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NO. 90037-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN WORTHINGTON,

Appellant,

v.

WESTNET,

Respondent.

STATE OF WASHINGTON'S AMICUS CURIAE BRIEF

Filed
Washington State Supreme Court

SEP 19 2014

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I. INTRODUCTION

State and local agencies and other governmental entities often work cooperatively to achieve common goals, using a variety of workgroups, interagency task forces, or commissions. These cooperative efforts range from informal meetings among staff members to the creation of separate legal entities through an interlocal agreement or other statute. *See, e.g.*, RCW 39.34.030(3)(b) (interlocal agreement authorizes creation of separate legal entity); RCW 70.96A.510 (creating Fetal Alcohol Syndrome Interagency Work Group). While some of these cooperative efforts may result in an entity that can be considered a separate “agency” for purposes of the Public Records Act, many such cooperative efforts do not.

The Court should affirm the Court of Appeals and trial court conclusions that the task force at issue here was not a separate legal entity, and therefore not an “agency” for purposes of the Public Records Act, RCW 42.56. As explicitly allowed by statute, the agencies forming the task force clearly stated their intent not to create a separate entity, and the record shows that the public records request at issue was not ignored, but was responded to by the participating agency that received the public records request. Thus, this case differs fundamentally from those cases in which a private entity performing a government function would otherwise

evade public scrutiny. On these narrow facts, the Court should affirm rather than considering a broad ruling that all task forces comprised of public agencies are separate “agencies” required to comply with the Public Records Act.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The State of Washington exercises governmental functions through scores of state agencies, boards, and commissions. These agencies often collaborate with other state entities, local governments, federal agencies, and private citizens to coordinate common efforts, analyze interagency issues, and achieve economies of scale in their respective missions. The legislature authorized and encouraged these cooperative relationships by passing the Interlocal Cooperation Act, RCW 39.34. In addition, state and local agencies and local governments often collaborate in more informal workgroups, commissions, and panels, including joint efforts with judicial bodies and private organizations or citizens.

The State has a substantial interest in this case in ensuring the continued vitality of these cooperative efforts. A broad ruling, which in the State’s view is not called for given the facts in the case, could chill cooperative efforts among state, local, and federal agencies. Specifically, the State respectfully requests this Court not to adopt a new rule that task

forces created by interlocal agreement are necessarily separate legal entities subject to the Public Records Act.

III. ISSUES ADDRESSED BY AMICUS

Should this Court affirm the Court of Appeals when the agencies comprising WestNET did not intend to create a separate legal entity and the record fails to show that Mr. Worthington's access to public records was obstructed?

IV. STATEMENT OF THE CASE

The State adopts the statement of facts as set forth in the Court of Appeals opinion, *Worthington v. WestNET*, 179 Wn. App. 788, 320 P.3d 721 (2014).

V. ARGUMENT

A. Multiple Agencies Working Cooperatively Do Not Necessarily Create A Separate "Agency" Subject To The Public Records Act

Washington's Public Records Act imposes various obligations relating to public records on a state or local "agency."¹ *E.g.*, RCW 42.56.040, .070, .100, .152. In turn, agencies subject to the Public

¹ RCW 42.56.010(1) defines "agency" to include:

[A]ll state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

Records Act often work cooperatively with other agencies, local governments, private citizens and organizations, and judicial staff. Just a few examples of cooperative efforts include law enforcement task forces such as in the present case, the Public Health Standards Workgroup (including members of various local health departments and the State Department of Health), and this Court's Commission on Children in Foster Care (including various government agency officials, judges, and non-profit organizations).² In addition, agencies frequently cooperate on a more informal basis, through creation of various workgroups, committees, or task forces.

