72413-4

72413-4

No. 92846-1

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

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

ALYNE FORTGANG,

Appellant/Plaintiff,

v.

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

Respondent/Defendant.

AMICUS BRIEF IN SUPPORT OF APPELLANT

[*Counsel listed next page*]

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 16 PM 3:41

SUSANNAH CARR
WSBA #38475
GORDON TILDEN THOMAS &
CORDELL LLP
1001 FOURTH AVENUE, SUITE 4000
SEATTLE, WA 98154
Telephone: (206) 467-6477
Facsimile: (206) 467-6292

GREGORY J. KERWIN
JASON STAVERS
GIBSON, DUNN & CRUTCHER LLP
1801 CALIFORNIA STREET, SUITE
4200
DENVER, CO 80202
Telephone: (303) 298-5700
Facsimile: (303) 298-5907

PETER BACH-Y-RITA
ROBERT E. KIM
GIBSON, DUNN & CRUTCHER LLP
555 MISSION STREET, SUITE 3000
SAN FRANCISCO, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

Attorneys for Amicus Curiae

ANIMAL LEGAL DEFENSE FUND

TABLE OF CONTENTS

Page

INTRODUCTION 1

IDENTITY AND INTEREST OF AMICUS 2

STATEMENT OF THE CASE 2

ISSUES ADDRESSED BY AMICUS 3

ARGUMENT 4

I. The Trial Court's Understanding of "Governmental Function" Was Legal Error 4

A. "Governmental Function" Under *Telford* is Properly Understood to Encompass Functions Traditionally Associated with Government 5

B. The Trial Court Erred When It Interpreted "Governmental Function" to Exclude the "Provision of Services" 7

II. Management of the Woodland Park Zoo Is a Traditional Government Function under *Telford* 11

A. The Management of Zoos is A Traditional Government Function in the United States 11

B. Maintaining Zoos Including the Woodland Park Zoo Is a Traditional Government Function in Washington 13

III. Application of Washington's Public Records Act to the WPZS Is Consistent With the Purposes of the Act 16

A. The Washington Public Records Act Was Passed to Give Citizens Control Over the "Instruments That They Have Created"—

Whether Those Instruments Are Public or Private 16

B. Public Records Act Requests Like Ms. Fortgang's Are Instrumental In Promoting Animal Welfare 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Tr. v. Freedom of Info. Comm'n,
181 Conn. 544, 436 A.2d 266 (1980) 5, 9

Clarke v. Tri-Cities Animal Care & Control Shelter,
144 Wn. App. 185, 181 P.3d 881 (2008) 8, 9

Clayton County Hospital Authority v. Webb,
208 Ga. App. 91, 430 S.E.2d 89 (Ga. Ct. App. 1993) 17

Denver Post. Corp. v. Stapleton Dev. Corp,
19 P.3d 36 (Colo. App. 2000) 15

Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Info. Comm'n,
No. CV94 0367012-S, 1995 Conn. Super. LEXIS 1581 (Conn. Super. Ct. May 23, 1995) 5

Evans v. Newton,
382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) 10

Fahey v. Jersey City,
52 N.J. 103, 244 A.2d 97, 100 (N.J. 1968) 10

Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.,
577 N.E.2d 208 (Ind. 1991) 17

Marks v. McKenzie High Sch. Fact-Finding Team,
319 Or. 451, 878 P.2d 417 (1994) 6, 9

Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.,
729 So.2d 373 (Fla. 1999) 15, 17

New York Times Co. v. United States,
403 U.S. 713, 91 St. Ct. 2140, 29 L. Ed. 2d 822 (1971) 16

News and Observer Pub. Co. v. Wake Cnty. Hosp. Sys., Inc.,
55 N.C. App. 1, 284 S.E.2d 542 (N.C. Ct. App. 1981) 17

News and Sun-Sentinal Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.,
596 So.2d 1029 (Fla. 1992) 17

Prison Legal News v. Dep't of Corr.,
154 Wn.2d 628, 115 P.3d 316 (2005)..... 16

Sebek v. City of Seattle,
172 Wn. App. 273, 290 P.3d 159 (2012)..... 19

Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n,
133 Wn. App. 602, 137, P.3d 120 (2006)..... 8, 9

