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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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WASHINGTON STATE  
SUPREME COURT  
b/h

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ALYNE FORTGANG,

Petitioner,

vs.

WOODLAND PARK ZOOLOGICAL SOCIETY

a/k/a WOODLAND PARK ZOO,

Respondent.

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BRIEF OF *AMICUS CURIAE*  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit Washington corporation that provides education and training in the area of municipal law to attorneys who represent cities and towns throughout the State of Washington. The Washington State Association of Municipal Attorneys also works to advance knowledge of municipal law at the state-level to assist judicial and legislative decision-making that impacts service provision by cities and towns to residents of the State of Washington. This brief of *amicus curiae* is provided by WSAMA in furtherance of these purposes.

Each year WSAMA provides training on the Public Records Act (PRA), codified in Chapter 42.56 of the Revised Code of Washington (RCW), to municipal attorneys, which can include the application of the PRA to non-governmental entities that perform governmental functions, or affiliate with governmental entities to collaborate for the benefit of Washington citizens. The Washington State Association of Municipal Attorneys submits this brief of *amicus curiae* to request that this Court decline Plaintiff's invitation to expand the PRA beyond its plain language or intended scope. Clarifying the scope of the PRA will enhance the education provided by WSAMA to municipal attorneys throughout the State; and, correspondingly, facilitate PRA compliance by the cities and towns represented by WSAMA members.

The Washington State Association of Municipal Attorneys also submits this brief of *amicus curiae* to provide this Court with additional

information regarding implementation and effect of the PRA at the municipal level. Ensuring that this Court has thorough and accurate information regarding the impact of the PRA statute of limitations on municipal government increases the likelihood that this Court's decision will improve municipal service provision, including PRA compliance, to the residents of the State of Washington.

## II. STATEMENT OF THE CASE

The Washington State Association of Municipal Attorneys adopts the Statement of Facts provided by Woodland Park Zoological Society (WPZS) in its Responding Brief, *Brief of Respondent*, pp. 3-7.

## III. ARGUMENT

RCW 42.56.010(1) defines a local agency as "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district... or agency thereof, or other local public agency." The WPZS is not a county, city, town, municipal corporation, or special purpose district. Thus, the PRA only applies to WPZS if it can be categorized as (1) a quasi-municipal corporation, (2) the agent of a county, city, town or municipal corporation, or (3) an "other local public agency." *Id.* However, it is only the third option that has any real relevancy to the matter before this Court.

A quasi-municipal corporation is an instrumentality of the state for a limited purpose. *Roza Irr. Dist. v. State*, 80 Wn.2d 633, 636, 497 P.2d

166 (1972). An agency of a city is one which is an instrumentality of the city. *See, e.g., Simonds v. City of Kennewick*, 41 Wn. App. 851, 854-55, 706 P.2d 1080 (1985) (addressing the Kennewick Civil Service Commission as an agency of the city); *Livingston v. City of Everett*, 50 Wn. App. 655, 657, 751 P.2d 1199 (1988) (addressing the Everett Animal Control Department as an agency of the city). The WPZS is not a creation of the State of Washington, nor is it an instrumentality of the City of Seattle; it is a non-profit organization created by citizens of the State of Washington in 1965. *Brief of Respondent*, p. 3.

Although there is reasonable clarity as to what it means to be a quasi-municipal corporation or an agency of the city, the “other local public agency” language has generated greater difficulty. In *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 161, 974 P.2d 886 (1999), the Court of Appeals found that “the Legislature did not clearly intend to include or exclude hybrid agencies [those that have some public and some private attributes] from the PDA and no Washington case law speaks to the issue.” Consequently, the court used the “functional equivalent test” developed in federal case law interpreting the Freedom of Information Act. *Id.* The “‘functional equivalent’ test ... determines ... whether a particular entity is the functional equivalent of a public agency for a given purpose.”<sup>1</sup> *Id.* at 162.

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<sup>1</sup> *Telford* adopted a four-factor test to determine whether an entity is a “functional equivalent” of an agency for purposes of the PRA. The four factor test is “(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.

Yet this “functional equivalent” language does not occur anywhere in the PRA and has not been explicitly endorsed by this Court. The WSAMA encourages this Court to either (1) limit the application of the PRA to public agencies, or (2) limit the application of the *Telford* test to hybrid agencies, as this Court has impliedly done in *Worthington v. WestNET*, 183 Wn. 2d 500, 507-08, ¶ 12, 341 P.3d 995 (2015). Limiting the application of the PRA to public agencies, or the application of the PRA to hybrid agencies, avoids a significant burden to private and non-profit entities that partner with governmental entities to provide benefits and services to Washington citizens. The purpose of the PRA is not fulfilled by such a chilling effect and this Court should decline the Petitioner’s request to do so.