Certainly there are instances in which collaboration creates a separate "agency," but the State respectfully submits that it would be absurd to suggest that a separate public "agency" subject to the Public Records Act is created *every* time an agency engages in such cooperative effort. Such a ruling would require all such collaborative groups, among other obligations, to appoint a public records officer (RCW 42.56.580); publish in the Washington Administrative Code procedures for obtaining records (RCW 42.56.040); publish a list of every law that may contain exemptions of its records (RCW 42.56.070(2)); and maintain an index of

² See <http://www.doh.wa.gov/Portals/1/Documents/1200/Phs-Roster.pdf> (last visited Sept. 8, 2014) (Public Health Standards Workgroup membership list); http://www.courts.wa.gov/committee/?fa=committee.home&committee_ID=50 (last visited Sept. 8, 2014) (Commission on Children in Foster Care membership list).

certain policies and reports (RCW 42.56.070(3)). There is no reason to broadly impose these obligations on cooperative efforts by agencies, especially given that a member of the public can always request documents under the Public Records Act from the actual state or local agencies that are participating in a task force. For these reasons, the State submits that it should be the unusual collaborative effort that would rise to the level of creating an entirely independent “agency” subject to the Public Records Act.

Nor should the fact that a task force or workgroup has been created pursuant to an interlocal agreement authorized by RCW 39.34 be dispositive. In enacting the Interlocal Cooperation Act, the legislature explicitly authorized agencies to enter into agreements to exercise joint or cooperative action. Specifically, the legislature authorized “[a]ny two or more public agencies [to] enter into agreements with one another for joint or cooperative action pursuant to the provisions of [RCW 39.34.]” RCW 39.34.030(2). When entering into such an agreement, the participating agencies have discretion regarding the precise legal nature of the cooperative action—and that discretion includes the option to collaborate without creating a separate legal entity capable of being sued. RCW 39.34.030(3)(b).

It makes sense that the legislature gave flexibility to public agencies in determining whether to establish a separate legal entity. If every agreement under the Interlocal Cooperation Act created a separate legal entity capable of being sued, such a requirement would discourage public agencies from sharing resources and achieving economies of scale. WestNET represents a proper exercise of the participating jurisdictions' discretion under the Interlocal Cooperation Act. Accordingly, this Court should affirm the lower courts and find that this interlocal agreement did not create a separate legal entity capable of being sued, and therefore did not create an "agency" subject to the Public Records Act.

B. The *Telford* Four-Factor Test Is Inapposite Here

Mr. Worthington suggests that this Court should apply a test developed by Division Two of the Court of Appeals to determine whether a private entity is operating as the functional equivalent of a government agency. Pet'r's Suppl. Br. at 10 (citing *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886 (1999)). To the contrary, the *Telford* test has no application here. As the Court of Appeals correctly determined, the four-factor test set forth in *Telford* is used to determine if a private entity is operating as the functional equivalent of a government agency, not whether a separate entity was created by public agencies working collaboratively. *Worthington*, 179 Wn. App. at 792.

In *Telford*, the Court of Appeals considered whether an association of counties was subject to the Public Disclosure Act's limitations on using public funds for campaign purposes. The *Telford* court developed a four-factor test to determine whether an entity is the functional equivalent of a public agency: "(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. Subsequent courts have referred to this four-factor balancing test in analyzing whether the Public Records Act or the Open Public Meetings Act applied to private entities. See *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 252 P.3d 406 (2011) (by statute, association of counties constituted a "public agency" and *Telford* analysis did not control); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 181 P.3d 881 (2008)³ (private animal control company was functional equivalent of public agency and subject to the Public Records Act); *Spokane Research & Def. Fund v.*

³ Mr. Worthington suggests in his petition for review that the *Clarke* case involved the issue presented here—whether an intergovernmental association is a separate legal entity subject to suit and a separate "agency" for purposes of the Public Records Act. Pet. Rev. at 11-12. He is incorrect. Although an intergovernmental association created pursuant to interlocal agreement is mentioned in the case, it is the private corporation hired by the intergovernmental association that is the focus of the court's analysis. The opinion neither analyzes the question of whether the intergovernmental association is separately subject to the Public Records Act nor addresses factually whether the interlocal agreement created a separate legal entity. *Clarke*, 144 Wn. App. at 188-92.

West Cent. Cmty. Dev. Ass'n, 133 Wn. App 602, 137 P.3d 120 (2006) (*Telford* analysis unnecessary for a charitable organization meeting on public property that clearly did not fit statutory definition of “state agency”).