State ex rel. Toomey v. City of Truth or Consequences,
2012-NMCA-104, 287 P.3d 364 (N.M. Ct. App. 2012)..... 17

Telford v. Thurston Cnty. Bd. of Comm'rs,
95 Wn. App. 149, 974 P.2d 886 (1999)..... 3, 4, 5, 9

Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.,
165 Wn.2d 679, 202 P.3d 924 (2009)..... 10

Weston v. Carolina Research and Dev. Found.,
303 S.C. 398, 404 S.E.2d 161 (S.C. 1991) 17

Statutes

42 RCW § 42.56 ..... 3, 16

Other Authorities

Elephants are dying out in America's Zoos, The Seattle Times (Dec. 1, 2012), http://www.seattletimes.com/nation-world/elephants-are-dying-out-in-americas-zoos/..... 19

Elizabeth Hanson, *Animal Attractions: Nature on Display in American Zoos* 4 (Princeton University Press, 2002)..... 12

Jesse C. Donahue & Erik K. Trump, *American Zoos During the Depression* 7 (2010) 12

Judge Orders NYPD to Provide Records on Carriage Horses to ALDF, Animal Legal Defense Fund (Apr. 28, 2014), http://aldf.org/blog/judge-orders-nypd-to-provide-records-on-carriage-horses-to-aldf/ 18

Legally Brief: NYC Considers Ban on Carriage Horse Industry, Animal Legal Defense Fund (Dec. 8, 2014), http://aldf.org/blog/legally-brief-nyc-considers-ban-on-carriage-horse-industry/ 19

Legally Brief: Traffic Reports Finally Released in Horse Carriage Accidents, Animal Legal Defense Fund (Nov. 20, 2014), http://aldf.org/blog/legally-brief-traffic-reports-finally-released-in-horse-carriage-accidents/ 18

Press Release: Woodland Park Zoo to phase out its elephant program Plans will begin for relocating elephants to an AZA-accredited institution, Woodland Park Zoo (Nov. 19, 2014), http://www.zoo.org/document.doc?id=1458 20

Ringling Bros. Says No More Circus Elephants By 2018, NPR (Mar. 5, 2015), http://www.npr.org/blogs/thetwo-way/2015/03/05/390951839/ringling-bros-says-no-more-circus-elephants-by-2018 20

Settlement In Palm Springs Lawsuit Will Mean Improvements In Conditions For Homeless Animals, Animal Legal Defense Fund (June 26, 2012), *http*://aldf.org/press-room/press-releases/settlement-in-palm-springs-lawsuit-will-mean-improvements-in-conditions-for-homeless-animals/ 19

INTRODUCTION

The trial court denied Alyne Fortgang's request for information about the conditions under which the Woodland Park Zoo ("WPZ" or "Zoo") keeps elephants, in part because it believed that Washington's Public Records Act does not apply to entities which provide public services under contract with the government—such as the Woodland Park Zoo Society ("WPZS"), the operator of the Zoo. But there is no such limitation in the statute or in case law. Rather, the question is whether the entity is performing a function traditionally associated with government. This is the formulation used by the Washington Attorney General, and by courts in Connecticut and Oregon, the jurisdictions that the Washington Court of Appeals looked to in its controlling opinion on this issue, *Telford v. Thurston County Bd. of Comm'rs*, 95 Wash.App. 149, 974 P.2d 886 (1999). The trial court's contrary holding was an error of law.

Applying this analysis, there should be no doubt that the management of the Woodland Park Zoo is a function traditionally associated with government. The Zoo's history, and that of zoos in the United States generally, is a history of civic involvement. Moreover, that history reflects our evolving understanding of animal welfare and captivity, an evolution driven in part by public disclosure just like that Ms. Fortgang seeks here.

IDENTITY AND INTEREST OF AMICUS

The Animal Legal Defense Fund ("ALDF") is a national, non-profit organization of attorneys and supporting members committed to protecting the lives and advancing the interests of animals through the legal system. ALDF is responsible for developing case law and legal theory involving the consideration of nonhumans by the courts. ALDF has over thirty years of experience litigating cases across federal and state jurisdictions, including this Court.