**A. The words “functional equivalent” are wholly absent from the Public Records Act.**

The goal of any statutory analysis is to give effect to the legislature’s intent, which is derived solely from the plain language of the statute whenever possible. *Schrom v. Bd. for Volunteer Firefighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). Just as the Court “cannot ‘delete language from an unambiguous statute,’” *McAllister v. City of Bellevue Firemen’s Pension Bd.*, 166 Wn.2d 623, 630-31, 210 P.3d 1002 (2009) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)), neither can it “add words where the legislature has chosen not to include them.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

WSAMA recognizes that the term “other local public agency” is undefined, but nowhere does the PRA contain or use the term “functional equivalent.” The legislature has not hesitated to expand the PRA when it believed it was necessary to further its goal of transparency. *E.g.*, LAWS OF 2007, ch. 391, § 1, *codified at* RCW 42.56.904. Not once though has the legislature taken action to expand the PRA to encompass private entities. The Court should jealously protect the PRA from an expanding interpretation that creates obligations for entities outside the scope of the statute. As the Court previously reaffirmed, “[e]ither the entity maintaining a record is an agency under the PRA or it is not.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (citing and following *Nast v. Michels*, 107 Wn.2d 300, 306, 730 P.2d 54 (1986)). As such, relying on the policy to construe the PRA broadly does not permit extending the PRA beyond the statutory text, particularly when the legislature has not deemed it necessary to upset the judiciary’s longstanding interpretation. *Id.* at 349 (Korsmo, J., concurring) (“[O]nly the legislature should overturn the longstanding construction of the statute. It has not done so.”).

**B. The Telford test should be applied only to hybrid agencies, not private entities**

There are entities that are set up to operate on behalf of the public agencies creating them - governmental task forces, interlocal cooperation act agencies and joint operating agreements. Similarly, there are entities that partner with public agencies to perform governmental services -

chambers of commerce promote economic development, nonprofits provide housing assistance and vocational training, and for-profit entities provide utility assistance. Where such organizations work with public agencies to provide services, that should not transform them into another public agency for the purposes of the PRA.

Unquestionably, the PRA is an essential component of governmental operations and it exists to provide the transparency that is crucial to our representative form of government. However, by the same token, it is important that evaluating the applicability of the PRA to non-governmental entities, great care should be given to recognize the differences between entities and to not expand the application of the PRA beyond the statute's intent of holding *government* accountable, especially where such an expansion would interfere with the operations of community minded nonprofit organizations. If the PRA is expanded to apply to entities merely because they partner with public agencies, it will have a chilling effect on those partnerships. Should this Court choose to explicitly endorse the *Telford* test, it should focus on hybrid agencies, not wholly independent entities.

Every jurisdiction for which the authors of this amicus brief has worked, including Lewis County, the Cities of Chehalis, Toppenish, Sunnyside, SeaTac, Lakewood, Vancouver, and Auburn, regularly worked with non-profit organizations that assist them in addressing municipal and community issues. It is likely that every public agency in this state likewise works with non-governmental, non-profit associations to

accomplish tasks beneficial for the community. Being mindful of how much work it is for municipalities to address their PRA responsibilities, were those responsibilities expanded to apply to private, nongovernmental entities because of their ties to and cooperation with public agencies the tasks on which such entities work will suffer, either because of the additional work necessary to comply with the PRA or because of the reluctance of non-profit entities to engage in such.

#### IV. CONCLUSION

The decision of the Court of Appeals should be affirmed and this Court should clarify that the PRA applies to public agencies, or, at least, that the *Telford* test extends the PRA beyond public agencies only to entities that possess at least some governmental attributes.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

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**CERTIFICATE OF SERVICE**

I certify that on the date referenced below, I mailed (via first class mail, postage prepaid, and via e-mail) a copy of the foregoing document to each and every attorney of record herein, as identified below:

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Dear Mr. Carpenter:

Attached hereto please find an electronic copy of a Motion for Leave to file Brief of Amicus Curiae and a proposed Brief of Amicus Curiae of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing our pleadings to counsel of record, per the certificate of mailing (appended to the Brief), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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