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No. 98150-7

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

LORI SHAVLIK and ARTHUR WEST,

Appellants,

v.

DAWSON PLACE,

Respondent,

RESPONDENT DAWSON PLACE'S ANSWER TO
PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

This case involves a public records case filed against a private non-profit corporation organized as a Section 501(c)(3) charity to serve the needs of victims of child abuse. Plaintiffs made public records requests to this private entity, with full knowledge that it is not an “agency” covered by the Public Records Act (“PRA”).

On November 30, 2017 Judge George F. B. Appel issued an order granting Defendant Dawson Place’s Motion for Summary Judgment and denying motions for summary judgment by Plaintiffs Arthur West and Lori Shavlik¹. Judge Appel’s decision analyzed the question of whether Dawson Place Child Advocacy Center (“Dawson Place”) was a functional equivalent of an agency under the factors set forth in *Telford v. Thurston County Board of Commissioners*, 95 Wn.App. 149, 165-166, 974 P.2d 886 (1999) which was adopted by the Supreme Court in *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017). Applying the tests adopted by this Court in *Fortgang*, Judge Appel found that none of the “*Telford* factors” favored a finding that Dawson Place should be subject to the PRA and that all the *Telford* factors compelled the opposite result.

¹ This case involves two separate Public Records Act cases which were consolidated pursuant to CR 42.

Petitioners appealed seeking direct review by the Supreme Court, which denied this request, sending the matter to Division One of the Court of Appeals. On November 25, 2019 Division One affirmed Judge Appel's summary judgment ruling, holding that Dawson Place is not the functional equivalent of a government agency under the Public Records Act.

Dawson's Place is a charitable organization designed to serve the needs of abused children. One of its primary functions is to own a building which provides a common location for public and private entities to address the physical, mental, emotional and legal needs of abused children. CP 4058. Dawson's Place leases space to several tenants who provide such services on behalf of victims of child abuse, specifically:

- Providence Intervention Center for Assault and Abuse (PICAA)
- Compass Health – Child Advocacy Program (CAP)
- Snohomish County Prosecuting Attorney – Special Assault Unit
- Snohomish County Sheriff – Special Investigation Unit; and,
- Department of Social and Health Services, Division of Child and Family Services (DCFS).

CP 4058.

By co-locating these service agencies in a single building, abused children are not forced to go to multiple locations to receive the therapy, treatment, and advocacy services they desperately need. Dawson Place

facilitates access to the needed services for abused children and allows a multi-disciplinary approach to their needs. CP 4057-58.

Dawson Place employs expert child interviewers who interview child victims at the request of law enforcement agencies, pursuant to a professional services agreement with Snohomish County. CP 4087. The interviewers are trained experts who follow nationally recognized standards designed to elicit factual responses from child victims. The interviews are videotaped and provided to investigators for use in legal proceedings. However, Dawson Place itself has no decision-making authority in the investigation or prosecution of child abuse cases. CP 4056-57. All such authority is retained by law enforcement and the prosecuting attorney's office. Moreover, no law compels Dawson Place to perform any such functions, which is done pursuant to contract.

The majority of Dawson Place's operational funding comes from private donations. CP 4059. For fiscal years from 2014 to the first half of FY 2017, Dawson Place received between 24% and 43% was from governmental funding. CP 4313. Between 57% and 76% was received from private sources and rental income from the Dawson Place building. *Id.* Dawson Place receives public funds in exchange for providing the child interview specialists pursuant to its professional services contract. It

is paid rent in exchange for providing office space to its tenants, both public and private alike.

Dawson Place historically has received capital funding from state and federal grants available to non-profit corporations through the federal Department of Housing and Urban Development (HUD) and Washington State Department of Commerce. CP 4061. These funds were used for the purchase and renovation of the building Dawson Place now occupies. The funds obtained from the Washington State Department of Commerce were provided through the Local and Community Projects Grant Program under RCW 43.63A.125(1). This source of funding is available to numerous charities and non-profit organizations and has been used to build projects on behalf of the Boys and Girls Clubs in several localities, the Federal Way National Little League, Cold Creek YMCA, and Salvation Army of Clark County. See Chapter 497, Laws of 2009, Sec. 1048.

