P.3d 995 (2015).

Thus, our analysis under Telford must be grounded in the unique factual circumstances present in each case. Due to the various ways in which a government may partner with a private entity, the Telford test requires a functional, case-by-case approach. Telford, 95 Wn. App. at 162 (No single factor under the Telford test is dispositive. Rather, "[a] balancing of factors . . . is more suitable to the functional, case-by-case approach of Washington law."). Indeed, "any general definition [of government

[3] We note the Washington Supreme Court has yet to apply the Telford test. See Worthington v. Westnet, 182 Wn.2d 500, 508, 341 P.3d 995 (2015) (stating that the Telford factors, though instructive, had limited applicability in determining whether a multijurisdictional drug task force was subject to the PRA).

agency] can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done. The unavoidable fact is that each new arrangement must be examined anew and in its own context." Wash. Research Project, Inc. v. Dep't. of Health, Educ. & Welfare, 164 U.S. App. D.C. 169, 504 F.2d 238, 245–46 (1974).[4]

Under the circumstances here, the Telford four factors weigh against concluding that WPZS is a functional equivalent of a government agency subject to the PRA.

Government Function

This factor considers whether the entity performs a government function. Pursuant to contract, WPZS exclusively manages and operates the Zoo. These services undoubtedly provide a public benefit. But serving public interests is not the exclusive domain of the government.

In Spokane Research & Defense Fund v. West Central Development Assoc., 133 Wn. App. 602, 137 P.3d 120 (2006),[5] Division Three of this court concluded that the operation of a neighborhood-based nonprofit community center to provide community services to benefit low and moderate income residents was not a governmental function. Spokane, 133 Wn. App. at 609-10.

---

[4] The functional equivalent test is derived from federal jurisprudence. Thus, federal cases interpreting the Freedom of Information Act (FOIA) are relevant when Washington courts interpret the PRA. Dawson v. Daly, 120 Wn.2d 782, 791–92, 845 P.2d 995 (1993), overruled on other grounds by Progressive Animal Welfare Soc'y. v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994); see also, Telford, 95 Wn. App. at 161.

[5] Arguably, the court's Telford four-factor analysis constitutes dicta. The court stated that there was no need to apply the Telford test because there was "no ambiguity as to the Associations' [nongovernmental] status." Spokane, 133 Wn. App. at 608. The court nevertheless analyzed the Telford factors "solely for argument", concluding the result would be the same under that test. Spokane, 133 Wn. App. at 608.

The court reasoned, that despite the center's commitment to public interests, it provided services that could be delegated to the private sector and therefore, performed no governmental function:

> The Association functions to provide community services to benefit low to moderate income residents. While the government often provides social programs, serving public interests is not the exclusive domain of the government. Unlike in Telford, the Association's function is one that may be "delegated to the private sector."

Spokane Research, 133 Wn. App. at 609 (quoting Telford, 95 Wn. App. at 164). Fortgang claims that operating a zoo, like any park or recreational facility, is a quintessential governmental function. We disagree. Operating a zoo does not necessarily implicate any function unique to government. Indeed, private zoos have existed alongside publicly owned zoos for decades, including in Washington.[6]

Fortgang relies on nonPRA cases to make her point—City of Seattle v. State, 59 Wn.2d 150, 367 P.2d 123 (1961) and Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003). We are not persuaded. Seattle involved whether a State excise tax extended to services provided by the Seattle Parks Department, including towel rentals, pony rides, and rental space for concession vehicles. Seattle, 59 Wn.2d at 152. The Seattle court expressly stated that it was "unnecessary to consider whether the particular activities are governmental . . . in nature." Seattle, 59 Wn.2d at 154. Similarly, the Okeson court held that providing city street lighting is a government function, the costs of which "must be borne by Seattle's general fund" rather than a

[6] For example, the Cougar Mountain Zoo in Issaquah, Washington, has been privately owned and operated since its inception in 1972. See History, Cougar Mountain Zoo, http://www.cougarmountainzoo.org/About%20Zoo/history.aspx (last visited [Jan. 14, 2016]).

proprietary function for which utility customers may be charged. Okeson, 150 Wn.2d at 545. Okeson's government function analysis is unique to how city governments allocate the cost of services. It provides no analysis on whether a private entity is the functional equivalent of a government agency for purposes of the PRA.

