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WASHINGTON STATE
SUPREME COURT

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No. 92846-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

ALYNE FORTGANG,

Petitioner/Appellant/Plaintiff,

v.

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

Respondent/Defendant.

**SUPPLEMENTAL BRIEF OF PETITIONER
ALYNE FORTGANG**

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I. INTRODUCTION

The functional equivalence analysis created in *Telford v. Thurston Cnty. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886 (1999) (“*Telford*”), touches on the correct aspects of public/private relationships; however, it is essential that the analysis encompass a meaningful case-by-case assessment that accounts for all relevant facts. Here, this Court has the opportunity to clarify *Telford* and examine each of the four factors anew to determine what facts bear on whether an entity is the functional equivalent of a public agency such that it is subject to the Washington Public Records Act (“PRA”). In so doing, this Court should reject the Court of Appeals’ decision below; affirm and clarify the practical, fact-specific application of the *Telford* functional equivalence analysis; and apply that analysis to hold the Woodland Park Zoological Society (“WPZS” or “Zoo”) accountable to taxpayers under the PRA.

II. SUPPLEMENTAL ARGUMENT

The *Telford* functional equivalence analysis consists of balancing the following four factors:

- (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. Adopting this test, *Telford* repeatedly recognized the need for case-by-case application. *See, e.g., id.* at 161 (“The test determines, on a case-by-case analysis of various factors . . .”) (emphasis added); *id.* at 162 (rejecting any requirement that all factors be satisfied because “[a] balancing of factors . . . is more suitable to the functional, case-by-case approach of Washington law.”). *Telford* also highlighted the PRA’s goal of providing “full access to public records,” and the need to “liberally construe[]” the PRA to achieve that goal. *Id.* at 158.

The Court of Appeals in this case gave lip service to these fundamental rules, but then went on to articulate new highly-restrictive bright-line rules for each factor in the *Telford* test. The Court of Appeals’ bright lines and strict interpretation of *Telford* arbitrarily limit the application of the PRA to entities that are identical to public agencies, which is contrary to both this Court’s directive and the PRA’s command that it be “liberally construed” to achieve its goal to “assure that the public interest will be fully protected.” RCW 42.56.030; *see Worthington v. Westnet*, 182 Wn. 2d 500, 507, 341 P.3d 995 (2015) (the PRA reflects the need for “the public [to] have full access to information concerning the workings of the government . . . [a]ccordingly, courts must avoid

interpreting the PRA in a way that would tend to frustrate that purpose.”) (citations and internal quotations omitted); *Telford*, 95 Wn. App. at 158 (“Our paramount duty [in interpreting the statute] is to give effect to the Legislature’s purpose and intent.”). Functional equivalence – the idea that a thing can be different, but can perform similar functions – requires consideration of all relevant facts and a balancing that recognizes that, in some circumstances, certain significant facts do and should outweigh others.

a. The Governmental Function Factor Requires Consideration of Whether The Entity’s Activities Serve a Public Purpose

The Court of Appeals held that the government function factor weighs against application of the PRA unless the entity is performing “a core government function” within “the exclusive domain of the government,” “that [can]not be wholly delegated to the private sector.” (A-9, A-13.) While similar language can be found in prior Court of Appeals decisions, *see, e.g., Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006)¹ (finding governmental function factor did not weigh in favor of applying the PRA because the entity’s function, operating a

¹ *Spokane*’s application of *Telford* was in dicta. *See Spokane*, 133 Wn. App. at 608.

neighborhood-based nonprofit community center, “is one that may be ‘delegated to the private sector’”), there is no support for the Court of Appeals’ holding here that the PRA is only implicated when the entity at issue performs “core government functions”. Rather, the proper application of the first *Telford* factor should be more broadly focused on whether the activities being carried out by the private entity generally serve a “public function,” *see Cedar Grove*, 188 Wn. App. at 720, or a “public purpose,” *see Telford*, 95 Wn. App. at 163. After all, public agencies do more than tasks which are “the exclusive domain of the government.” (A-9, A-13.)