Dawson Place, as a non-profit charitable corporation, is organized under the laws of the State of Washington pursuant to Articles of Incorporation and Bylaws. CP 4068. These Bylaws provide that the governance of the non-profit corporation is through a Board of Directors which has a majority of its membership comprised of community members. CP 4974. The service agencies located at Dawson Place also have a seat on the board but do not control a majority of votes. Dawson

Place is organized as wholly owned subsidiary of Compass Health, a private service provider. CP 4068.

II. COUNTERSTATEMENT OF ISSUE

- A. Whether the Supreme Court should accept review under RAP 13.4(b) where the Court of Appeals closely followed recent Supreme Court precedent establishing the test for whether an entity is the functional equivalent of a governmental agency under the Public Records Act?

III. ANSWER TO PETITION FOR REVIEW

- A. THIS COURT OF APPEALS FAITHFULLY APPLIED WASHINGTON LAW AND THERE IS NO CONFLICT WITH *FORTGANG V. WOODLAND PARK ZOO*.**

In order to seek review of a Court of Appeal Court decision, Appellants must demonstrate that it is within the types of cases listed in RAP 13.4(b). Plaintiffs do not argue why this case fits these criteria, which are:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

First, the Supreme Court has already decided the issues of law as to what test should be applied to claims that a private entity is the

functional equivalent of an agency under the Public Records Act. This case is a straight-forward application of the rules set forth in *Fortgang* which clearly demonstrate that, like the Woodland Park Zoo, Dawson Place is not the functional equivalent of an agency under Washington law.

Petitioners spend considerable time pointing to cases from other jurisdictions, but do not devote any of their petition to identifying why or how the Court of Appeals decision departs from or conflicts with the *Fortgang* decision. The body of the petition does not cite to any of the provisions of *Fortgang*, which was adopted weeks before the records requests at issue were made, and which is dutifully cited and closely followed by the Court of Appeals opinion. Thus, there is no conflict with the controlling Supreme Court precedent so recently adopted in *Fortgang*. Thus, under the first criteria in RAP 14.4(b), the Court should deny the request for direct review.

Secondly, the Petitioners argue that the Court of Appeals opinion misapplies the *Telford* test, without citation to any particular portion of the opinion and without discussing the articulation and application of that test set forth in *Fortgang*. The Court of Appeals correctly followed the ruling of this court in *Fortgang* and applied it to the facts applicable to Dawson Place.

The reasons explained in the Court of Appeals opinion show a faithful examination of the functions performed by Dawson Place and analyze them under the four-part test first articulated in *Telford* and explained and adopted in *Fortgang*. The Court explained the three major functions of Dawson Place: 1) acting as a landlord to governmental and non-governmental entities that serve the needs of abused children; 2) coordinating information sharing between these entities, while reserving decision-making to the appropriate entities; and 3) employing two child interview specialists who, pursuant to contracts with government entities, perform forensic interview services to victims of abuse, at the request of law enforcement, counsellors, social workers or health care providers. 452 P.3d at 1249. The Court noted that these functions, while important in serving the needs of abused children, are not inherently governmental in nature, but advance the therapeutic process for these young victims while allowing law enforcement, social service agencies and health care providers all to benefit. *Id.*

The Court critically evaluated Petitioners' arguments and rejected them because Dawson Place does not exercise any governmental decision-making authority. Despite Petitioners' unsupported claims to the contrary, the uncontradicted evidence demonstrated that Dawson Place exists and functions even where there is no law enforcement role at all. Thus it

correctly determined that the first *Telford* factor, was not met because Dawson Place does not perform any nondelegable governmental function.

Secondly, the Court correctly found that much of Dawson Place's governmental funding was from grants for non-profits to buy and upgrade its building. 452 P.3d. at 1250. The Court of Appeals correctly followed *Fortgang* by distinguishing income that is derived from fees for services from dedicated governmental funding. *Id.* at 1251. When income from services provided to the government is excluded, less than half of Dawson Place's income comes from public sources. *Id.* at 1251. Petitioners cast a blind eye to this part of the *Fortgang* analysis and failed to offer competent evidence concerning the amount of governmental funding.