In Clarke, the court held that the Tri-Cities Animal Care & Control Shelter (TCAC)—"a privately-run corporation that contracts with the [Tri-Cities] to provide animal control services," Clarke, 144 Wn. App. at 188—was subject to the PRA. Clarke, 144 Wn. App. at 196. Applying the Telford factors, the court concluded the TCAC performed "core government functions." Clarke, 144 Wn. App. at 194. The court analogized the duties of animal control officers to law enforcement officers. It noted TCAC's duties involved the exercise of police power, implicating due process concerns:

> Individuals associated with TCAC take oaths as animal control officers; animal control officers can be employed only by an animal care and control agency. See former RCW 16.52.011(2)(c) (1994). As part of the oath, the employees of TCAC agree to enforce the area's animal control regulations. As regulators, TCAC and its officers execute police powers in carrying out their duties, most notably impounding and destroying private citizens' pets. These types of acts implicate due process concerns . . . The implication of police powers is clear from the language of former RCW 16.52.015(2), which requires animal control officers to comply with 'the same constitutional and statutory restrictions concerning the execution of police powers imposed on law enforcement officers . . .' Because a local government grants TCAC the ability to execute police powers pursuant to state statute, TCAC is performing a governmental function.

Clarke, 144 Wn. App. at 193 (emphasis added).

Telford involved The Washington State Association of Counties (WSAC) and the Washington State Association of County Officials (WACO), entities founded and organized by elected and appointed county officials empowered statewide to administer government programs. Telford, 95 Wn. App. 163-65. State statutes imposed explicitly

nondelegable public duties on these entities. The court noted that these duties "could not be delegated to the private sector." Telford, 95 Wn. App. at 163-64.

The court held that under these circumstances WSAC and WACO were public entities for purposes of the PRA. These entities retained characteristics of private entities, but "their essential functions and attributes are those of a public agency." Telford, 95 Wn. App. at 165.

As to the government function factor, Clarke and Telford are distinguishable. Unlike the present case, Clarke involved the local government's grant of police powers (implicating due process concerns) to the private entity and contracting out this essential government function—animal control services. Telford also involved essential government functions.[7]

Acknowledging that "Telford's analysis seems to hinge on whether the entity's duties can be delegated to the private sector", Clarke explained this statement by concluding that a "local government" can delegate its "performance authority" to a "private entity" but it "cannot delegate away its statutory responsibility" under the PRA. Clarke, 144 Wn. App. at 194. Because TCAC was "perform[ing] core government functions," allowing the governmental agencies to contract with private agencies to performs these "core functions" contravenes the intent of the PRA. Clarke, 144 Wn. App. at 194. Here, the contractual services provided by WPZS do not implicate "core

[7] The parties read Telford's single statement, "[t]hese duties could not be delegated to the private sector" too broadly. Telford, 95 Wn. App. at 164. We read this statement in context to mean the duties that may not be delegated to the private sector are the additional public duties "mentioned in the 35 statutes" and "their enabling legislation." Telford, 95 Wn. App. at 163-64. We note that nothing in the opinion explains or analyzes the significance of this bare statement.

government functions." Thus, Clarke's legitimate concern over evading PRA requirements via "out sourcing" "core government functions" are not present in this case.

WPZS shares some nominal similarities to a government agency given its commitment to the public interest. But this is not sufficient to conclude it performs a government function. Fortgang fails to point to any Zoo operation that resembles a "core government function" that could not be wholly delegated to the private sector as in Telford and Clarke. WPZS is not performing a governmental function. This factor weighs against concluding that WPZS is subject to the PRA.[8]

Government Funding

Fortgang contends the amount of money WPZS received from the City alone weighs in favor of finding government funding. We disagree.

Public funding comprises a minority of WPZS' revenue. Washington courts have consistently concluded that the government funding factor weighs in favor of applying the PRA only when a majority of the entity's funding comes from the government. In Telford, the court reasoned that this factor weighed in favor of applying the PRA because "[m]ost of WSAC's and WACO's funds come from current county expense funds. . . . Both associations are therefore mostly supported by public funds." Telford, 95 Wn. App. at 164-65. Similarly, in Clarke, the court concluded that "[n]early all of TCAC's operating budget comes from public money. . . . Thus, this factor clearly weighs in favor of application of the [PRA]." Clarke, 144 Wn. App. at 194-95. We applied a

[8] Given our discussion, we need not address Fortgang's enabling legislation claims.

similar rule in Cedar Grove: "Marysville paid Strategies for at least the majority of the work at issue . . . Its activities . . . were paid in large part with public funds." Cedar Grove, 188 Wn. App. at 720. In Spokane Research, the court stated the neighborhood association was not the equivalent of a government agency when a quarter of its funding came from private sources, "[t]he Association receives funding from various public and private sources. About 25 percent is private funding. . . . In sum, the Association's funding does not weigh for application of the [PRA]." Spokane Research, 133 Wn. App. at 609. The facts here present an even stronger case for concluding that the funding factor weighs against application of the PRA because the majority of WPZS' funding comes from private sources. In 2013, only 16 percent of WPZS' funding came from the City.

