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NO. 92846-1

SUPREME COURT OF THE STATE OF WASHINGTON

ALYNE FORTGANG,

Petitioner,

v.

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

Respondent.

FILED E
SEP 21 2016
WASHINGTON STATE
SUPREME COURT
b/h

BRIEF OF *AMICUS CURIAE*
THE SEATTLE AQUARIUM SOCIETY

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Seattle Aquarium Society (“the Society”) is a Washington nonprofit corporation incorporated in 1982. The Society’s mission is to inspire conservation of our marine environment.

Since 2010, under an agreement with the City of Seattle, the Society has been solely responsible for the programs, operations, and maintenance of the Seattle Aquarium. Although the City of Seattle continues to own the facility, the Society operates the Seattle Aquarium. The Society’s operating budget derives almost entirely from admission revenues and donations from members of the public. Less than 3 percent of its revenue is derived from program grants from the city, county, state, or federal governments.

As a nonprofit organization that does derive *some* of its revenues from governmental entities, the Society has a deep interest in the issues in this matter. The petitioner’s expansive interpretation of Washington’s Public Records Act, RCW chapter 42.56, could and almost certainly would impose significant burdens on nonprofits such as the Society. Accordingly, the Society—which resembles the Washington Park Zoological Society (“the WPZS”) in some regards—has a definite interest in this matter.

The Society therefor submits the following brief in support of the respondent, the WPZS, and urges this Court to *affirm* the Court of Appeals and hold that the PRA does not apply to private, nonprofit corporations such as the Zoo or the Society.

II. SUMMARY OF THE ARGUMENT

In its opinion in this matter,¹ the Court of Appeals correctly held that Washington's Public Records Act, RCW chapter 42.56, does not apply to private entities such as the WPZS. Under the plain language of the statute, the act applies only to public agencies. The Washington legislature has considered and so far refused to enact a bill that would extend the PRA. Further, extension of the PRA would have socially undesirable results.

This Court should therefore affirm the decision of the Court of Appeals.

III. ANALYSIS

A. Under the Plain Language of the PRA, the WPZS Is Not an Agency Subject to Its Terms

The Court should affirm the opinion of the Court of Appeals because, under the plain language of the PRA, the WPZS is not a state or local agency.

The PRA is unambiguous. The statute applies only to agencies: "Each agency . . . shall make available for public inspection and copying all public records . . ."²

The statute offers a restrictive definition of the term "agency":

"Agency" includes all 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.³

¹*Fortgang v. Woodland Park Zoological Society*, 192 Wn.App. 418, 368 P.3d 211 (2016).

² RCW 42.56.070(1).

³ RCW 42.56.010(1).

The WPZS is not an agency under this definition. It simply doesn't fall within any of the terms listed in the statute.

The Court could and should end its analysis there. The language of the statute is "plain, unambiguous, and well understood according to its natural and ordinary sense and meaning."⁴ Under that plain language, the WPZS is simply not an agency subject to the requirements of the PRA.

The Court should not adopt a reading of the term "agency" that is contrary to the plain language of the statute. Instead, the Court should affirm the opinion of the Court of Appeals.

B. House Bill 1425 Shows That the PRA Doesn't Extend to Nonprofits

Under the plain language of the statute, the PRA extends only to actual public agencies—not to nonprofit corporations. This conclusion is reinforced by recent attempts to enact House Bill 1425.⁵ That bill would have expanded the PRA and the Open Meetings Act to certain nonprofits—that is, nonprofits that perform "governmental functions . . . where significant public funding is provided for such functions."⁶

House Bill 1425 has its own problems. But the point is that the Washington legislature is already considering the issue before the Court. And House Bill 1425 demonstrates that the current version of the PRA does not extend to nonprofits. If it did, there'd be no reason for the Legislature to attempt to modify the statute.

This Court should respect the separation of powers and leave it to

⁴ *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008).

⁵ See <http://app.leg.wa.gov/billinfo/summary.aspx?bill=1425&year=2015> (accessed Sept. 8, 2016) (showing legislative history to date).

