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No. 92846-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALYNE FORTGANG,
Petitioner,

v.

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

**RESPONDENT WOODLAND PARK ZOOLOGICAL SOCIETY'S
SUPPLEMENTAL BRIEF**

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ORIGINAL

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I. INTRODUCTION

Private, nonprofit organizations provide numerous charitable, civic, and public benefits in our society. Often they do so with partial support from government. This case presents an issue of first impression in this Court: when, if ever, are such private entities subject to Washington's Public Records Act, ch. 42.56 RCW ("PRA"). The people, when they enacted the PRA by initiative, answered this question in the plain language of the statute. The PRA applies to government agencies only, defined to include all levels of state and local government. This application effectuates the PRA's purpose of keeping the people informed of governmental conduct and processes "so that they may maintain control over the instruments that they have created." RCW 42.56.030.

Here, it is undisputed that Respondent Woodland Park Zoological Society ("WPZS") is a private, nonprofit organization—not a government agency. The plain language of the PRA does not apply to WPZS. Indeed, the legislature recently considered whether to amend the PRA to extend its application to private nonprofits, including specifically WPZS. The amendment was not enacted into law. This Court should not extend the PRA to apply to WPZS where the legislature has declined to do so.

WPZS recognizes, however, that there may be circumstances where a government agency contracts away its functions to the extent that

a private entity essentially stands in the shoes of government. If this Court elects to apply the PRA to private entities in such circumstances, it should adopt the functional equivalency test articulated in *Telford v. Thurston Cty. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886 (1999). When appropriately applied as a narrow extension of the term “agency,” the *Telford* factors are a practical means to determine when a private entity is performing the conduct of government—in contrast to situations where a private entity simply is providing public benefits with government support. Appellant Alyne Fortgang’s (“Fortgang’s”) suggestion to alter and expand the reach of the *Telford* analysis by focusing primarily on receipt of a large amount of public funds should be rejected. Such a result is untethered from the PRA’s statutory language and purpose. The Court of Appeals correctly analyzed all four *Telford* factors here in holding the PRA does not apply to WPZS. The Court of Appeals should be affirmed.

II. STATEMENT OF THE CASE

WPZS incorporates in their entirety the Statements of the Case set forth in WPZS’s Answer to Petition for Review filed with this Court on April 1, 2016 and its Opening Brief filed with the Court of Appeals. In addition, WPZS provides the following short summary of relevant facts.

There is no dispute regarding WPZS’s origin, structure, and governance. Private citizens created WPZS in 1965. CP 170, 177. WPZS

is and always has been a private, nonprofit, and tax-exempt 501(c)(3) charitable organization. *Id.* at 170, 177, 181. Since its founding, WPZS has been governed by an independent, volunteer board of directors. *Id.* at 171. Today WPZS manages and operates the Woodland Park Zoo (“Zoo”) pursuant to a contractual relationship with the City of Seattle (the “City”). *Id.* at 210, 217. The City has no involvement in or control over the Zoo’s day-to-day operations. *Id.* at 217, 224, 226-29. WPZS receives 74 percent of its revenue from non-public sources, 16 percent from the City, and 10 percent from other public entities. *Id.* at 171, 183-208.

Fortgang, in her capacity as co-founder of the group Friends of Woodland Park Zoo Elephants, had a long running disagreement with WPZS over the operation of the Zoo’s elephant exhibit.¹ Fortgang submitted multiple requests to WPZS seeking information regarding WPZS’s elephant exhibit. *See* CP 24-25. In response, WPZS produced records related to the veterinary management and treatment of Zoo animals in WPZS’s care, as its contract with the City requires. CP 26-27.

¹ In 2014, WPZS decided to close its elephant exhibit due to an inability to build a multigenerational herd. In 2015, WPZS transferred ownership of its three elephants to the Oklahoma City and St. Louis Zoos. Fortgang filed multiple legal challenges to that transfer. Like her other prior lawsuits regarding WPZS’s elephant exhibit, the courts dismissed each claim as a matter of law. Most relevant here, the courts ruled that WPZS, not the City, has sole authority over Zoo animal decisions. *See* Order Denying Motion for Preliminary Injunction and Dismissing Case, *Elephant Justice Project v. WPZS*, No. 15-2-05611-5 (King County Sup. Ct.) (Apr. 3, 2015); Order Denying Motion for Injunctive Relief, No. 73253-6-1 (Wash. Ct. App.) (Apr. 10, 2015). For the Court’s convenience, WPZS provides copies of these Orders in Appendix A.