Fortgang relies heavily on the amount of money WPZS receives from the City, claiming that "the most significant Telford factor in this case is government funding." Br. of Appellant at 15. According to Fortgang, the total amount of money alone is sufficient for the court to conclude that the government funding factor weighs in favor of applying the PRA. Fortgang cites a case discussed in Telford: "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." Telford, 95 Wn. App. at 164 (citing Weston v. Carolina Research and Dev. Found., 303 S.C. 398, 401 S. E. 2d 161, 165 (1991)). Fortgang's reliance on this single quote is misplaced. The statute at issue in Weston is broader than Washington's PRA. South Carolina's Freedom of Information Act applies to "'any organization, corporation, or agency supported in whole or in part by public

funds or expending public funds.'" Weston, 401 S. E. 2d at 163 (some emphasis added) (quoting former S.C. CODE ANN. § 30-4-20(a) (1987)).

Washington's PRA contains no similar provision. Fortgang's reliance on Telford's reference to Weston ignores the rule consistently applied by Washington courts following Telford—the government funding factor weighs in favor of applying the PRA when the entity at issue receives the majority of its revenue from public funds. See, e.g., Clarke, 144 Wn. App. at 194-95. This factor weighs against applying the PRA.

Government Control[9]

[9] We note that under both federal and Connecticut case law, from which the Telford test derives, a private entity must be subject to substantial government control to be considered the functional equivalent of a government agency. See Irwin Mem'l Blood Bank of S.F. Med. Soc'y. v. Am. Nat'l. Red Cross, 640 F.2d 1051 (9th Cir. 1981); Envtl. Systs. Corp. v. Freedom of Info. Comm'n, 59 Conn. 753, 757 A.2d 1202, 1206 (2000). In Irwin, the Ninth Circuit concluded that the American Red Cross was not subject to FOIA despite possessing analogous attributes of government involvement present in this case. Irwin, 640 F.2d at 1057. The court stated that it is "substantial federal control that distinguishes those entities that can be fairly denominated as federal agencies under the FOIA from the organizations whose activities may be described as merely quasi-public . . . [A] private recipient of a federal grant is not an agency under the FOIA 'absent extensive, detailed, and virtually day-to-day supervision.'" Irwin, 640 F.2d at 1055 (quoting Forsham v. Harris, 445 U.S. 169, 180, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980)). Connecticut requires a similar showing of substantial government control:

> [T]o satisfy the regulation prong of the test, the entity must "operate under direct, pervasive or continuous regulatory control . . ." Also critical in the determination of whether an entity is a governmental agency is the amount of control the government exercises over the entity's detailed physical performance . . . .
> . . . . Because the government does not control the day-to-day activity of the plaintiff's business, the third prong of the functional equivalent test is not met.

This factor focuses on "the extent of government involvement or regulation." Telford, 95 Wn. App. at 162. Fortgang contends several provisions indicate the City "exercises more than enough control over the Zoo's operations. . . ." Br. of Appellant at 17.

Fortgang's control argument focuses almost exclusively on the agreement's provisions to demonstrate the City's alleged substantial control over zoo operations. For example, she argues that the City "prohibits the Zoo from using the City parkland . . . for any purpose . . ." other than the uses spelled out in the contract and the Long Range Plan. CP at 41.

> Required Use. WPZS shall use and continuously occupy the Property during the Term solely for the operation of a public zoological garden and related and incidental purposes and programs . . . in accordance with this Amendment and the Long Range Plan . . ."

CP at 41.

As the contract's preamble explains, the Zoo is located on real property owned by the City. In accordance with the City charter, the City retained ownership of the "zoo properties and facilities."

She also argues Zoo animal acquisition and disposal policies must comply with City policies as required under the contract. She further claims contract provisions

---

Envtl. Sys. Corp. v. Freedom of Info. Comm'n, 59 Conn. 753, 757 A.2d 1202, 1206 (2000) (quoting Hallas v. Freedom of Info. Comm'n, 18 Conn. App. 291, 296, 557 A.2d 568 (1989)).