⁶ See <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/1425.pdf> (accessed Sept. 8, 2016).

the Legislature to determine the wisdom of extending the PRA to nonprofits. It should therefore reject the petitioner's arguments in this case.

C. This Court Should Not Expand the Scope of the PRA

The petitioner herself concedes that the Zoo is not an agency under the plain terms of the statute. Instead, she is asking this Court to expand the reach of the PRA to include entities that receive some unspecified but "significant" level of public funding.

The Court should reject that approach. As set out above, the Court should reject that approach because the PRA simply doesn't support that reading.

But the Court should also reject the petitioner's argument because it would impose a tremendous burden on nonprofit organizations that receive state or local funding. And it should reject that argument because an expanded PRA would severely affect the ability of nonprofits to perform the socially useful functions that they perform.

There are approximately 50,000 nonprofit organizations in Washington state.⁷ The Washington state and local governments provide significant funding to a very wide range of those nonprofit corporations.

For example, the Washington Department of Commerce provides grants to nonprofits devoted to, among other things, helping with housing.⁸ The Washington State Arts Commission provides a wide range of funding for nonprofit organizations devoted to historic preservation and the arts.⁹

⁷ See <http://washingtonnonprofits.org/index.cfm?fuseaction=Page.ViewPage&pageId=493> (accessed Sept. 7, 2016).

⁸ See <http://www.commerce.wa.gov/building-infrastructure/housing/> (accessed Sept. 7, 2016).

⁹ See <http://www.arts.wa.gov/grants> (accessed Sept. 7, 2016).

The Washington State Department of Archaeology and Historic Preservation provides funding for historic preservation.¹⁰ King County 4 Culture, a King County agency,¹¹ provides funding to nonprofit organizations and individuals, including nonprofit organizations dedicated to preservation of historic buildings,¹² to preservation of cultural heritage,¹³ and more generally to support of the arts.¹⁴ The City of Seattle provides arts funding as well.¹⁵

Under the petitioner's proposed rule, any nonprofit organization that received any of these grants could potentially be subject to the PRA. Indeed, because the petitioner ignores the statute's use of the unambiguous term "agency," her rule could potentially extend even to individuals who receive public grants. After all, a nonprofit organization is no more of an agency than is an individual person.

The state, county, and local governments fund these nonprofits and individuals to promote social, cultural, historical, and artistic values. At the end of the day, the voters tell these various levels of government what they—the voters—value, what the voters want to promote. Although voters don't usually vote on individual programs, voters do elect officials who oversee the flow of funds to these programs.

Thus, the funding of these programs reflects decisions ultimately

¹⁰ See <http://www.dahp.wa.gov/grants> (accessed Sept. 8, 2016).

¹¹ See <http://www.4culture.org/about/index.htm> (accessed Sept. 7, 2016).

¹² See <http://www.4culture.org/apply/preservationsustained/index.htm> (accessed Sept. 7, 2016).

¹³ See <http://www.4culture.org/apply/heritagesustained/index.htm> (accessed Sept. 7, 2016).

¹⁴ See <http://www.4culture.org/apply/artssustained/> (accessed Sept. 7, 2016).

¹⁵ See <http://www.seattle.gov/arts/programs/grants> (accessed Sept. 7, 2016).

made by the citizens of the State of Washington, who express their wishes through their elected representatives at the state and local levels.

Under the petitioner's proposed rule, the PRA could apply to any of the nonprofit organizations—and perhaps even individuals—funded by the various levels of Washington governments. Those organizations and individuals would have to be prepared to respond to or litigate PRA requests. Under either scenario, a portion of their funding would be eaten up by PRA requests.

Thus, extension of the PRA to publicly funded nonprofits would reduce the value of state or local grants to those nonprofits. If a nonprofit must respond to every PRA request that comes through its door, then it must set aside funds to deal with those requests. In the alternative, the nonprofit must set aside funds to litigate PRA requests.