In an effort to be transparent, WPZS also voluntarily provided additional requested documents despite the lack of a legal obligation under the PRA to do so. CP 27. WPZS declined to produce other records Fortgang requested, asserting that as a private entity it is not subject to the PRA. *Id.*

Both the trial court and the Court of Appeals analyzed the facts here and concluded that the PRA does not apply to WPZS.

III. ARGUMENT

A. **The PRA applies to government agencies only, not private nonprofit organizations such as WPZS**

1. **The plain language of the statute applies the PRA to “agencies”**

The only issue before this Court is whether the PRA applies to a private, nonprofit organization such as WPZS. The plain language of the PRA answers this question in the negative. The portions of the PRA relevant to this appeal were passed by citizen initiative in 1972. *See* Laws of 1973, ch. 1, §§ 2, 26 (Initiative Measure No. 276). The approach this Court takes when interpreting initiatives is well established:

Standard rules of statutory construction apply to initiatives. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000). “[I]n determining the meaning of a statute enacted through the initiative process, the court’s purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure.” *Id.* “Where the language of an initiative enactment is ‘plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.’” *Id.* (quoting *State v. Thorne*, 129 Wn.2d

736, 762–63, 921 P.2d 514 (1996)); *Brown v. State*, 155 Wn.2d 254, 267, 119 P.3d 341 (2005) (noting that an initiative must be read as written, not as a court would like it to be written). “In construing the meaning of an initiative, the language of the enactment is to be read as the average informed lay voter would read it.” *State v. Brown*, 139 Wn.2d 20, 28, 983 P.2d 608 (1999) (quoting *W. Petroleum Imp., Inc. v. Friedt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995)).

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

Here, the PRA uses plain and unambiguous language to describe its intended reach: “Each agency . . . shall make available for public inspection and copying all public records” RCW 42.56.070(1) (emphasis added). In turn, the statute defines “agency” to include:

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

RCW 42.56.010(1).²

The average voter would read the plain language of the PRA as written because its natural meaning is unambiguous. The statute means exactly what it says—the PRA applies only to state or local government

² The original language of Initiative 276 varied the list in the last sentence slightly, without substantive effect here. The initiative used the following language in the last sentence: “‘Local agency’ includes every county, city, city and county, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.” Laws of 1973, ch. 1, §2(1).

agencies.³

2. Applying the PRA only to government agencies is consistent with the PRA's statutory scheme, purpose, and legislative record

There is no support in the text of the PRA for the notion that the people intended “agency” to extend beyond government agencies and reach private, nonprofit organizations. “An initiative must be read in light of its various provisions, rather than in a piecemeal approach, and in relation to the surrounding statutory scheme.” *Am. Legion Post #149*, 164 Wn.2d at 585 (internal citations omitted). The PRA’s statutory scheme focuses solely on oversight of governmental—not private—conduct. *See* RCW 42.17A.001(11) (policy of PRA is “full access to information concerning the conduct of government” and “full access to public records so as to assure continuing public confidence of . . . governmental processes”); RCW 42.56.010(3) (public record must relate “to the conduct of government or the performance of any governmental or proprietary

³ This Court has declined to look beyond the plain language of the PRA definition of “agency” before. In addressing whether the judiciary is an “agency” under the PRA:

[This Court] considered the full definition of agency and found that the judiciary was not included. Indeed, the PRA definition of agency does not include any language referring to courts or the judiciary. The *Nast* court reasonably concluded that the legislature did not intend to include the judiciary, basing its ruling on a “reading of the entire public records section of the [PRA].”

City of Federal Way v. Koenig, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (quoting and citing *Nast v. Michels*, 107 Wn.2d 300, 305, 730 P.2d 54 (1986).

function”); *Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015) (purpose of PRA is “access to information concerning the workings of the government”). Underlying this statutory scheme is the PRA’s fundamental purpose: to keep the people informed “so that they may maintain control over the instruments that they have created.” RCW 42.56.030.