Indeed, the Court of Appeals recently found the PRA applicable when the entity’s work was clearly delegable to the private sector. *See Cedar Grove Composting, Inc. v. Marysville*, 188 Wn. App. 695, 720, 354 P.3d 249 (2015). In *Cedar Grove*, the Court of Appeals found the PRA applicable to Strategies 360—a public relations firm—in part because “[i]ts activities served a public function.” *Id.* at 720. Certainly, public relations work is not a “core government function” “within the exclusive domain of the government.” *Cedar Grove* is consistent with prior Washington cases which have broadly focused on the nature of the activities in question without reference to only “core” or “exclusive” functions. These cases considered, for example, whether the activity was

delegated to the private entity via enabling legislation. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192-93, 181 P.3d 881 (2008) (statute allowed cities and counties to contract with private companies to perform animal care and control services); *Telford*, 95 Wn. App. at 152-53 (statute allowed counties to work with a private entity to carry out coordination of administrative programs).

Here, there is legislation permitting the City of Seattle (“City”) to delegate management of the Zoo to WPZS that—similar to the statutes in *Telford* and *Clarke*—imposes limitations on the extent of the delegation. *See* RCW 35.64.010 (A-25—A-26). The enabling statute allows the City to contract for private management of the zoo, but requires the City to hold a public hearing on the proposed management of the zoo prior to executing the contract, imposes time limitations on the contract term, and obligates “the legislative authority of the city [to] provide for oversight of the managing and operating entity to ensure public accountability.” *Id.* (emphasis added). The statute also permits WPZS to “manage, supervise, and control” City employees “employees in connection with the zoo . . . and may hire, fire, and otherwise discipline those employees.” *Id.* These elements align with the proper “public purpose” and “public function” focus of the first functional equivalence factor.

Using prior Court of Appeals' decisions as a guidepost, this Court should clarify that the first *Telford* factor favors disclosure under the PRA even when the function is not a "core" one that cannot be wholly delegated to the private sector. The alternative would result in public/private partnerships largely escaping public scrutiny. Considering an entity's "public purpose" more broadly, this factor should weigh in favor of finding that WPZS, which publically holds itself out as a "City of Seattle facility,"² is performing a government function.

b. The Government Funding Factor Should Focus on the Source and Amount of All Government Funding.

The Court of Appeals articulated a new rule that the *Telford* government funding factor weighs in favor of applying the PRA only when a majority of the entity's total funding comes from the government. (A-13, A-15.) But this strict "majority of total funding" test is unworkable, easily manipulated, unsupported by Washington case law, and inconsistent with the PRA's language and purpose. This Court should reject the "majority of total funding" test in favor of a case-by-case analysis that focuses instead on the source and amount of all government funding.

² See <http://www.zoo.org/myzoomagazine> (Summer 2016 issue, p. 3), last visited July 28, 2016.

To be sure, a quantitative or percentage-based analysis is attractive. But, as this Court and the Court of Appeals have noted time and again, bright-line rules are not appropriate in applying the PRA. *See, e.g., Worthington*, 182 Wn. at 508 (noting courts must engage in a “practical analysis” in deciding whether to apply to PRA to a particular entity); (App. 8) (“[O]ur analysis under *Telford* must be grounded in the unique factual circumstances present in each case.”)); *Telford*, 95 Wn. App. at 162 (noting the “functional, case-by-case approach of Washington law.”). There can be no dispute that the “majority of total funding” rule is unsupported by the language of the PRA. While other states inserted threshold funding levels into their public records statutes, Washington’s PRA contains no such threshold. *See, e.g., Jackson v. E. Mich. Univ. Found.*, 544 N.W. 2d 737, 740 (Mich. Ct. App. 1996) (Michigan’s public records act, defining “public body” as including “[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority,” requires that entity receive at least 50% of its funding from the government); Ga. Code Ann. § 50-18-70 (2012) (defining “agency” as including any organization that, among other things, “derives more than 33 1/3 percent of its general operating budget from [public funds]”). The PRA’s intent should not be so easily ignored.