In addition to analyzing issues involving animals in many states and legal areas, ALDF seeks to raise public awareness regarding the treatment of animals within the legal system. In particular, ALDF has extensive experience campaigning for the humane treatment of animals in zoos and aquariums. Many of ALDF's campaigns have involved the use of public records requests such as the ones at issue in this case. Accordingly, ALDF has an important interest in the outcome of this appeal, and is well-positioned to assist the Court in reaching its decision regarding the application of the Public Records Act.

STATEMENT OF THE CASE

ALDF adopts the Appellant's Statement of the Case as a fair and accurate description of the events giving rise to this appeal.

ISSUES ADDRESSED BY AMICUS

In *Telford*, the Court of Appeals of Washington adopted a four-factor test from the Connecticut Supreme Court for determining if an entity is subject to the Washington Public Records Act ("PRA"), 42 RCW § 42.56. *Telford v. Thurston Cnty. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886 (1999).[1] In Connecticut and other jurisdictions employing a similar test, entities that perform functions traditionally performed by the government, such as the operation of parks and schools, satisfy the first *Telford* factor: "whether the entity performs a governmental function." But here, the trial court interpreted "governmental function" to mean enforcement of the law, and to exclude "providing services."

1. Did the trial court err by limiting "governmental function" to enforcement of the law, expressly excluding "providing services?"

2. Is the operation of a large, urban zoo a "governmental function" under *Telford*, as that factor is properly understood?

3. Is the application of the PRA to Woodland Park Zoo Society consistent with the principles of the PRA and with the public disclosure provisions and cases of other states?

---

[1] *Telford* discusses the former chapter 42.17 RCW, the Public Disclosure Act, which was re-codified as the Public Records Act, chapter 42.56 RCW, on July 1, 2006. *See* 42 RCW § 42.56.001.

ARGUMENT

I. The Trial Court's Understanding of "Governmental Function" Was Legal Error

In *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999), this Court adopted a four-factor test for evaluating the application of the Washington Public Records Act to a non-governmental entity: "(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." *Id.* at 162.

Here, the trial court found that the first factor, "governmental function," weighed in favor of the WPZS—and thus against disclosure—because it believed that "governmental functions" were limited to "actually enforcing laws and issuing citations for animal control and that type of thing." Summ J. Hr'g Tr. ("RP") 33:15–18. It expressly excluded "[p]roviding services," from the definition. *Id.* at 33:18–20. It cited no applicable authority for these positions, and there is none. To the contrary, the cases that the Washington Court of Appeals relied on to craft the *Telford* test define "governmental functions" as functions "traditionally associated with government," and have found that services such as operating schools are government functions.

A. "Governmental Function" Under *Telford* is Properly Understood to Encompass Functions Traditionally Associated with Government

The four-factor test adopted in *Telford* was borrowed directly from the Connecticut Supreme Court, with additional reliance on the Oregon Supreme Court and on a pre-existing Washington Attorney General Opinion. *See Telford*, 95 Wn. App. at 161 (citing *Bd. of Tr. v. Freedom of Info. Comm'n*, 181 Conn. 544, 436 A.2d 266 (1980)); *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or. 451, 878 P.2d 417, 424–25 (1994); Att'y General Op. 1991 No. 5). Accordingly, these opinions and cases interpreting them are a natural source of guidance for courts interpreting *Telford*. *See Telford*, 95 Wn. App. at 162 (following a subsequent Connecticut opinion in deciding to balance the four factors, rather than require satisfaction of all four).

In *Board of Trustees*, the Connecticut Supreme Court found that "providing public education at a secondary school level" constitutes a governmental function. *Bd. of Tr.*, 436 A.2d at 271. Lower court cases applying *Board of Trustees* have subsequently held that a government function is "a function traditionally performed by the government." *See, e.g.*, *Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Info. Comm'n*, No. CV94 0367012-S, 1995 Conn. Super. LEXIS 1581, at *6 (Conn. Super. Ct. May 23, 1995). Moreover, as illustrated in *Board of*

Trustees itself, "traditionally performed" is not synonymous with "exclusively performed,"—secondary education is routinely provided by private actors. Likewise, in *Marks v. McKenzie High School Fact-Finding Team,* the Oregon Supreme Court denied the public records request before it, but not before finding that "the operation of a public school" was "unquestionably" "a function traditionally associated with government." *Marks*, 878 P.2d at 425.