Extending the definition of “agency” to private, nonprofit organizations finds no basis in the PRA’s statutory scheme and purpose. While many nonprofits provide public benefits supported in part by public funds, their work does not constitute the conduct of government. Simply because government could or has provided a public benefit does not make it per se governmental conduct. For example, government may decide to provide shelter for the homeless. When it does so, it is operating a governmental process. But when Amazon.com, Inc. decides to donate a building to Mary’s Place, a private, nonprofit organization, to provide shelter for homeless families, the fact that government has also provided shelter for the homeless does not convert either Amazon’s or Mary’s Place’s activity into government conduct. The people have an interest in the government’s homeless shelter as a means of controlling “the instruments that they have created.” RCW 42.56.030. But Mary’s Place and Amazon, and the vast majority of other private, nonprofit

organizations, are not created by government. The people in enacting the PRA did not express a similar interest in their activities.

To the extent a government agency provides funding to a private non-profit, the PRA's concern with access to the workings of government is protected as a person can always request all documents from the government agency providing such funding. This will include contracts, proposals, communications, audits, and any other document that reflects what government has decided to support and on what terms. In this way, government accountability is upheld without going beyond the statutory language.

Finally, whether to extend the PRA to private nonprofits that provide public benefits and contract with government agencies is a legislative decision. *Brown v. State*, 155 Wn.2d 254, 267, 119 P.3d 341 (2005) (this Court interprets initiatives "as they are written, and not as we would like them to be written"). Here, the legislature has considered whether to amend the PRA to extend its reach to private, nonprofit organizations, including specifically to WPZS. In the 2015 legislative session, House Bill 1425 proposed to amend the PRA so that it would apply to any "nonprofit legal entity" that "[p]erforms a government function that has been delegated by a state or local agency" or "[r]eceives substantial public funding on a regular basis for general operations," and is

either “subject to regular [government] involvement or regulation” or “[c]reated or designated by statute to carry out a government function.” H.B. 1425, 64th Leg., 2015 Reg. Sess. § 4(1). Further, HB 1425 proposed to amend the PRA to apply to any “nonprofit corporation or other public organization managing and operating a zoo or aquarium,” specifically mentioning the Zoo by name. *Id.* at § 4(2), 1. The legislature did not enact HB 1425 into law. The legislature reintroduced the same bill in 2016. Again, the legislature declined to act on the bill. This Court should not amend the plain language of the PRA to extend it beyond government agencies, and specifically to WPZS, where the legislature has declined to do so. *See Wash. State Coal. for the Homeless v. Dep’t of Soc. & Health Servs.*, 133 Wn.2d 894, 938, 949 P.2d 1291 (1997) (“Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs”) (internal citation omitted); *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (this Court “may not create legislation under the guise of interpreting a statute”) (internal citation omitted).

3. WPZS is not a government agency subject to the PRA

Here, Fortgang does not contend, nor could she, that WPZS is a government agency. WPZS is not a unit of government, nor a department, division, or any other subunit of government. It is a private, nonprofit

organization that, like many other nonprofits, provides a public benefit with support from government. But that does not make it an “agency” under a plain meaning reading of the statute. Accordingly, it falls outside the scope of the PRA. This Court should affirm on this basis alone.

B. To the extent the Court determines that the PRA applies to some private entities that operate like government agencies, it should adopt the *Telford* test

1. The *Telford* factors are a reasonable framework for analyzing whether a private entity is carrying out the work of government

WPZS recognizes that there may be some circumstances where a private, nonprofit organization steps into the shoes of government to the extent that it should be considered a government “agency” subject to the PRA. While not necessary to affirm here, this Court may decide to look beyond the plain meaning of the PRA and adopt a “functional equivalency” test to provide guidance for the courts, governments, and private entities in such circumstances. As an extension of the plain language of the statute, however, any such test should be applied narrowly. The PRA should apply to private, nonprofit organizations only if they are, in fact, acting in lieu of government “agencies”—not simply because they receive some government funding and provide some public benefit. The touchstone for any such test should be whether applying the PRA to the private entity will allow the people to “maintain control over

the instruments that they have created.” RCW 42.56.030.