Likewise, the “majority of total funding” rule is unsupported by Washington case law. For example, in *Cedar Grove*, the Court of Appeals found that the City of Marysville paid a private public relations firm, “for at least the majority of the work at issue” 188 Wn. App. at 720 (emphasis added). In other words, this factor weighed in favor of applying the PRA based on the specific activity at issue. There was no finding that a majority of the entity’s total funding had to come from public dollars.

The Court should clarify that the second *Telford* factor requires consideration of all functional equivalence facts that may bear weight on the funding, including: the source of the public funds; the dollar amount of public funding; and whether the government is providing other benefits, such as free use of government property, that support the entity, albeit not through actual dollar contributions.

i. The Source of Public Funds is Significant.

First, the Court should clarify that courts can and should consider the source of the government funding—not merely the percentage of an entity’s overall total funding for a particular subset of years. Such an approach is consistent with the silence of the PRA regarding government funding and is consistent with the purpose of the PRA to “promote government accountability.” *Telford*, 95 Wn. App. at 159. Especially where, as here, the source of the funding is a taxpayer levy. (A-3). This

aligns with the approach of *Spokane*, where the Court of Appeals distinguished between an entity's receipt of government grants (which, on balance, was not sufficient for application of the PRA) and other sources of government funding, such as assessments. 133 Wn. App. at 609.

Unlike a government grant, a tax levy is a payment directly from taxpayer dollars, voted on and approved by the taxpayers themselves. The taxpayers of King County approved Proposition No. 1, which provided for a levy to direct taxpayer funds directly to the Zoo. Notably, Proposition No. 1 stated that it was to “fund maintenance and operations of the King County parks system . . . and zoo programs, all subject to citizen oversight.” (Br. of Amicus Curiae in Supp. of Pet. for Review at 5.) (emphasis added). In other words, here, the source of funds specifically contemplated public oversight, such as through the PRA.

The Court of Appeals gave little or no weight to the fact of taxpayer levy funding, focusing instead on the Zoo's preferred quantitative measurement. (A-13). But this holding leaves taxpayers without the ability to oversee the spending of their tax dollars, despite the ballot measure's promise otherwise. *Telford*, 95 Wn. App. at 159 (“[T]he intent of the P[R]A is to promote government accountability”); *see also Raheer v. Fed. Bureau of Prisons*, 749 F. Supp. 2d 1148, 1156 (D. Or. 2010) (holding that disclosure of information showing how defendant

Bureau of Prisons [BOP] spent money appropriated from the taxpayers “would further congressional intent in passing FOIA” and “would permit public scrutiny of the wisdom and efficiency of BOP’s decisions and the of the value received by taxpayers for these federal expenditures of taxpayer funds”). The source of funds must be considered.

ii. The Amount of Government Funding is Significant.

Second, the Court should clarify that the dollar amount of public funds given to an entity, as opposed to the percentage of total funding, should be considered in applying the government funding factor. A functional equivalence analysis which considers the amount of public funds is both more practical and more consistent with Washington case law than the Court of Appeals’ bright line “majority of total funding” rule.

In the case of large taxpayer-funded entities such as WPZS, the Court of Appeals’ rule would leave the public without oversight of hundreds of millions of levied dollars. Since the Operating Agreement between the City of Seattle and WPZS was executed, over \$123,000,000 in City and County taxpayer money has been allocated to the Zoo through a combination of levy proceeds, multi-million dollar annual allotments from the City General Fund, and annual maintenance payments. (A-25—A-26). Taxpayers should not lose the right to oversee how those dollars

are spent simply because they are allocated to an entity fortunate enough to have additional sources of funding.