For any nonprofit, the costs of dealing with PRA requests would reduce the public benefits provided by those nonprofits. And for some nonprofits, a single PRA request could potentially destroy the organization. It can be difficult and expensive to comply with PRA requests.¹⁶ For example, the City of Gold Bar spent 12 percent of its revenue for the year 2010 responding to PRA requests from one individual.¹⁷ A budget reduction of 12 percent would severely damage the bottom line for many nonprofits.

Further, the PRA is a potential trap for nonprofits, especially those unused to responding to PRA requests. If an entity fails to comply in a

¹⁶ Under the PRA, a responding agency can charge the actual cost of copying documents, but it cannot charge for the overhead of identifying the documents. RCW 42.56.070(7)(a), (b).

¹⁷ *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 864, 288 P.3d 384, 388 (2012)

timely fashion,¹⁸ or if it fails to produce all responsive, nonprivileged documents,¹⁹ that entity may face a lawsuit in which it could end up paying some portion of the requester's fees²⁰—along with paying its own attorneys' fees. And even a successful defense of a PRA lawsuit can be expensive.

Indeed, the simple fact of a lawsuit could doom some nonprofits. Even nonprofit corporations, of course, must be represented by counsel in court: they cannot appear pro se.²¹ Some nonprofits simply can't afford to hire counsel, and there is no certainty that pro bono counsel would be available to them. Under those circumstances, a nonprofit on the receiving end of a PRA request might have no choice but to close its doors.

This argument isn't a dystopian fantasy. The PRA is a valuable statute. But it has its own dark side. Under the PRA, a person requesting documents has no obligation to justify the request.²² And an individual can make as many PRA requests as he or she desires.²³ Given those features, the PRA can be a potent weapon in the hands of someone with a grudge against a targeted agency. For example, in *Forbes* the plaintiff and persons associated with her sent 82 PRA requests to the City of Gold Bar.²⁴ The

¹⁸ See RCW 42.56.520 (initial response must be made within five days of request); *West v. Wash. State Dep't of Natural Resources*, 163 Wn. App. 235, 244, 258 P.3d 78 (2011) (failure to respond within five days violates the PRA).

¹⁹ *Zink v. City of Mesa ("Zink I")*, 140 Wn. App. 328, 348–49, 166 P.3d 738 (2007) (agencies must strictly comply with requests; substantial compliance does not suffice).

²⁰ RCW 42.56.550(4).

²¹ *Cottringer v. State, Dep't of Employment Sec.*, 162 Wash. App. 782, 787, 257 P.3d 667, 669 (2011)

²² RCW 42.56.080.

²³ *Zink I*, 140 Wn. App. at 340.

²⁴ See *Forbes*, 171 Wn. App. at 862.

city had to hire additional personnel to respond to those requests.²⁵ And, as noted above, the city ended up spending 12 percent of its revenue responding to these requests.²⁶

This case itself shows how a litigant may use the PRA aggressively against an ideological opponent. The petitioner believes that the WPZS doesn't treat its elephants properly, and she wants to do something about it. She obviously doesn't have standing to bring a lawsuit against the WPZS for its treatment of elephants, as she has not suffered any sufficiently personal harm.²⁷ Yet she has used the PRA to mount an expensive lawsuit against the WPZS. If the WPZS is paying its attorneys—and the Court must presume that it's doing so—then it's spending money to pay lawyers that could instead be spent to further its mission.

Nonprofits such as the WPZS perform useful public functions. They should not be forced to spend money on PRA requests. And if the decision is ultimately made to extend the PRA to nonprofits, the Washington legislature, and not the courts, should make that decision.

D. This Court Need Not Decide Whether to Adopt the *Telford* Factors; If It Does Apply Them, It Should Conclude That the PRA Does Not Extend to the WPZS

In its opinion, the Court of Appeals reviewed the *Telford*²⁸ factors to determine whether the WPZS is a functional equivalent of a public agency. This Court need not decide whether to apply *Telford*, as the language of the PRA is plain and unambiguous: the PRA applies only to

²⁵ *Id.* at 862–63.

²⁶ *Id.* at 864.

²⁷ See *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) (general public interest does not confer standing).