In Forsham v. Harris, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980), the United States Supreme Court addressed whether the acts of a private entity that received federal grants of federal funds became governmental acts subjecting that entity to the federal Freedom of Information Act. The court held that "absent extensive, detailed, and virtually day-to-day supervision," the entity was not a "federal instrumentality of a FOIA agency." Forsham 445 U.S. at 180.

impose numerous reporting requirements on the Zoo; the City controls the membership of three positions on the Zoo's Board, the Zoo's naming rights, and certain admission fee increases. Fortgang argues these provisions show governmental control. We disagree.

The City retains some oversight over WPZS via contract to ensure public accountability and contract compliance.[10] Read in context, the disputed provisions barely impinge on WPZS' exclusive authority to manage and operate the Zoo. Fortgang does not dispute that the agreement states, "WPZS shall exclusively manage and operate the Zoo. . . ." CP at 40. As the agreement's recitals explain, the City recognized the public benefit of a "creative partner" to improve and operate the Zoo for the public's benefit. CP at 54.

To achieve this goal, the City contracted with WPZS, recognizing that it was uniquely qualified to manage and operate the Zoo.

> WPZS is a non-profit public benefit corporation organized in 1965 for charitable, scientific and educational purposes for the study and promotion of zoology and wildlife conservation and for the education and recreation of the public. WPZS currently provides a limited range of services for the City's Parks Department at the Zoo, including educational programs and activities; wildlife and habitat conservation, marketing, management and operation of the Zoo food and gift services; and fundraising; . . .
>
> . . . [I]t would be in the best interest of the Zoo and its future development if the City were to enter into an agreement with WPZS to provide for the management by WPZS of the entire Zoo operation . . .

CP at 33, 35 (emphasis added).

---

[10] "As part of the management and operation contract, . . . the city shall provide for oversight of the managing and operating entity to ensure public accountability of the entity and its performance in a manner consistent with the contract." RCW 35.64.010(5).

The parties also intended WPZS to exercise its exclusive authority over the Zoo's management and operation by further defining the legal relationship of the parties as owner and contractor.

> The services to be rendered by WPZS . . . are as an independent contractor only and the relationship between the WPZS and the City is solely that of owner and contractor. Nothing contained in this Agreement shall be construed to create a partnership, joint venture, or a relationship of employment or agency.

CP at 341.

As this and other contract provisions demonstrate, these sophisticated contracting parties allocated various duties and responsibilities with the issue of control firmly in mind. For example, the City granted WPZS exclusive authority to manage and operate the Zoo. WPZS owns and cares for the Zoo animals. The City lacks authority over day to day Zoo operations. WPZS exercises complete control over its employees, setting price for admission, collecting and spending admission proceeds, and contracting vendors for visitor services. WPZS retains ultimate authority over whether to acquire or dispose of zoo animals. The agreement also grants WPZS broad discretion to implement alterations and improvement, such as new exhibits and support for visitor facilities.[11]

---

[11] The City retained certain rights related to its ownership of park lands and facilities. For example, the agreement requires WPZS to obtain approval before it moves "appurtenances, fixtures, improvements, equipment, additions, and other property attached to or installed in the [p]remises." CP at 48.

In Clarke, the court concluded that prohibiting private use of a rent-free municipally leased building indicates governmental control. We disagree however that limitations on the use of Zoo premises means government control. We are not persuaded that the City's contractual limitations in WPZS' use of city-owned land and facilities necessarily indicate government control. Under Telford's practical analysis, contract clauses like the ones here routinely impose limits on the use of land or

The agreement requires WPZS to comply with all federal, state, and local laws. This requirement is also true for any entity operating within the City. The agreement requires WPZS to operate the Zoo in accordance with American Zoo Association's policies (AZA).[12] But any zoo, public or private, must abide by these policies to maintain AZA accreditation.

Nor do various reporting requirements imposed by the agreement amount to governmental control. [13] As noted above, the agreement requires WPZS to provide several plans and reports to certain government entities. Financial reporting rules are a standard requirement for any government contractor receiving public funds. Reporting rules are not necessarily indicative of governmental control. See Dolan v. King County, 172 Wn.2d 229, 317, 258 P.3d 20 (2011). Further, these reports are not attached to any enforcement mechanism in the agreement, such as review or approval process. Most of these reports are merely "informational item[s]." CP at 3.

---

buildings rented or leased to another for valuable consideration. The mutual termination clauses here allow either party to terminate the agreement in the event of default by the other party.