Moreover, the “majority of total funding” test is not practical because it will foster disputes over accounting methods and the time period over which percentages should be calculated. The PRA’s application should not be dependent upon hypertechnical fluctuations in yearly accounting practices. *See Worthington*, 182 Wn. at 508 (courts must engage in a “practical analysis” in deciding whether to apply to PRA to a particular entity); *see also Telford*, 95 Wn. App. At 162-63 (*citing Bd. of Ttees. of Woodstock Academy v. Freedom of Information Comm’n*, 181 Conn. 544, 556, 436 A.2d 266 (Conn. 1980) (cautioning against a formulaic approach because “A case by case application of the factors noted above is best suited to ensure that the general rule of disclosure underlying this state’s FOIA is not undermined by nominal appellations which obscure functional realities.”)).

iii. Additional Non-Monetary Government Benefits Are Significant.

Third, the Court should clarify that in-kind government benefits, such as use of government land or facilities and whether the entity’s employees enjoy government benefits, should be considered in applying the government funding factor.

Although ignored by the Court of Appeals below, the consideration of in-kind benefits is contemplated by prior cases. *Telford* held that the entities at issue in that case were “mostly supported by public funds.” *Telford*, 95 Wn. App. at 165. It made this finding, however, only after noting that the entities “receive some additional governmental benefits” outside of direct payments of public funds:

WSAC and WACO receive some additional governmental benefits: some of their employees are members of the Washington public employees’ retirement system, both associations take advantage of Washington’s SCAN telephone system, and WACO is a member of the Washington Counties Insurance Fund.

Id. In fact, *Telford* specifically said that facts such as whether the entity’s employees receive government benefits would be considered under the government funding factor, if “it sheds any light on legislative intent.” *Id.* at 162-63. *Telford* thus left the door open for this Court to provide guidance that includes consideration of in-kind government benefits.

Likewise, the Court of Appeals in *Clarke* held that the government funding factor weighed in favor of applying the PRA where the government subsidized the entity’s use of property and the entity was prohibited from using the space for any other purpose:

Nearly all of TCAC’s operating budget comes from public money. TCAC occupies space in a building rent-free, subsidized by the local government with which it contracts, and it is forbidden by the terms of that contract from

engaging in any business on that premises other than its animal control services. . . .

Clarke, 144 Wn. App. at 194-95. Consistent with this reasoning, in *Spokane*, the Court of Appeals found that the government funding factor weighed against application of the PRA, in part because the entity was permitted to sublease the space to generate income. *Spokane*, 133 Wn. App. at 609.

Here, WPZS, in addition to receiving direct funds from taxpayers and the City, is also provided free use of 92 acres of prime City-owned land and buildings on which to operate the Zoo which it is expressly prohibited from using except for “operation of public zoological gardens...”. (CP 34, 37, 41-44). For the first five years of the Operating Agreement, the City also provided in-kind maintenance services in lieu of cash payments. (*Id.* at 44).

The Court of Appeals’ “majority of total funding” test completely ignores any consideration of these salient facts that would have required application of the PRA to the Zoo. This Court should reinforce that the *Telford* functional equivalence analysis should consider all relevant facts, including the source of government funding, the amount of government funding, and other non-monetary benefits provided by the government. In

so doing, the Court should find that the Zoo, on balance, should be subject to the PRA.

c. The Government Involvement or Regulation Factor Should Focus on General Government Involvement.

Functional equivalence, by its very definition, rejects the “substantial” or “day-to-day” government control that is not, and never has been, a requirement for application of the PRA to the functional equivalent of a public agency. (A-20). This Court should clarify that the government involvement or regulation factor of the functional equivalence analysis should include: (1) whether the entity’s records are subject to audit by the government, *see Telford*, 95 Wn. App. at 165; (2) whether any government officials run the entity or are involved in the entity’s operations, *see id*; *Cedar Grove*, 188 Wn. App. at 260; (3) whether there are any government restrictions on how the government facilities are run, *see Clarke*, 144 Wn. App. at 195; and (4) any reporting requirements imposed by the government, *see id.*, all of which are present through the Operating Agreement between the City and the Zoo. (CP 49, 54-55).

i. Telford Rejected A Requirement For Substantial, Day-To-Day Government Control.