The four-part *Telford* analysis, applied appropriately, provides a practical and balanced framework to determine functional equivalency.⁴ Rather than focusing solely on one factor, the *Telford* analysis examines the specific facts of each case through multiple lenses. The factors are: (1) whether the private entity is performing a governmental function, (2) the level of government funding, (3) the level of government control, and (4) whether the entity was created by government. *Telford*, 95 Wn. App. at 162-64. Each factor may provide insight into whether a private entity is in actuality an agency doing the “work[] of the government.” *Worthington*, 182 Wn.2d at 507. No one factor should be dispositive.

2. Focusing on the overall amount of government funding is not a proper means to determine functional equivalency

In contrast to *Telford*'s balanced approach, Fortgang suggests that the PRA should apply to any private entity that receives a large amount of public money. Fortgang's approach is without merit for several reasons.

First, such a result is inconsistent with the PRA's language and purpose. As discussed above, Washington's PRA is concerned primarily

⁴ Some form of “functional equivalency” test has been adopted by several courts interpreting public disclosure laws. See, e.g., *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d 456, 462, 854 N.E.2d 193 (2006); *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 16, 769 A.2d 857 (2001) (collecting cases); *Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n*, 181 Conn. 544, 554, 436 A.2d 266 (1980) (cited in *Telford*).

with the conduct of government—not where government chooses to invest its funds or contract for public benefits. See RCW 42.17A.001(11). Consistent with the PRA’s definition of “agency,” the amount of government funding is relevant only to the extent that it indicates that a government agency has outsourced the “workings of government” to a private entity. The overall amount of government funding is not relevant to this inquiry—a grant or contract could be large or small depending on the specific facts of the situation. Rather, the amount of government funding in relation to a private entity’s overall revenue may serve as an indicator that the entity is, in fact, stepping into the shoes of a government agency. In *Telford* and its progeny only if a significant percentage of the private entity’s funding comes from government does the factor weigh in favor of applying the PRA.⁵ This Court should adopt the same approach and analyze the level of government funding in relation to a private entity’s overall funding, not raw amounts. The funding factor should

⁵ See, e.g., *Telford*, 95 Wn. App. at 155, 165 (funding factor weighs towards applying the PRA where “[m]ost of WSAC’s and WACO’s income is derived from annual dues” which are “paid by the counties with public funds” and “the associations are therefore mostly supported by public funds”); *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 720, 354 P.3d 249 (2015) (funding factor weighs towards applying the PRA where contractor paid by government “for at least the majority of the work at issue” and “in large part with public funds”); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 194-95, 181 P.3d 881 (2008) (funding factor weighs towards applying the PRA where “[n]early all of TCAC’s operating budget comes from public money”); *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass’n*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006) (funding factor weighs against applying the PRA where income from private sources accounted for 25% of private entity’s funding).

weigh in favor of applying the PRA only if a significant percentage of the private entity's revenue comes from government sources. And the factor should be balanced along with government function, control, and origin.

Second, the PRA is not a "follow the money" statute. This is made clear by comparing the PRA's statutory language with other states' laws that specify public disclosure is required based on receipt of public funds. For example, South Carolina's public disclosure laws apply to any "public body," which includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds" S.C. Code Ann. § 30-4-20(a). Likewise, the Georgia legislature has defined "agency" to include "[a]ny nonprofit organization to which there is a direct allocation of tax funds made by the governing body of any agency . . . which constitutes more than 33 1/3 percent of the funds from all sources of such organization" Ga. Code Ann. § 50-14-1(a)(1)(E). In contrast, the PRA's definition of "agency" does not include any similar reference to recipients of public funds or private entities. *See* RCW 42.56.010(1); *cf.* S.C. Code Ann. § 30-4-20(a) (referring also to "organization[s]" and "corporation[s]"); Ga. Code Ann. § 50-14-1(a)(1)(E) (referring to certain "nonprofit organization[s]"). Again, while the legislature could amend the PRA in this manner, it has declined to do so.