²⁸ *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 161, 974 P.2d 886, 893 (1999).

public agencies. But if the Court does consider the *Telford* factors, it should conclude that the WPZS is not the functional equivalent of a public agency.

Under *Telford*, a nongovernmental entity may be subject to the PRA if it is “the functional equivalent of a public agency for a given purpose.”²⁹ A court applies a four-factor balancing test to make that determination:

- (1) [W]hether 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.³⁰

“[E]ach 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.”³¹ The courts undertake “a practical analysis” in applying this test.³²

The WPZS has ably discussed these factors in its briefing. We wish to focus on the first factor—that is, whether operating a zoo constitutes “perform[ing] a governmental function.”³³

The operation of a zoo is not a governmental function. To determine whether a function is a “governmental function,” a court should ask, not whether some governments perform that function, but whether it is a core governmental function: that is, a function that a reasonable person would expect to be performed by a governmental entity, not a private entity. In *Spokane Research & Defense Fund v. West Central Development*

²⁹ *Id.*, 95 Wn. App. at 161.

³⁰ *Id.* at 162.

³¹ *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 WnApp. 185, 192, 181 P.3d 881 (2008).

³² *Worthington v. Westnet*, 182 Wn.2d 500, 508, 341 P.3d 995 (2015).

³³ *See id.*

Association,³⁴ the Court of Appeals held that a function is “governmental” if it cannot be delegated to a private entity.

The reasoning in *Spokane Research & Defense Fund* is sound. The fact that a government may engage in some undertaking doesn’t make that undertaking itself a governmental function. Cities may own and operate orchestras, but the operation of an orchestra is not a governmental function. The petitioner’s alternate approach would transform governments into Midases, capable of transforming anything they touch into a governmental function.

Under the reasoning of *Spokane Research & Defense Fund*, the operation of a zoo is not a “governmental function” as that work may be delegated to a private entity. As the Court of Appeals noted in its opinion in this matter, there are also private zoos.³⁵

Moreover, if the operation of zoos were truly a governmental function, we’d expect to find most cities operating zoos. But the vast majority of cities simply don’t operate zoos—or aquariums, for that matter. For example, there are ten first-class cities in the State of Washington, including Seattle.³⁶ Setting aside Seattle, out of the other nine first-class cities, only one—Tacoma—operates a zoo or aquarium.³⁷ And, of course,

³⁴ 133 Wn. App. 602, 609, 137 P.3d 120 (2006).

³⁵ *Fortgang*, 192 Wn. App. at 429.

³⁶ https://en.wikipedia.org/wiki/List_of_cities_in_Washington (accessed Sept. 8, 2016).

³⁷ See [https://en.wikipedia.org/wiki/Category:Zoos_in_Washington_\(state\)](https://en.wikipedia.org/wiki/Category:Zoos_in_Washington_(state)) (accessed Sept. 8, 2016); https://en.wikipedia.org/wiki/Northwest_Trek (accessed Sept. 8, 2016) (discussing two zoos owned and operated by Tacoma Metro Parks); http://www.cattales.org/documents/about_cat_tales.html (accessed Sept. 8, 2016) (discussing Cat Tales, the only zoo in Spokane, but not operated by the city); <http://cougarmountainzoo.org/About%20Zoo/history.aspx> (accessed Sept. 8, 2016) (discussing Cougar Mountain Zoo, a privately

not a single one of the second-class and smaller cities and towns in the State of Washington operates zoos or aquariums.

Further, the fact that the City of Seattle chose in the past to operate a zoo doesn't mean that operation of the zoo remains a governmental function. A city may choose to do things that are not governmental functions—for example, fund the writing of poetry to be displayed on public buses.³⁸ But if a city decides to get out of that business, then the business is no longer carrying on a public function—even if the city or other governmental entity decides to fund that business.

The petitioner suggests that a nonprofit is performing a governmental function if its work serves a public purpose.³⁹ The Court should reject that approach, as it would mean that every nonprofit funded by a state or local agency is performing a governmental function. Obviously, state and local governments should support *only* those nonprofits whose work serves a public purpose. If a nonprofit's work is socially useless, then governments shouldn't fund that work.