Telford adopted its four-factor test from the Connecticut Supreme Court’s holding in *Board of Trustees v. Freedom of Information Commission*. *Telford*, 95 Wn. App. At 162-63. In doing so, it rejected a

six-factor test from the Oregon Supreme Court, evidencing an intent to apply the more flexible *Board of Trustees* test rather than the more rigid test adopted in Oregon. *Id.* Specifically, *Telford* rejected the Oregon Supreme Court’s second factor, “the presence of substantial government control over the entity’s day-to-day operations,” in favor of the general “extent of government involvement or regulation” factor. *Id.* The Court of Appeals erred in rewriting *Telford* to mirror the Oregon approach.

ii. The Court of Appeals Wrongly Relied on *Sebek*.

Ignoring *Telford*’s rejection of a need for government control over day-to-day operations, the Court of Appeals relied heavily on its decision in *Sebek v. City of Seattle*, 172 Wn. App. 273, 290 P.3d 159 (2012), in finding insufficient government control over WPZS. (A-20). But *Sebek* involved a very different question—whether the City could be held accountable for the allegedly illegal actions of a private entity in caring for elephants at the Zoo, such that a taxpayer had standing to sue the City for those actions. *Sebek*, 172 Wn. App. at 274. *Sebek*, therefore, only considered whether the City had sufficient control of the treatment of the Zoo’s elephants to warrant a finding that the City should be held legally responsible for the elephants’ treatment in violation of criminal animal cruelty laws.

Here, the issue is much broader than *Sebek*: whether the government has sufficient involvement in any of the entity's activities to tilt this factor in favor of applying the PRA. The PRA is a different statute with a far different purpose than criminal animal cruelty statutes.

iii. The Court of Appeals Inappropriately Relied on Cases Involving Government Grants and *Quid Pro Quo* payments.

The Court of Appeals also relied on inapposite federal FOIA and Connecticut case law to support a requirement for substantial, day-to-day government control.

The Court of Appeals relied on two FOIA cases: *Forsham v. Harris*, 445 U.S. 169 (1980) and *Irwin Memorial Blood Bank of San Francisco Medical Society v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981). (A-15—A-16 & n.9). In *Forsham*, the University Group Diabetes Program (“UGDP”), a private group of physicians and scientists, received a federal grant to conduct a study of diabetes treatment regimens. *Forsham*, 445 U.S. at 170. In holding that the UGDP was not a public agency, the Supreme Court focused on the fact that the UGDP was funded solely through government grants, and determined that FOIA was not intended to encompass such grant entities:

Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of

“agency,” an action consistent with its prevalent practice of preserving grantee autonomy.

Id. at 178. *Irwin* likewise involved an entity that received a government grant, an important factor taken into account by the Ninth Circuit:

The United States does not appropriate any funds to assist the Red Cross in implementing its charter powers and duties. Rather, the only federal money received by the Red Cross is in connection with various government contracts and specific purpose grants.

Irwin, 640 F.2d at 1056.

The Court of Appeals also relied on *Envtl. Svcs. Corp. v. Freedom of Info. Comm'n*, 59 Conn. 753, 757 A.2d 1202, 1206 (2000), as supporting a requirement for a higher level of government control. (A-15—A-16 & n.9). In that case, the entity at issue received government payments for services actually rendered (“*quid pro quo* payments”)—“not an allotment of government funds.” *Id.* at 759.

Government grants and *quid pro quo* payments are not tax levies. Neither of those types of payments allow the private entity discretion in spending those funds. In contrast, when a private entity receives a large general allocation of government taxpayer funds to support its overall general operations—like WPZS receives from the City and taxpayers—the entity’s use of those funds must be subject to public oversight. Where taxpayers have specifically directed millions of their tax dollars to support

an organization, the level of government involvement necessary to tilt this factor in favor of applying the PRA should be reduced.

d. The Entity Creation Factor Should Focus on More than Just Entity Non-Profit Status.