A *Telford* analysis is inapposite to the issue before this Court. The *Telford* analysis was not intended to determine whether an entity is subject to suit; instead, *Telford*'s four-factor test presupposes a separate legal entity, but examines the nature of that entity. *E.g.*, *Telford*, 95 Wn. App. at 162 (listing as factors whether “the entity” performs a governmental function and whether “the entity” was created by government). Moreover, the test's focus on distinguishing between public and private entities is not helpful to an analysis of whether a collaborative group made up of public agencies constitutes a separate “agency,” because every factor of the test would be met in virtually any collaborative effort by public agencies. The underlying purpose of the *Telford* rule—to ensure transparency and accountability when private agencies not otherwise subject to the Public Records Act perform governmental roles—also has no application here, where the members of the task force are themselves agencies subject to the Public Records Act. Designating WestNET an “agency” would do nothing to enhance transparency, but would discourage collaboration

between agencies by creating confusion and additional cost in any such effort.

Rather than look to *Telford*, this Court should look to persuasive federal case law. In *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995), the Ninth Circuit considered a task force very similar to WestNET in the context of determining whether the taskforce was a “person” subject to suit for violations of constitutional rights. The taskforce in *Hervey*, the Tacoma Narcotics Enforcement Taskforce, was based upon an interlocal agreement that—like the agreement here—acknowledged each participating agency was responsible for its own employees, and each participating agency would indemnify the other agencies for its employees’ actions or inactions. *Id.* at 792; CP at 125-35. Although the court acknowledged that governmental entities can in some circumstances be considered “persons” and subject to suit under 42 U.S.C. § 1983, it held that an intergovernmental association was subject to suit only if the parties that created it intended to create a separate legal entity. *Hervey*, 65 F.3d at 792. In determining that the record demonstrated that the parties did not intend to create a separate entity, the court referenced Washington’s Interlocal Cooperation Act and the terms of the parties’ agreement under the Act. *Hervey*, 65 F.3d at 792. The court also distinguished intergovernmental associations created by statute from those created by

agreement, holding the latter created separate legal entities only if the parties intended to do so. *Hervey*, 65 F.3d at 792. The same analysis should control here.

C. The Court Should Affirm The Court Of Appeals Based On The Facts Presented Rather Than Announce A Broad Ruling Potentially Affecting All Intergovernmental Collaboration

Given the sparse record and the narrow issue presented, this Court should follow the lower courts' reasoning that WestNET is not a separate legal entity subject to suit rather than announcing a broad rule regarding any joint cooperation agreement among agencies. This is not the case to issue a broad rule that may define myriad task forces, working groups, or stakeholder meetings as separate "agencies" subject to the Public Records Act. Rather, the issue and facts of this case are narrow: Mr. Worthington submitted a public records request to the Kitsap County Sheriff's Office, requesting records relating to WestNET. CP at 18. The Kitsap County Sheriff's Office responded to his public records request. CP at 20. If he was dissatisfied with the response, he should have named that public agency in his Public Records Act lawsuit—not a task force that was not legally capable of acting on behalf of its constituent agencies. *See* CP at 127-28 (no separate legal entity created and each agency an independent contractor without authority to bind or control other agencies). Similarly, if he believed that other records regarding WestNET existed that were not

provided to him, he could have requested records from the other public agencies making up WestNET. There is simply nothing in the record suggesting that the creation of WestNET allowed public records to escape scrutiny, nor that the Kitsap County Sheriff's Office used the existence of WestNET as an excuse for why records were not provided. *Cf. Clarke*, 144 Wn. App. at 188 (public agency that contracted with private entity to perform government function claimed only private entity had records and private entity refused to provide records because it claimed it was not subject to the Public Records Act). Accordingly, this Court should affirm.