In the Washington Attorney General Opinion cited in *Telford*, the Attorney General considered a PRA request directed at the Small Business Export Finance Center ("EAC"), a non-profit formed "to assist small and medium-sized businesses in accessing export markets for their goods . . . by providing information about export opportunities and assisting in financing export transactions." Att'y General Op. 1991 No. 5 at 2. The Attorney General found that the EAC satisfied the first factor of what would become the *Telford* test because "provision of assistance to businesses which would likely be unable to afford or qualify for assistance from the private sector" constituted a "governmental function." Att'y General Op. 1991 No. 5 at 6.

Thus, in adopting the four-factor test developed by the Connecticut Supreme Court in *Board of Trustees*, the Washington Court of Appeals incorporated the widely held view that "governmental functions" in the

context of public records requests are functions traditionally associated with government—including the provision of services.

B. The Trial Court Erred When It Interpreted "Governmental Function" to Exclude the "Provision of Services"

The trial court found that the "governmental function" factor in *Telford* favored the WPZS, based on its understanding of the scope of that term. RP 33:15–22. The court stated that "other cases that have found a government function find it in matters such as actually enforcing laws and issuing citations for animal control and that type of thing." *Id.* at 33:15–18. "Providing services," the court went on, "are not generally thought of as a government function." *Id.* at 33:18–20. This was an error of law.

In support of its position, the trial court offered only the observation that this was the nature of conduct that had been found to satisfy the first *Telford* factor in other cases. *See* RP 33:15 (citing without identification "other cases that have found . . ."). While it is true that this sort of conduct satisfies the first *Telford* factor, as court have held, that does not justify limiting *Telford* to that conduct.

In *Clarke v. Tri-Cities Animal Care & Control Shelter*, for example, the Court of Appeal found that TCAC, a privately-run corporation providing animal control services, performed a "governmental function" under *Telford*, "[b]ecause a local government grants TCAC the

ability to execute police powers pursuant to state statute[.]" *Clarke v. Tri-Cities Animal Care & Control Shelter,* 144 Wn. App. 185, 193, 181 P.3d 881 (2008). The particular function at issue in *Clarke* was euthanasia, which the court understood to include "impounding and destroying private citizens' pets," and thus "implicate[s] due process concerns." *Id.* at 193. That was sufficient in the court's view to satisfy the "governmental function" factor in *Telford*. *Id.* at 194. But *Clarke* and other cases concerning coercive state action should not be applied to *limit* "governmental function" to such conduct, or exclude the "provision of services"—as the trial court here concluded.

The trial court's error may have been based on language in *Clarke* and *Spokane Research*, which suggest that "governmental function" is limited to non-delegable duties. *See Clarke*, 144 Wn. App. at 194 ("*Telford*'s analysis seems to hinge on whether the entity's duties can be delegated to the private sector"); *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 609, 137, P.3d 120 (2006) ("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.'") (quoting *Telford*, 95 Wn. App. at 164). These statements

suggesting limitation to non-delegable duties, however, are dicta,[2] are not supported by *Telford*, and are inconsistent with the case law upon which *Telford* is based.

In *Telford* itself, the court observed that the functions performed by the entities before the court "could not be delegated to the private sector." 95 Wn. App. at 164. But the opinion does not suggest that this is a *requirement* of the "governmental function" factor. And a review of the authorities on which *Telford* relied confirms that no such limitation should apply. In *Board of Trustees*, the Connecticut Supreme Court found that "providing public education at a secondary school level" is a governmental function. *Bd. of Tr.*, 436 A.2d at 271. *Marks*, the Oregon case discussed in *Telford*, reaches a similar result. *Marks*, 878 P.2d at 425. Yet education is quite frequently provided by private actors acting under limited governmental regulation and authority. Similarly, the function of the EAC in the Washington Attorney General Opinion cited in *Telford*, "providing information about export opportunities and assisting in

---

[2] In *Spokane Research*, the court expressly declined to reach the *Telford* analysis, and considered it only "for argument." 133 Wn. App. at 608 ("we need not apply *Telford's* functional equivalent analysis"); *id.* at 123 ("Applying *Telford* solely for argument . . . ."). And in *Clarke*, the non-delegable nature of the law enforcement function at issue rendered was *sufficient* to satisfy *Telford*'s first factor, but the court was not required to determine if that feature was *necessary* under *Telford*. 144 Wn. App. at 194.

financing export transactions," is not a core, coercive power that cannot be delegated to the private sector. This authority—the source of the test adopted in *Telford*—is incompatible with the exclusion of non-delegable functions or the delivery of services from "governmental function."

