

NO. 43689-2-II

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

JOHN WORTHINGTON,

Appellant,

v.

WESTNET,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-2-02698-3

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly granted WestNET's CR 12(b)(6) Motion for Dismissal for Failure to State a Claim Upon Which Relief can be Granted when Plaintiff's Complaint failed to identify WestNET as an entity that had the capacity to be sued.

2. Whether the trail court properly granted WestNET's CR 12(b)(6) Motion for Dismissal for Failure to State a Claim Upon Which Relief can be Granted because Plaintiff could prove no set of facts, consistent with the Complaint, which could identify WestNET as an entity with the capacity to be sued thereby entitling him to relief.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Worthington filed suit against WestNET, complaining of violation of the Public Records Act, RCW 42.45.550. CP 5-6. WestNET moved for dismissal of the action pursuant to CR 12(b)(6), asserting that Worthington had failed to state a claim upon which relief could be granted as the Complaint: a) failed to identify WesNET in any capacity; and b) under no set of facts could Worthington identify WestNET as an entity subject to suit as a public agency. CP 106-109; 110-113. After denial of

WestNET's motion, and with the court's leave, WestNET filed a Motion for Reconsideration, providing the Court with the Interlocal Drug Task Force Agreement, which set forth the agreement by which several counties and cities had joined efforts to combat enforcement of controlled substance laws (WestNET). CP 114-120; CP ___ - ___ (Docket No. 22). The trial court subsequently granted WestNET's motion for reconsideration and Granted WestNET's Motion for Dismissal Pursuant to CR 12(b)(6); an order from which Worthington now appeals.

B. FACTS

As outlined above, Worthington filed a Complaint against WestNET which failed to identify WestNET as an entity that had the capacity to be sued. CP 1-10; 106-109; 110-112. Indeed, other than naming WestNET as a defendant, the Complaint did not identify WestNET in any regard; that is, he did not identify WestNET as an individual, business, public corporation or entity.

Pursuant to the terms of the Interlocal Task Force (e.g. WestNET) Agreement (agreement by which multiple city and municipal agencies joined efforts to combat enforcement of controlled substance laws), each

entity joining the task force acted in its individual capacity; NO separate legal entity was intended or created by the Agreement.¹

III. ARGUMENT

A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted is a question of law which is reviewed de novo. CR 12(b)(6); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts should dismiss a claim under CR 12(b)(6) if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Cutler*, 124 Wn.2d at 755; *see also Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (action may be dismissed under CR 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would entitle him to relief).

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¹ Specific provisions of the Interlocal Task Force Agreement were set forth in WestNET's Reply in Support of Motion for Reconsideration (Docket No. 26; CP ___ - ___ and the Agreement in its entirety was attached as Exhibit A to the Declaration of Lone George (Docket No. 22, at p.1; CP ___ - ___.)

A. The Trial Court did not err in granting WestNET's CR 12(b)(6) Motion for Dismissal for Failure to State a Claim Upon Which Relief can be Granted because Plaintiff's Complaint failed to identify WestNET as an entity that had the capacity to be sued.

In its CR 12(b)(6) Motion for Dismissal, WestNET pointed out that even when accepting all the factual allegations of the Complaint as true, Worthington had failed to state a claim upon which relief could be granted because the Complaint did not identify WestNET as an entity that had the capacity to be sued in any regard. Indeed, WestNET was not identified in any manner; as an individual, as a business, public corporation or agency. Because the Complaint was deficient on its face, the court appropriately ruled that Worthington's claims should fail as he had not identified WestNET as an entity that had the capacity to be sued.

B. The trial court properly granted WestNET's CR 12(b)(6) Motion for Dismissal for Failure to State a Claim Upon Which Relief can be Granted because Plaintiff could prove no set of facts, consistent with the Complaint, which could identify WestNET as an entity with the capacity to be sued thereby entitling him to relief.

Not only was Worthington's Complaint deficient on its face, his Complaint also failed to state a claim upon which relief could be granted because he could prove no set of facts under which WestNET as either an entity subject to suit (in any regard) or an "agency" subject to suit pursuant to RCW 42.56.550.

Worthington's action against WestNET was for alleged violations of the Public Records Act (RCW 42.56.550). RCW 42.45.010 defines an agency that is subject RCW 42.56.550 as:

“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.

Because the Complaint failed to provide any identification of WestNET as a “local agency” it failed to state a claim upon which relief can be granted.

Though he has not made this argument on appeal, Worthington argued to the trial court that it was “clear from the composition of the Board that it [WestNET] is a “corporate entity.” CP 69. Worthington then referenced Minutes of the WestNET board's quarterly meeting to establish the “extensive composition of the ‘Board,’” and to “demonstrate[e] that WestNET follows all fundamental rules of corporate governance.” CP 69.