The Court of Appeals limited its analysis of the fourth factor of the *Telford* test—whether the entity was created by the government—solely to asking whether the entity was organized or incorporated by the government. (A-22). Once again, the Court of Appeals’ limiting approach to the *Telford* test is inappropriate. Instead, other facts must be considered such as: (1) whether government officials had a hand in creating the entity, *Telford*, 95 Wn. App. at 165; (2) whether the entity’s creation was “set in motion” by statute, *Spokane*, 133 Wn. App. at 609-10; and (3) government involvement in the creation of the facilities operated by the entity, *id.* at 609. Here, although WPZS was founded as a private organization, the fact that the Zoo was operated by the City for more than a century should be considered. (CP 33-35).

In support of its narrow application of the PRA, the Court of Appeals indicated that there is “no persuasive authority” for considering any fact besides whether the private entity was organized or incorporated by the government. (A-22). Not true. The PRA does not include any language that would indicate an “agency” must be organized or

incorporated by the government itself. RCW 42.56.010(1). In contrast, the Open Public Meetings Act (in the same chapter of the Washington statutes), includes such a requirement:

“Public agency” means: (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature . . .

RCW 42.30.020(1) (emphasis added). Construed together, these two statutes counsel against the Court of Appeals’ restrictive application of the functional equivalence analysis. *E.g., Capello v. State*, 114 Wn. App. 739, 750-51, 60 P.3d 620 (2002) (the “expression of one thing in a statute implies the exclusion of the other”); *see also Moore v. Abbott*, 2008 ME 100, 952 A.2d 980, 988 (Me. 2008) (relying on *Telford* and interpreting Maine’s similar public records act to hold that the fourth factor “is not so narrow” as to ask only whether the entity was created by legislative action, but rather a “broader understanding of the fourth criterion is necessary”).

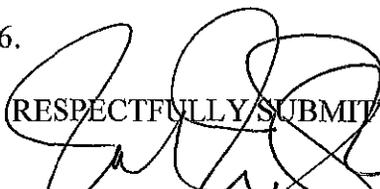
This factor must also be analyzed cumulatively alongside the government function test and the type of records sought in the PRA request. Where a private entity that was not created by the government may be performing a government function in some respects, but not others, only those records relating to the government function should be considered “public records.” Records relating to the internal governance

of the entity, for example, are not “public records” subject to the PRA. *See Cedar Grove*, 188 Wn. App. at 720. Here, Petitioner sought records related to municipal zoo operation, not of the WPZS in its private functions. (CP 24-25). Applying the functional equivalence test in this manner, the WPZS should be held subject to the PRA.

III. CONCLUSION

The Court of Appeals’ strict application of functional equivalence analysis is out of line with the PRA and Washington case law which emphasizes the need for a practical, case-by-case analysis. This Court should reject the restrictive analysis, and instruct Washington courts to eschew bright line rules in favor of a practical, case-by-case analysis that will further PRA’s broad mandate of ensuring public oversight of the business of government and the expenditure of public funds. In so doing, the Court should lift the veil on the Zoo and expose the Zoo’s use of hundreds of millions of taxpayer dollars to the transparency mandated by the PRA.

DATED July 29, 2016.


RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

I certify that on July 29, 2016, I caused to have served an original and one copy upon the Supreme Court Clerk's Office, and one true and correct copy upon Gregory J. Wong and Paul J. Lawrence of the following

SUPPLEMENTAL BRIEF OF PETITIONER ALYNE FORTGANG

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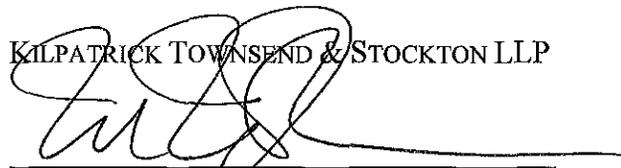
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DATED this 29th day of July, 2016, at Seattle, Washington.

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