The trial court's statement that "providing services are not generally thought of as a government function" is incompatible not just with public disclosure cases, but with case law in other contexts. *See*, *e.g.*, *Evans v. Newton*, 382 U.S. 296, 301–02, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) (finding that a private park was subject to the Fourteenth Amendment because, "like a fire department or police department that traditionally serves the community[,] [m]ass recreation through the use of parks is plainly in the public domain"); *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d 679, 690-94, 202 P.3d 924 (2009) (collecting cases holding that the maintenance of public parks and swimming pools is a governmental function for the purposes of sovereign immunity); *Fahey v. Jersey City*, 52 N.J. 103, 244 A.2d 97, 100 (N.J. 1968) ("Public parks, open spaces, playgrounds and places for public resort, rest and recreation are facilities anciently provided by local government . . . .").

Indeed, the trial court itself was not consistent in its view that providing services was not a government function. In its discussion of the

issue with Ms. Fortgang's counsel, the trial court stated, "I think you have a hard argument that a zoo is a government function. I think you have a much easier argument that a park is a government function." RP 7:23–8:1. As demonstrated above, the trial court was right to associate parks with traditional government functions. But the court did not explain why it distinguished between parks and zoos in this context, or how the operation of a park would satisfy its understanding of "governmental function" whereas operation of a zoo would not. In fact, the history of zoos generally, and of the Woodland Park Zoo in particular, demonstrates that zoos are traditionally associated with government, and moreover that their history and operation is closely linked with that of parks.

II. Management of the Woodland Park Zoo Is a Traditional Government Function under *Telford*

Zoos have long been government functions in the United States, where they evolved out of simple animal displays in public parks. This was the case in Washington, where major urban zoos, including the WPZ, have been run by government directly for nearly their entire existence.

A. The Management of Zoos is A Traditional Government Function in the United States

American zoos have evolved into their modern forms as civic institutions, and remain closely associated with government. In an authoritative study on the history of American zoos, the authors note that a

1932 survey by the American Association of Zoological Parks located "88 public zoos and 10 privately owned zoos, representing 35 states." Jesse C. Donahue & Erik K. Trump, *American Zoos During the Depression* 7 (2010). They note that during this time, "[t]he vast majority of American zoos were public institutions funded by local government." *Id.* at 3.

"Most American zoos were founded as divisions of public parks departments." Elizabeth Hanson, *Animal Attractions: Nature on Display in American Zoos* 4 (Princeton University Press, 2002). "Local parks departments typically ran city zoos, devoting a portion of the park's budget to their upkeep." Donahue, *supra*, at 3. Typically, these early zoos emerged gradually out of a city park department's informal collection of animals. "[T]hese animal collections became too big to ignore, and parks departments planned the construction of zoos and acquired more select groups of animals." Hanson, *supra*, at 31.

The growing popularity of zoos in the past century was directly linked to civic support, which usually included some form of municipal funding as well as a site in a public park[.]" *Id.* at 39. Cities considered zoos "esteemed and desirable additions to plans for city expansion" and zoos served as "a badge of rank for a city, a sign of its significance." *Id.* at 38–39. Zoos have promoted themselves to their private and public patrons on this basis. For example, the Association of Zoos & Aquariums

("AZA"), which accredits nearly all major zoos and aquariums in the United States, including the WPZ, claims that zoos and aquariums provide their respective communities with economic, educational, and entertainment benefits.[3]

B. Maintaining Zoos Including the Woodland Park Zoo Is a Traditional Government Function in Washington

The history of the Woodland Park Zoo and other zoos in the State of Washington is consistent with this larger national narrative. The Woodland Park Zoo's origins lie in the City of Seattle's 1899 purchase of 200 acres on the southwest shore of Green Lake. Shortly after the purchase, the City retained the designers of New York's Central Park to turn the space into a public park, including space for an animal menagerie. Over the next century, using taxpayer funds, bond funds, private donations, and admission fees, the City grew its initial collection of animals into the Woodland Park Zoo. Like other major urban zoos in the United States, Seattle's zoo evolved from turn-of-the century curiosities into modern zoos under government guidance.[4]

---

[3] *See* Association of Zoos & Aquariums, https://www.aza.org/about-aza/ (last visited Mar. 13, 2015).