Third, extending the PRA as Fortgang suggests would impact many private entities that receive significant amounts of public funding. Governments frequently contract with and fund private entities to provide public benefits. But that in and of itself should not convert the private entities into government agencies. As the Court of Appeals correctly noted in this case, “serving public interests is not the exclusive domain of the government.” *Woodland Park Zoo v. Fortgang*, 192 Wn. App. 418, 428, 368 P.3d 211 (2016). For example, private, nonprofit organizations such as the Boys and Girls Club and the Seattle Art Museum receive significant levels of public funds to operate pursuant to contractual arrangements. Fortgang’s reasoning would result in both being considered government agencies. For over 40 years the PRA has not been construed to apply to these recipients of public funds. This Court should decline to make such an unwarranted extension now.

In sum, Washington’s PRA is concerned primarily with the conduct of government—not where government chooses to invest its funds or contract for public benefits. The practical and balanced *Telford* test is narrowly tailored to promote that purpose. Only the relative percentage of an entity’s funding is relevant under *Telford*.

C. The Court of Appeals thoughtfully and correctly applied the *Telford* factors to determine that WPZS is not the functional equivalent of a public agency for purposes of the PRA

If this Court adopts the *Telford* test, it should affirm the Court of Appeals' application of the *Telford* factors to the facts and circumstances of this case. Considering the *Telford* factors in light of the language and purpose of the PRA, the Court of Appeals properly concluded that each of the four *Telford* factors weighs against applying the PRA to WPZS here: WPZS is not engaged in a government function, it receives the majority of its revenue from non-public sources, it has exclusive authority to manage and operate the Zoo, and the government played no role in its creation. *Woodland Park Zoo*, 192 Wn. App. at 421.

First, the Court of Appeals correctly determined that WPZS does not perform a "government function." *Id.* at 428-29. The court concluded that "[o]perating a zoo does not implicate any function unique to government," recognizing that "private zoos have existed alongside publicly owned zoos for decades, including in Washington." *Id.* at 429. In reaching this conclusion, the court considered and distinguished *Telford* and *Clarke*. *Id.* at 430-31; see *Clarke*, 144 Wn. App. at 193-94 (private animal care and control agency performs a governmental function where its officers execute police powers); *Telford*, 95 Wn. App. at 163-64 (providing "statewide coordination of county administrative programs" is

a governmental function). Because WPZS does not perform a “government function,” the court concluded that the “legitimate concern” that a government may “evad[e] PRA requirements via ‘out sourcing’ ‘core government functions’ [is] not present in this case.” *Id.* at 431. Where, as here, a private entity merely provides a public benefit, not an essential government function, the first *Telford* factor weighs against applying the PRA.

Second, the Court of Appeals correctly determined that the relative level of government funding factor also weighs against applying the PRA. *Id.* at 432-33. WPZS receives the vast majority of its funding—74%—from private sources. No case has ever applied the PRA to an entity where public funding comprises less than a significant percentage of the entity’s total revenue. *See, e.g., Telford*, 95 Wn. App. at 155, 165 (funding factor weighs towards applying the PRA where “[m]ost of WSAC’s and WACO’s income is derived from annual dues” which are “paid by the counties with public funds” and “the associations are therefore mostly supported by public funds”); *Cedar Grove Composting, Inc.*, 188 Wn. App. at 720 (funding factor weighs towards applying the PRA where contractor paid by government “for at least the majority of the work at issue” and “in large part with public funds”); *Clarke*, 144 Wn. App. at 194-95 (funding factor weighs towards applying the PRA where

“[n]early all of TCAC's operating budget comes from public money”); *Spokane Research & Def. Fund*, 133 Wn. App. at 609 (funding factor weighs against applying the PRA where income from private sources accounted for 25% of private entity's funding). This Court similarly should decline to do so.