"Moreover, a tenant located in a publicly owned structure on public land does not automatically become a public agency. Tenants located on municipally owned industrial parks, even when occupying publicly owned structures do not become public agencies."

Spokane Research & Defense Fund v. West Central Development Assoc., 133 Wn. App. 602, 606, 137, P.3d 120 (2006).

[12] AZA animal care standards followed by WPZS are developed by independent AZA committees. The City has no role in animal care policies.

[13] Our record shows Fortgang never made a public records request for the disputed documents from the City despite the City's alleged government control over WPZS.

We addressed a similar government control question in Sebek, 172 Wn. App. 273, 290 P.3d 159 (2012).[14] The plaintiff sued the City, arguing its payments to WPZS were illegal because WPZS' treatment of the elephants violated animal cruelty laws. Sebek, 172 Wn. App. at 276. The plaintiff alleged that WPZS is a de facto City agency or an arm of the City and should be prevented from taking alleged illegal acts related to its elephant program. We rejected this claim, reasoning that "[t]he question of whether [WPZS] operates as an 'arm' of [the City] or a 'de facto' part of [the City] turns on whether [the City] exerts a 'right of control' over [WPZS]." Sebek, 172 Wn. App. at 280 (citing Dolan v. King County, 172 Wn.2d 229, 258 P.3d 20 (2011)).[15]

We affirmed the trial court's dismissal of the plaintiff's lawsuit. Responding to the plaintiff's claim that "The City 'retains ownership and control' over the Zoo property," we rejected the claim explaining, the agreement makes it clear WPZS "shall exclusively manage and operate the Zoo" . . . animals "shall be the sole property of [WPZS]" and [WPZS] "shall assume all obligations . . . with respect to animals exhibited, housed . . . kept or cared for. . . ." We also rejected the plaintiff's claim that "the 'control provisions built into the agreement' show the City has control over the acts of the Zoo and its employees." Citing Dolan v. King County, 172 Wn.2d 229, 258 P.3d 20 (2011), we explained that the provisions cited by the plaintiff "do not give the City control over [Zoo] operations and . . . [t]he question of whether an entity operates as an 'arm' of a

---

[14] Plaintiff Sebek is Fortgang's co-coordinator of Friends of Woodland Park Zoo Elephants, a group of community members. We are unpersuaded by Fortgang's attempt to distinguish Sebek from the present case. Indeed, we see no reason to apply a different analysis of government control to the facts presented here. Government control in Sebek considers the same indicia of control for purposes of the PRA analysis here.

governmental agency or a 'de facto" part of the government agency turns on whether the agency exerts a 'right of control' over the entity." Sebek, 172 Wn. App. at 279-80 (quoting Dolan, 172 Wn.2d at 312-13). We reasoned that unlike in Dolan, where the Supreme Court determined "stringent control over the defender organization" rendered it a de facto county agency, we concluded WPZS controlled what "exhibits are to be displayed, how they are to be displayed, what animals . . . to purchase" and their care. Sebek, 172 Wn. App. at 280.

Fortgang also argues City control over WPZS based on its right to appoint 3 of 38 WPZS Board members. The City lacks any veto power over the Board's actions or override authority relating to WPZS' countless discretionary zoo operation decisions. Unlike the present case, in Telford, the court summarily concluded that WSAC and WACO were "completely controlled by elected and appointed county officials. There is no private sector involvement or membership." Telford, 95 Wn. App. at 165.

In Clarke, the agreement permitted euthanasia services only in a manner approved by a government agency. Unlike the facts presented here, the government controlled euthanasia services, a core service, provided by the private animal control service provider. See Interlocal Cooperative Agreement Between the Cities of Richland, Pasco, Kennewick Washington for Animal Control, Section 3(e).

As discussed above, numerous provisions in the agreement weigh against government control over WPZS. Nothing Fortgang points to demonstrate sufficient City control over WPZS' exclusive authority to manage and operate the Zoo. The government control factor weighs against applying the PRA to the unique facts presented here.

Origin Factor

The final factor analyzes "whether the entity was created by government." Telford, 95 Wn. App. at 162. The parties disagree on whether this factor applies to the Zoo or WPZS. Fortgang claims we must analyze the Zoo's origin, pointing to "the PRA's liberal construction requirement," the City's previous operation of the Zoo, and the Zoo's public-facility attributes. We disagree. Fortgang cites no persuasive authority that these considerations are relevant to the entity's origin.