D. WestNET Did Not Establish A "Secret Police Agency" Unaccountable To The Public Records Act Or Public Scrutiny

Mr. Worthington appears to argue that the WestNET interlocal agreement enabled the participating jurisdictions to create a secret police agency unaccountable to the people, including via the Public Records Act. That is not so. RCW 39.34.030(5) explicitly provides that interlocal agreements do not "relieve[] any public agency of any obligation or responsibility imposed upon it by law[.]"⁴ Contrary to Mr. Worthington's concerns, the WestNET interlocal agreement did not relieve the Kitsap County Sheriff's Office or any other participating jurisdiction from its

⁴ RCW 39.34.030(5) provides an exception regarding contracting and performance of contracts that is not at issue in this litigation.

obligation to respond to public records requests regarding WestNET operations. This is not a case where a public agency attempted to delegate its Public Records Act responsibilities to another entity or sought to avoid those responsibilities. Cf. *Clarke*, 144 Wn. App. at 194 (a local government “cannot delegate away its statutory *responsibility* to perform within [Public Records Act] legal requirements”). Indeed, the Kitsap County Sheriff’s Office responded to the public records request at issue. CP at 20 (letter from Kitsap County Sheriff’s Office acknowledging Mr. Worthington’s Public Records Act request and offering to allow him to review the responsive records at its office).

Nor is this a case where a requestor could not identify the agencies or public employees carrying out the functions of a task force. Thus, this is not a case where the requestor was unable to pursue governmental accountability because he did not know to which public agency to send a public records request. The interlocal agreement clearly identified the agencies that participate in WestNET. Mr. Worthington could submit public records requests to those agencies regarding task force operations. Mr. Worthington could sue these agencies individually under RCW 42.56.550 for failing to respond to his public records request. There is no secret police agency or ploy to undermine the Public Records Act.

Accordingly, this Court should affirm the Court of Appeals and find that WestNET is not a separate legal entity subject to lawsuits.

E. Finding That WestNET Is An Agency That Is Capable Of Being Sued Would Raise A Host Of Unanswered Questions

Mr. Worthington invites this Court down an uncertain and unnecessary path without the factual record to merit this journey. Should this Court hold that WestNET is a separate legal entity subject to suit under the Public Records Act, the holding will create more questions than answers. These questions include whether each agency to the task force received fair notice of the request or had an obligation to respond to the request sent to another public agency. *See Germeau v. Mason County*, 166 Wn. App. 789, 271 P.3d 932 (2012) (a requestor must provide fair notice to an agency of a public records request). If a requestor chooses to pursue remedies under RCW 42.56.550, how does the requestor serve the task force? Do statutory service requirements such as RCW 4.92.020 apply? These unanswered questions will likely chill the purpose and policy of the Interlocal Cooperation Act.

Additionally, such a rule could impact participation and cooperation between public agencies and other participants in a variety of situations. Will experts outside government agree to sit on task forces if the task force itself could be sued for violating the Public Records

Act? What purpose would allowing such suits serve where, as here, the records are all retained by state or local agencies that are unquestionably subject to the Public Records Act?

These hypothetical situations, like the situation before this Court, does not require a *Telford* analysis to further the Public Records Act or the public's right to know. The public can identify the governmental agencies or employees who served on the task force or committee. The public can submit public records requests to the agency for records related to the committee. Likewise, Mr. Worthington could, and did, submit public records requests to the WestNET participating jurisdictions. This is not the case to evaluate hypothetical scenarios that could enable public agencies to skirt their Public Records Act responsibilities by entering into interlocal agreements, because that did not happen here.

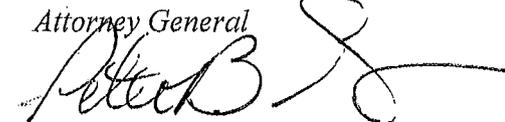
VI. CONCLUSION

The collaboration of government agencies with each other, other governments, and private citizens and organizations is an important aspect of effective government. In this case, various governmental jurisdictions collaborated to achieve important goals and there is no evidence in the record that this collaboration was intended to create a separate legal entity, or that it resulted in public records being hidden from

public scrutiny. Accordingly, the State respectfully requests that the Court affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 8th day of September 2014.

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A handwritten signature in black ink, appearing to read "Peter B. Gonick", written over the printed name of Peter B. Gonick.

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