Third, the Court of Appeals properly determined that the government control factor weighs against application of the PRA here. In reaching that conclusion, the court analyzed the language of the agreement between the City and WPZS, concluding that the agreement demonstrates that “these sophisticated contracting parties allocated various duties with the issue of control firmly in mind.” *Woodland Park Zoo*, 192 Wn. App. at 436. The court noted that Fortgang does not dispute that the agreement between the City and WPZS states, “WPZS shall exclusively manage and operate the Zoo.” *Id.* at 438. The agreement provides the City no control over day-to-day operations at the Zoo, that WPZS owns and cares for the Zoo animals, and that WPZS exclusively controls its employees. *Id.* at 436-38. The court rejected Fortgang's argument that the reporting requirements imposed by the agreement amount to government control, reasoning that such oversight and accountability requirements are “standard” in government contracts. *Id.* at 437. After a thorough analysis, and on “the unique facts presented here,” the court correctly concluded

that nothing in the Agreement demonstrates “sufficient City control over WPZS’ exclusive authority to manage and operate the Zoo” to weigh in favor of disclosure under the PRA.⁶ *Id.* at 439.

Finally, the Court of Appeals correctly focused on the origin of WPZS, not the facility it operates, in determining that the fourth *Telford* factor also weighs against application of the PRA. The fourth factor asks “whether the entity was created by government.” *Telford*, 95 Wn. App. at 162 (emphasis added). Here, the Court of Appeals concluded that “[i]t is undisputed that the government played no role in WPZS’ creation.” *Woodland Park Zoo*, 192 Wn. App. at 439-40. WPZS was founded by private citizens, is a private, nonprofit, and tax-exempt 501(c)(3) organization, and is and has always been governed by an independent, volunteer board of directors. *Id.* at 440. On that basis, the Court of Appeals properly concluded that this factor weighs against application of the PRA to WPZS. *Id.*

The Court of Appeals’ well-reasoned decision is grounded in the purpose and intent of the PRA. *Id.* at 426-27. Disclosure of the records of a private, non-profit corporation regarding its operation of a zoo does not

⁶ After undertaking an independent analysis under *Telford*, the court also noted that the issue of government control had already been decided in favor of WPZS in a different lawsuit brought by Fortgang’s group. 192 Wn. App. at 437-38 (discussing *Sebek v. City of Seattle*, 172 Wn. App. 273, 290 P.3d 159 (2012) (holding that WPZS is not an arm or de facto part of the City)).

implicate government accountability or dispel secrecy in government, because government is not involved.⁷ See *Progressive Animal Welfare Soc. v. Univ. of Washington*, 114 Wn.2d 677, 682, 790 P.2d 604 (1990); *Worthington*, 182 Wn.2d at 507 (the PRA is concerned with public access to information regarding the “workings of the government”). The PRA adequately allows interested citizens to seek records from the City regarding its involvement with and provision of funding to WPZS. Should this Court adopt the *Telford* functional equivalency test, it should affirm the Court of Appeals’ decision holding that WPZS is not subject to the PRA.

IV. CONCLUSION

The plain language of the PRA limits its reach to public agencies only. It is undisputed that WPZS is a private nonprofit organization, not a government agency. This Court should affirm on that basis alone. But should this Court decide to extend the PRA to some private entities, it should adopt the *Telford* test. The test should be applied to adhere closely to the statutory language and purpose. The Court of Appeals conducted a well-reasoned and thorough analysis of the *Telford* factors

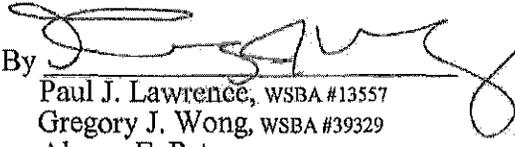
⁷ Nor does this case present a situation where the government intentionally outsourced its work to avoid application of the PRA. See, e.g., *Cedar Grove Composting*, 188 Wn. App. at 720 (finding that the City of Marysville “direct[ed] and delegate[d] activities to [a private entity] with the express object of avoiding the reach of the PRA”).

to the facts here in holding that the PRA does not apply to WPZS.

WPZS respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 29th day of July, 2016.

PACIFICA LAW GROUP LLP

By 

Paul J. Lawrence, WSBA #13557

Gregory J. Wong, WSBA #39329

Alanna E. Peterson, WSBA #46502

Attorneys for Respondent
Woodland Park Zoological Society

APPENDIX A

HONORABLE PALMER ROBINSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ELEPHANT JUSTICE PROJECT and
ROOM2ROAM,

Plaintiff,

v.