[4] The City of Seattle and the Woodland Park Zoo Society provide detailed information about the history of Woodland Park and the WPZ. *See Woodland Park*, Seattle Parks & Recreation, www.seattle.gov/parks/park_detail.asp?ID=292 (last visited Mar. 13,

(Cont'd on next page)

This was true elsewhere in Washington as well. All four zoos and aquariums in Washington accredited by the AZA are government-owned and have been government-managed for all or most of their operating history. The Seattle Aquarium opened in 1977 and was operated by the City of Seattle until 2010.[5] The Point Defiance Zoo and Aquarium and the Northwest Trek Wildlife Park were founded in 1905 and 1975, respectively, and continue to be government-owned and operated by the City of Tacoma.[6] For 94 percent of the combined history of these four zoos and aquariums, they have been managed by city governments.

Even in 2001, when the City of Seattle transferred zoo employees from the Department of Parks and Recreation to the WPZS and contracted with the WPZS to manage the Zoo, the City recognized that the Zoo was a civic institution. The ordinance authorizing this move stated that the

---

(Cont'd from previous page)

2015); *Chronological History of Woodland Park Zoo*, Woodland Park Zoo, www.zoo.org/about/chronologicalhistory (last visited Mar. 13, 2015).

[5] *See About Us*, Seattle Aquarium, www.seattleaquarium.org/about (last visited Mar. 13, 2015) ("Opened in 1977, the Seattle Aquarium was owned and operated by the City of Seattle Department of Parks and Recreation until 2010, when the nonprofit Seattle Aquarium Society assumed its management."). The City of Seattle has retained ownership of the Aquarium, including its buildings and animals.

[6] *See* Metro Parks Tacoma, www.metroparkstacoma.org (last visited Mar. 13, 2015).

City's intent was to assist the "Zoo in fulfilling its mission in education, conservation of wildlife, recreation, providing benefits to the citizens of Seattle, and developing the Zoo as an important civic asset, cultural resource and attraction." Seattle, Wa., Ordinance 120697. The City's characterization of the Zoo as "an important civic asset," along with its continued financial support of the Zoo, demonstrates that if the WPZS did not operate the WPZ, the City of Seattle would do so—a hallmark of functions traditionally associated with government. *See, e.g. Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*,729 So.2d 373, 381 (Fla. 1999); *Denver Post. Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36, 40 (Colo. App. 2000) ("which the public agency otherwise would perform").

The WPZS itself describes the Zoo as "a treasured community asset," which for more than 110 years, has "serv[ed] as a resource for local residents and a partner for regional organization."[7] And the WPZS claims to provide more than 65,000 local students per year with "essential lessons in environmental education" and "a gateway to nature."[8] The WPZS has embraced its role in providing a traditional governmental function—it

---

[7] *See About Us*, Woodland Park Zoo, http://www.zoo.org/about/community (last visited Mar. 13, 2015).

[8] *See Membership: Learn, Care & Act*, Woodland Park Zoo, http://www.zoo.org/sslpage.aspx?pid=2028#Education%20Program (last visited Mar. 13, 2015).

should be held accountable for how it does so. The history of the Woodland Park Zoo and the nature of its function today make clear that its management is a "governmental function" under *Telford*.

III. Application of Washington's Public Records Act to the WPZS Is Consistent With the Purposes of the Act

Ms. Fortgang's records request implicates the concerns addressed by the PRA, and exemplifies the type of information request which strengthens public accountability and improves public administration of taxpayer funds and public services.