Of course, this analysis doesn't mean that Washington governmental entities can outsource all of their governmental functions. If a governmental entity decides to hire a private police force or to contract with a private party to operate a prison—then, of course, it would make sense to extend the PRA to those entities. But it does not make sense to extend the PRA to nonprofits simply because a governmental entity has decided to support the socially beneficial activities of the nonprofit.

Because the operation of a zoo isn't a governmental function, and

owned zoo in Issaquah).

³⁸ See <http://metro.kingcounty.gov/programs-projects/poetry-on-buses/> (accessed Sept. 8, 2016).

³⁹ Petitioner's Supp. Br. at 3.

because the other *Telford* factors weigh against application of the PRA to the WPZS, the Court should affirm the opinion of the Court of Appeals.

E. The Public Has Other, Existing Avenues to Get the Information It Needs and to Oversee Actual Governmental Activity

The petitioner is asking this Court to give everyone in the State of Washington—and, in fact, anyone anywhere—the right to peer into the workings of nonprofits that receive some funding from state or local governments.

As set out above, the petitioner's approach is pernicious. It would impose costs on nonprofits that could cause some to close their doors. It would certainly mean that the nonprofits would have to consider very carefully whether to accept any level of governmental funding, as doing so would open any of them to PRA requests and litigation. Many nonprofits might conclude that they simply can't afford to accept government funding because of the potential risk. And the result would be that socially useful work wouldn't be done.

The people of the State of Washington have shown again and again that they value the work of nonprofits. The Court shouldn't extend the PRA in a way that would upset the balance of interests struck by the people, working through their elected official.

And the Court can reach this conclusion secure in the knowledge that the people aren't otherwise harmed. If someone is concerned about how a government-funded nonprofit is working, he or she can follow other avenues to pursue those concerns. Most obviously, the concerned individual can seek information from the relevant governmental entity—including sending PRA requests to that entity. And the individual can lobby his or her elected officials, asking them to decide whether they want to

continue funding a particular nonprofit.

The petitioner is asking the Court to give her a sledgehammer to solve the problem that she perceives to exist. But she doesn't need a sledgehammer. She has the tools that she actually needs: a pen, a computer, a telephone, her voice. The Court should leave her to use those tools. It should avoid extending the PRA in a fashion that would upset the interests of the public at large.

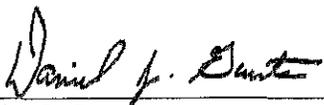
IV. CONCLUSION

The Court of Appeals correctly concluded that the PRA does not extend to the WPZS. This Court should reject the petitioner's request that the PRA be expanded. That expansion would impose significant costs on nonprofits, and it would almost certain cause some to dissolve or to reject public funds to continue their work. The Court should not adopt a rule, unsupported by the statutory language, that would impose such dire costs on entities performing work that the voters of this state deem beneficial.

This Court should therefore *affirm* the well-reasoned opinion of the Court of Appeals.

Respectfully submitted this 12th day of September, 2016.

RIDDELL WILLIAMS P.S.

By 
Daniel J. Gunter,
WSBA No. 27491
Of Attorneys for Amicus Curiae
The Seattle Aquarium Society

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on September 12, 2016, I caused the foregoing Brief of Amicus Curiae Seattle Aquarium Society to be filed electronically with the Clerk of this Court.

I also served the following parties via email and hand-delivery:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 12th day of September at Seattle, Washington.



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Importance: High

Alyne Fortgang v. Woodland Park Zoological Society a/k/a Woodland Park Zoo
Supreme Court Case No. 92846-1

Filed by:
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Dear Clerk,

Attached for filing are the following documents:

- Motion for Leave to File Brief of Amicus Curiae the Seattle Aquarium Society; and
- Brief of Amicus Curiae the Seattle Aquarium Society

Mr. Gunter may be reach at the email above or (206) 624-3600 x736.

Thank you,

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