WOODLAND PARK ZOOLOGICAL
SOCIETY and CITY OF SEATTLE,

Defendants.

No. 15-2-05611-5 SEA
DL
~~PROPOSED~~ ORDER DENYING
MOTION FOR PRELIMINARY
INJUNCTION AND DISMISSING
CASE

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. Pursuant to CR 65(a)(2), and because Plaintiffs' Motion presents questions of law that have been fully briefed and argued by the parties, the Court will consolidate the adjudication of the Motion with the merits of Plaintiffs' claims. In ruling on the Motion and the merits of Plaintiffs' claims, the Court has considered the following in addition to the applicable law and the pleadings on file herein:

1. Plaintiffs' Motion for Preliminary Injunction;
2. Declaration of Knoll Lowney and the exhibits attached thereto;
3. Declaration of Alyne Fortgang;

[PROPOSED] ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION AND DISMISSING
CASE - I

PACIFICA LAW GROUP LLP
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- 1 4. Declaration of Lisa Kane;
- 2 5. Declaration of Scott Blais;
- 3 6. Opposition to Motion by Woodland Park Zoological Society;
- 4 7. Declaration of Paul Lawrence and the exhibits attached thereto;
- 5 8. Declaration of Kenneth Bounds and the exhibits attached thereto;
- 6 9. Declaration of Bruce Bohmke and the exhibits attached thereto;
- 7 10. Declaration of Stephen Fritz;
- 8 11. Response to Motion by the City of Seattle;
- 9 12. Declaration of Greg Narver and exhibits attached thereto;
- 10 13. Plaintiffs' Reply in Support of Motion;
- 11 14. Second Declaration of Knoll Lowney;
- 12 15. Second Declaration of Alyne Förtgang; and
- 13 16. The argument of counsel at the hearing on April 3, 2015.

14 Upon consideration of the above, the Court makes the following findings of fact and
15 conclusions of law:

16 1. A preliminary injunction is “an extraordinary equitable remedy designed to
17 prevent serious harm” and, thus, “should be used sparingly and only in a clear and plain case.”
18 *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (quoting *Tyler Pipe*
19 *Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 796, 638 P.2d 1213 (1982)). Plaintiffs
20 must show “(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of
21 that right, and (3) that the acts complained of are either resulting in or will result in actual and
22 substantial injury” to the Plaintiffs. *Id.*

1 2. When deciding whether a party has a clear legal or equitable right sufficient to
2 warrant an injunction, the court examines the likelihood the moving party will prevail on the
3 merits. *Kucera*, 140 Wn.2d at 216. Here, for the reasons stated below, Plaintiffs have failed to
4 establish they are likely to succeed on the merits of their claims, and thus are not entitled to
5 injunctive relief.
6

7 3. For the same reasons, and pursuant to CR 65(a)(2), Plaintiffs' claims fail as a
8 matter of law and must be dismissed.

9 4. The City properly exercised its authority under both RCW 35.22.280(3) and the
10 City Charter when it transferred ownership of the Zoo Animals to WPZS. The Management
11 Agreement between the City and WPZS is a valid exercise of the City's authority to manage and
12 dispose of its own property. As such, the Zoo Animals were properly transferred to WPZS and
13 remain property of WPZS.
14

15 5. The Management Agreement gives WPZS the express authority to acquire or sell
16 or otherwise dispose of Zoo animals in the course of WPZS' operation of the Zoo.

17 6. The transfer of the Zoo Animals was not an unconstitutional gift of public funds
18 by the City. WPZS provided ample consideration in exchange for the Zoo Animals and there is
19 no evidence in the record of "donative intent" on the part of the City.
20

21 7. Ordinance 120697 is valid under Article IV, Section 7 of the state constitution.
22 The ordinance does not contain more than one subject and that subject is adequately expressed in
23 its title.

24 8. _____

25 _____

[PROPOSED] ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION AND DISMISSING
CASE - 3

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1
2
3
4
5
6 Because Plaintiffs' claims fail as a matter of law, the Court ORDERS that Plaintiffs'
7 Motion for a Preliminary Injunction is DENIED and Plaintiffs' Complaint for Declaratory and
8 Injunctive Relief is DISMISSED with prejudice.