A. The Washington Public Records Act Was Passed to Give Citizens Control Over the "Instruments That They Have Created"—Whether Those Instruments Are Public or Private

The federal government and all fifty states require the disclosure of public records upon request, reflecting the belief that "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." *Prison Legal News v. Dep't of Corr.*, 154 Wn.2d 628, 649,115 P.3d 316 (2005) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 724, 91 St. Ct. 2140, 29 L. Ed. 2d 822 (1971) (Douglas, J., concurring)). Consistent with this tradition, the mission of Washington's Public Records Act is to ensure that the people "remain[] informed so that they may maintain control over the instruments that they have created." 42 RCW § 42.56.030. The PRA is intended to be "liberally construed and

its exemptions narrowly construed to promote this public policy." *Id.*

Moreover, courts recognize that when a government contracts with private entities for the provision of public services, that arrangement should not be allowed "to circumvent a citizen's right of access to records[.]" *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, 287 P.3d 364, 370 (N.M. Ct. App. 2012). Limiting public records requests in this manner would "mark a significant departure from [the] presumption of openness at the heart of . . . access laws." *Id.* at 371.[9]

---

[9] *See, e.g., Toomey*, 287 P.3d at 370 (holding private company managing a public access channel is subject to New Mexico's public records act); *Mem'l Hosp.*, 729 So.2d at 375, 379 (Fla. 1999) (holding Florida's public records act applies to "a private nonprofit corporation's operations of hospital facilities transferred to it by" a governmental entity); *Clayton County Hospital Authority v. Webb*, 208 Ga. App. 91, 430 S.E.2d 89, 92–93 (Ga. Ct. App. 1993) (holding that records of five private corporations "created as part of a reorganization of" a public hospital authority were subject to the Georgia Open Records Act); *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 213 (Ind. 1991) (convention authority that received percentage of receipts from hotel-motel tax pursuant to contract with City is subject to public records act); *Weston v. Carolina Research and Dev. Found.*, 303 S.C. 398, 401, 404 S.E.2d 161, 164 (S.C. 1991) (foundation operating for benefit of public university subject to South Carolina's FOIA); *News and Observer Pub. Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 550 (N.C. Ct. App. 1981) (nonprofit corporation county hospital system is subject to release of records); *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031 (Fla. 1992) (holding that Florida's public records act is defined broadly "to ensure that a public agency cannot

(Cont'd on next page)

Here, Ms. Fortgang seeks the records of an institution that was an integral part of the City government for a century, and remains closely associated with it in many respects—including the annual receipt of millions of dollars in taxpayer funds. The trial court's denial of her request is incompatible with the principles enshrined in the PRA.

B. Public Records Act Requests Like Ms. Fortgang's Are Instrumental In Promoting Animal Welfare

The principles of openness and public accountability that underlie public records acts find frequent illustration in the animal welfare field, as ALDF's own experience demonstrates. In New York, ALDF relied on public records requests to support a long-term investigation into the city's horse-drawn carriage industry.[10] Those records revealed hit-and-run incidents and previously unreported horse carriage accidents,[11] and ALDF's investigation helped lead to a recently introduced bill that would

---

(Cont'd from previous page)

avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility").

[10] *See Judge Orders NYPD to Provide Records on Carriage Horses to ALDF*, Animal Legal Defense Fund (Apr. 28, 2014), http://aldf.org/blog/judge-orders-nypd-to-provide-records-on-carriage-horses-to-aldf/.

[11] *See Legally Brief: Traffic Reports Finally Released in Horse Carriage Accidents*, Animal Legal Defense Fund (Nov. 20, 2014), http://aldf.org/blog/legally-brief-traffic-reports-finally-released-in-horse-carriage-accidents/.

eventually phase out the carriage industry.[12] And in California, ALDF revealed abuses at the City of Palm Springs' animal shelter though public records act requests, resulting in a 2012 settlement that required the city to comply with state and local regulations for the humane treatment of homeless animals.[13] Without public records access, these and other campaigns would not have progressed as far as they have.

These types of efforts, as well as the related evolution in public attitudes, have already had an impact on the elephants that are at the heart of this case. In recent years, both the *Sebek* litigation and a series of investigative stories in The Seattle Times have used information obtained from WPZS records to focus public attention on the suffering that these elephants have experienced at the Zoo.[14] Then, just a few months ago, the

---

[12] The proposed bill would ban all horse-drawn carriage operations as of June 1, 2016. *See Legally Brief: NYC Considers Ban on Carriage Horse Industry*, Animal Legal Defense Fund (Dec. 8, 2014), http://aldf.org/blog/legally-brief-nyc-considers-ban-on-carriage-horse-industry/.