It is undisputed that the government played no role in WPZS' creation. In 1965, a group of private citizens formed WPZS to support the zoo by, "promo[ting] public interest in and . . . encourag[ing] greater understanding of international wildlife . . . conservation and propagation," "stimilat[ing] interest in all aspects of [the Zoo]" and "motivat[ing] programs in keeping with educational scientific and aesthetic interests." CP at 177. WPZS has always remained a private nonprofit organization incorporated under Washington laws and registered with the Secretary of State as a charity. It reports to the Internal Revenue Service as a tax-exempt 501(c)(3) charitable organization. WPZS has been governed by an independent, volunteer board of directors throughout its 50 years of operation.

In Clarke, Division Three of this court held that TCAC, formed as a "private corporation, by private citizens," was not an entity created by the government thus, "this factor weighs against the P[R]A application." Clarke, 144 Wn. App. at 195. As in Clarke, we resolve this factor against application of the PRA to WPZS.

Conclusion

On balance, the Telford factors weigh against concluding that WPZS is the functional equivalent of a government agency for purposes of applying the PRA. We affirm the trial court order granting WPZS' summary judgment motion.

WE CONCUR:

RCW 42.56.520

Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[2010 c 69 § 2; 1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW **42.17.320**.]

NOTES:

Finding—2010 c 69: "The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online." [2010 c 69 § 1.]

Chapter 35.64 RCW

ZOOS AND AQUARIUMS

Chapter Listing

Sections

35.64.010 Contracts for management and operation—Terms—Public hearing.
35.64.020 Construction—Collective bargaining agreement not affected.

35.64.010
Contracts for management and operation—Terms—Public hearing.

(1) If the legislative authority of a city with a population over one hundred fifty thousand that is not in a metropolitan park district contracts with one or more nonprofit corporations or other public organizations for the overall management and operation of a zoo, an aquarium, or both, that contract shall be subject to this section. No such contract for the overall management and operation of zoo or aquarium facilities by a nonprofit corporation or other public organization shall have an initial term or any renewal term longer than twenty years, but may be renewed by the legislative authority of the city upon the expiration of an initial term or any renewal term.

(2) Before approving each initial and any renewal contract with a nonprofit corporation or other public organization for the overall management and operation of any facilities, the city legislative authority shall hold a public hearing on the proposed management and operation by the nonprofit corporation or other public organization. At least thirty days prior to the hearing, a public notice setting forth the date, time, and place of the hearing must be published at least once in a local newspaper of general circulation. Notice of the hearing shall also be mailed or otherwise delivered to all who would be entitled to notice of a special meeting of the city legislative authority under RCW **42.30.080**. The notice shall identify the facilities involved and the nonprofit corporation or other public organization proposed for management and operation under the contract with the city. The terms and conditions under which the city proposes to contract with the nonprofit corporation or other public organization for management and operation shall be available upon request from and after the date of publication of the hearing notice and at the hearing, but after the public hearing the city legislative authority may amend the proposed terms and conditions at open public meetings.

(3) As part of the management and operation contract, the legislative authority of the city may authorize the managing and operating entity to grant to any nonprofit corporation or public or private organization franchises or concessions that further the public use and enjoyment of the zoo or aquarium, as the case may be, and may authorize the managing and operating entity to contract with any public or private organization for any specific services as are routinely so procured by the city.

(4) Notwithstanding any provision in the charter of the city so contracting for the overall management and operation of a zoo or an aquarium, or any other provision of law, the nonprofit corporation or other public organization with responsibility for overall management or operation of any such facilities pursuant to a contract under this section may, in carrying out that responsibility under such contract, manage, supervise, and control those employees of the city employed in connection with the zoo or aquarium and may hire, fire, and otherwise discipline those employees. Notwithstanding any provision in the charter of the city so contracting for the overall management and operation of a zoo or an aquarium, or any other provision of law, the civil service system of any such city shall provide for the nonprofit corporation or other public organization to manage, supervise, control, hire, fire, and otherwise discipline those employees of the city employed in connection with the zoo or aquarium.

(5) As part of the management and operation contract, the legislative authority of the city shall provide for oversight of the managing and operating entity to ensure public accountability of the entity and its performance in a manner consistent with the contract.

[2000 c 206 § 1.]

35.64.020
Construction—Collective bargaining agreement not affected.

Nothing in this chapter shall be construed to affect any terms, conditions, or practices contained in a collective bargaining agreement in effect on June 8, 2000.

[2000 c 206 § 2.]