As to the third factor in the *Fortgang* analysis, the Court correctly found that there is no day-to-day control over Dawson Place by government agencies. The Court correctly found that the protocols required by RCW 26.44 apply to the County and do not directly regulate a child advocacy center. Additionally, Dawson Place's by-laws ensure control of the Board is in private, not governmental hands. The Court thus faithfully applied the third factor to find a lack of governmental control over Dawson Place.

The fourth *Fortgang* factor, government origin, is grossly distorted by Petitioners, who select isolated passages from deposition testimony to

highlight the efforts of supporters who were in government positions. They ignore completely the roles of community organizers and private entities to build and organize Dawson Place into a non-profit corporation. The Court correctly points out that Dawson Place was not created by legislation and pre-existed the adoption of RCW 26.44 which required counties to establish protocols for investigating child abuse. Dawson Place was supported by a broad coalition of actors, some of whom were government officials, but others who were citizens, activists and companies devoted to providing health care and counselling services to children who have suffered unimaginably as victims of abuse. The Court was cognizant of all the facts and did not myopically select only those favorable to a partisan argument, as Petitioners do.²

Moreover, there is no fundamental and urgent issue in applying the PRA to a non-profit corporation in this case. To the extent Appellants contend that governmental tenants are located at the building owned by Dawson Place, the records of the Snohomish County Prosecutor, Sheriff and DSHS would be subject to the PRA through requests to each

² Petitioners claim that their version is “uncontradicted” evidence. Dawson Place welcomed support from individuals, whether employed by the government or not. It welcomed and depended on the efforts of citizens like Carole Kosturn and Mary Johanson who described a broad based community effort, acknowledging the contributions of Mr. Roe, Ms. Ellis and others. Petitioners falsely state that Dawson Place was created by Seth Dawson but point to no official act that accomplished this task. In reality, the Child Advocacy Center was named for Mr. Dawson who founded units within the Prosecutor’s Office to pursue child abuse cases.

respective agency. Thus, records concerning investigations conducted by the Special Investigation Unit of the Sheriff or the Prosecutor's Special Assault Unit can be requested from Snohomish County, including records of child interviews provided pursuant to the contract with Dawson Place.

Finally, Petitioners argue that the Court of Appeals misapplied *Fortgang* and *Telford* because they require review of the "totality of the circumstances". They contend, without supporting citation, that the Court disregarded analysis of the total circumstances in favor of a checklist approach. This is incorrect. The Court did assess the total circumstances, including all the *Telford* factors, despite Petitioners' argument that they should disregard that test and find that it plays an "inherently governmental" role in law enforcement. The Court correctly rejected this argument, which grossly overstates the role of a child advocacy center. 452 P.3d at 1248.

The Court of Appeals faithfully applied the law as set forth in *Fortgang*. There is no conflict with Washington law that supports granting the petition for review.

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B. THE COURT OF APPEALS DECISION DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC CONCERN OR CONSTITUTIONAL ISSUE MERITING SUPREME COURT REVIEW.

The last two criteria in RAP 13.4(b) are not present in this case.

There is no constitutional issue as this is solely a matter of statutory application of the Public Records Act and what entities are “agencies” under the statute.

Likewise, this case does not present any substantial issue of public concern. Indeed, the issue of law at issue was recently decided in *Fortgang*. Petitioners present no basis for reconsideration of that decision and do not discuss or even bother to cite to the *Fortgang* decision. As such, the Court should deny the petition for review.

IV. CONCLUSION

The Court should deny the motion for direct review.

Dated this 4th day of March, 2020.

LAW, LYMAN, DANIEL,
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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020 I served the foregoing with the Clerk of the Court for the Washington State Supreme using the Supreme Court portal. I certify that all participants in the case are registered Supreme Court portal users and that service will be accomplished by the Supreme Court portal system as well as by United States Postal Service.

Signature:

/s/ Lisa Gates
Legal Assistant to Jeffrey S. Myers

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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