[13] *See Settlement In Palm Springs Lawsuit Will Mean Improvements In Conditions For Homeless Animals*, Animal Legal Defense Fund (June 26, 2012), *http*://aldf.org/press-room/press-releases/settlement-in-palm-springs-lawsuit-will-mean-improvements-in-conditions-for-homeless-animals/.

[14] *See Sebek v. City of Seattle*, 172 Wn. App. 273, 290 P.3d 159 (2012); *Elephants are dying out in America's Zoos*, The Seattle Times (Dec. 1, 2012), http://www.seattletimes.com/nation-world/elephants-are-dying-out-in-americas-zoos/. In another development spurred by public

(Cont'd on next page)

WPZS finally acknowledged that it was not "realistic" to meet the needs of these elephants at the Zoo, and announced it would be finding them new homes.[15] These continuing developments highlight the value of public record disclosure in this area.

CONCLUSION

Public records laws such as the PRA are designed to promote government transparency and accountability. As such, the PRA should apply to entities such as the WPZS which receive significant taxpayer support to perform traditional government functions such as the operation and maintenance of parks and zoos.

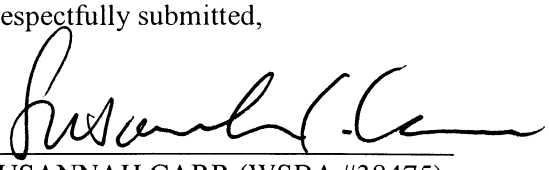
(Cont'd from previous page)

awareness, the Ringling Bros. and Barnum & Bailey Circus will stop using elephants. *See Ringling Bros. Says No More Circus Elephants By 2018*, NPR (Mar. 5, 2015), http://www.npr.org/blogs/thetwo-way/2015/03/05/390951839/ringling-bros-says-no-more-circus-elephants-by-2018.

[15] *See Press Release: Woodland Park Zoo to phase out its elephant program Plans will begin for relocating elephants to an AZA-accredited institution*, Woodland Park Zoo (Nov. 19, 2014), http://www.zoo.org/document.doc?id=1458.

Dated: March 16, 2015

Respectfully submitted,



SUSANNAH CARR (WSBA #38475)
GORDON TILDEN THOMAS &
CORDELL LLP
1001 4th Avenue, Suite 4000
Seattle, WA 98154
Telephone:(206) 467-6477
Facsimile: (206) 467-6292
scarr@gordontilden.com

GREGORY J. KERWIN
(Colo. Bar #14161)
JASON B. STAVERS
(Colo. Bar #44333, Cal. Bar #249072)
GIBSON, DUNN & CRUTCHER LLP
1801 CALIFORNIA STREET, SUITE
4200
DENVER, CO 80202
Telephone: (303) 298-5700
Facsimile: (303) 298-5907

PETER BACH-Y-RITA
(Cal. Bar #267442)
ROBERT E. KIM
(Cal. Bar #264932)
GIBSON, DUNN & CRUTCHER LLP
555 MISSION STREET, SUITE 3000
SAN FRANCISCO, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

*Attorneys for ANIMAL LEGAL
DEFENSE FUND*

PROOF OF SERVICE

I certify that on March 16, 2015, I caused to have served an original and one copy upon the Clerk of the Court of the Court of Appeals – Division I, and one true and correct copy upon Gregory J. Wong and Paul J. Lawrence of the following Amicus Brief in Support of Appellant by the method(s) indicated below:

Gregory J. Wong Paul J. Lawrence Pacifica Law Group LLP 1191 Second Avenue, Suite 2100 Seattle, WA 98101	X 	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

Attorneys for Respondent/Defendant

Rob Roy Smith Kilpatrick Townsend & Stockton, LLP 1420 Fifth Avenue, Suite 4400 Seattle, WA 98101	X 	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

Attorneys for Appellant/Plaintiff

Clerk of the Court Court of Appeals - Division I One Union Square 600 University St Seattle, WA 98101-1176	X 	Hand-Delivery U.S. Mail, Postage Prepaid Email Facsimile

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 16 PM 3:41

DATED this 16th day of March, 2015, at Seattle, Washington.

GORDON TILDEN THOMAS & CORDELL, LLP

Ellen R. Evans

Ellen R. Evans, Secretary