9 It is SO ORDERED.

10 DATED this 3 day of April, 2015

11
12 
13 Honorable Palmer Robinson
14 King County Superior Court Judge

13 Presented by:

14 PACIFICA LAW GROUP LLP

15 By _____

16 Paul J. Lawrence, WSBA #13557
17 Sarah C. Johnson, WSBA # 34529
18 Kymberly J. Evanson, WSBA #39973

19 Attorneys for Defendant Woodland Park Zoological Society

20 Approved as to Form:

21 CITY OF SEATTLE

22 By _____

23 Gregory Narver, WSBA #18127
24 Attorney for City of Seattle

25 SMITH & LOWNEY

By _____

Knoll D. Lowney, WSBA 23457
Attorney for Plaintiffs

[PROPOSED] ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION AND DISMISSING
CASE - 4

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ELEPHANT JUSTICE PROJECT,)
AND ROOM2ROAM)
Appellant,)
v.)
WOODLAND PARK ZOOLOGICAL)
SOCIETY and THE CITY OF SEATTLE)
Respondents.)

No. 73253-6-1

DIVISION ONE

ORDER DENYING MOTION
FOR INJUNCTIVE RELIEF

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 APR 10 PM 3:22

By emergency motion, appellants, Elephant Justice Project and Room2Roam, seek injunctive relief from the superior court order denying their request for an injunction prohibiting the transfer of two Asian Elephants from the Woodland Park Zoo to the Oklahoma City Zoological Park. Because appellants fail to satisfy the criteria of RAP 8.3, an order should enter denying this motion.

DECISION

Appellants have not satisfied the criteria of RAP 8.3 for injunctive relief.

Now therefore, it is hereby

ORDERED that the motion for injunctive relief is denied. An opinion providing written reasons for this court's decision will follow in due course.

Done this 10th day of April, 2015.

Leach, J.

Spears, C.J.

Dwyer, J.

Jul 29, 2016, 4:19 pm

RECEIVED ELECTRONICALLY

No. 92846-1

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.

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 29th day of July, 2016 I caused a true and correct copy of Respondent Woodland Park Zoological Society's Supplemental Brief to be filed with the Supreme Court and served electronically, via email, per the electronic service agreement, to the parties listed below:

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Christopher T. Varas
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Email: rsmith@kilpatricktownsend.com
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Attorneys for Plaintiff

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701 Fifth Avenue, Suite 4200
Seattle, WA 98104

Email: Margaret@enslowmartin.com

*Attorney for Amicus Curiae
Washington Coalition for Open
Government*

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct

DATED this 29th day of July, 2016.


Katie Dillon

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 29, 2016 4:20 PM
To: 'Katie Dillon'
Cc: rrsmith@kilpatricktownsend.com; cvaras@kilpatricktownsend.com; margaret@enslowmartin.com; Paul Lawrence; Greg Wong; Alanna Peterson; Dawn Taylor
Subject: RE: Fortgang v. Woodland Park Zoological Society: Cause No. 92846-1 - WPZS' Supplemental Brief and Proof of Service

Received 7/29/16.

Supreme Court Clerk's Office

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From: Katie Dillon [mailto:Katie.Dillon@pacificallawgroup.com]
Sent: Friday, July 29, 2016 4:08 PM
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Cc: rrsmith@kilpatricktownsend.com; cvaras@kilpatricktownsend.com; margaret@enslowmartin.com; Paul Lawrence <Paul.Lawrence@pacificallawgroup.com>; Greg Wong <Greg.Wong@pacificallawgroup.com>; Alanna Peterson <Alanna.Peterson@pacificallawgroup.com>; Dawn Taylor <Dawn.Taylor@pacificallawgroup.com>
Subject: Fortgang v. Woodland Park Zoological Society: Cause No. 92846-1 - WPZS' Supplemental Brief and Proof of Service

On behalf of Gregory J. Wong (WSBA No. 39329), attorney for Woodland Park Zoological Society, attached please find Respondent Woodland Park Zoological Society's Supplemental Brief and accompanying Proof of Service.

Please note that our reception, address suite number and zip code have changed.

Katie Dillon
Paralegal



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