The trial court properly rejected the argument that WestNET is the equivalent of a corporate entity. Per the Interlocal Drug Task Force Agreement it is clear that WestNET is not a corporate entity, and does not follow “fundamental rules of corporate governance.” Specifically, the Interlocal Agreement provides:

- The purpose of this agreement is *to provide for and regulate the joint efforts* of the City, County, State and Federal law enforcement to combat violations of controlled substance laws within the contracting jurisdictions for their mutual advantage. (Page 3, Section 2; emphasis added.)
- The parties *do not intend to create* through, this agreement, *a separate legal entity* subject to suit. (Page 3, Section 2; emphasis added.)
- Each jurisdiction shall pay all costs associated with its officers and equipment when assigned to the Task force. (Page 4, Section 3.b.)
- Each contributing agency shall act as an independent contractor and not as an employee of the Task Force or of another party to this agreement. (Page 4, Section 3.c.)
- As such, each party shall not have the authority to bind other parties nor control employees of other parties, contractors or entities. (Page 4, Section 3.c.)
- Pursuant to RCW 10.93.040, *personnel assigned to the Task Force shall be considered employees of the contributing agency*, which shall be solely and exclusively

responsible for that employee. (Page 4, Section 3.d; emphasis added.)

- The Office of the Kitsap County Prosecutor shall, in addition to its normal duties in the prosecution of Kitsap County felony drug violations, represent the Cities, Kitsap County, and the State in real and personal property forfeitures and drug nuisance abatement proceedings initiated by Task Force assigned personnel. (Page 5, Section 3.e.) [*Of note, the agreement does not provide for the Task Force (e.g. WestNET) to initiate forfeitures or abatements; nor does it reflect that the Prosecutor's Office would represent the Task Force.*]
- Personnel assigned to the Task Force shall conform to their agency's rules and regulations, as well as Task Force policy. All disciplinary matters will be the responsibility of the individual agencies. (Page 5, section 3.f.)

In the alternative, Worthington asserted to both the trial court as well as here that WestNET is an "agency" within the meaning of RCW 42.56. CP 69-71; 89-92. However, by the same consideration as set forth above, WestNET is not a "local agency" any more than it is a "public corporation." It is simply a coordinating agreement that allows a group of law enforcement agencies to collaborate in solving crime. To consider WestNET a local agency, and subject it to suit defies the clear language and intent of the agreement. The Interlocal Agreement provides that all

personnel assigned to work with the group remain employees of the contributing agency. Expenses, liability, employment policies, are those of the contributing law enforcement agency, not the Task Force. Who then to pay a lawsuit if the Task Force sued? Who could receive legal service for the Task Force if each person involved is the employee of another entity?

WestNET is simply framework under which independent law enforcement agencies can work together to solve crime. Moreover, as referenced in the Interlocal agreement itself, RCW 10.93.040 provides:

Any liability or claim for liability which arises out of the exercise or alleged exercise of authority by an officer acting within the course and scope of the officer's duties as a peace officer under this chapter is the responsibility of the primary commissioning agency unless the officer acts under the direction and control of another agency or unless the liability is otherwise allocated under a written agreement between the primary commissioning agency and another agency.

Under this Interlocal Agreement the fact that liability is not allocated to anything but the primary commissioning agency is clearly stated: "Pursuant to RCW 10.93.040, *personnel assigned* to the Task Force *shall be considered employees of the contributing agency*, which shall be solely and exclusively responsible for that employee."

Pursuant to RCW 39.34.030, WestNET is simply a statutory means by which independent public agencies (here, law enforcement entities) may jointly “exercise and enjoy” their powers, privileges or authority with other public agencies. RCW 39.34.030, which sets forth the means by which such a cooperative agreement may be effected, specifically contemplates and allows for such joint operations *without the establishment of a separate legal entity.*²

By the terms of the Interlocal Agreement that created WestNET, a separate legal entity was not created. CP ___ - ___ (Docket No. 22, Exhibit A, “Interlocal Drug Task Force Agreement, at p.3, Section 2.) All that the Interlocal Agreement accomplished was a means by which several independent law enforcement agencies could perform their duties in cooperation with other law enforcement agencies to enhance their independent efforts.

In arguing that WestNET is a public agency, Worthington’s reliance on the “functional equivalent” test of *Telford*³ is misplaced. *Telford* and its progeny applied a 4-factor test to determine whether a

²“In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall contain, in addition to the provisions specified in subsection (3)(a), (c), (d), (e), and (f) of this section, the following ...” RCW 39.34.030.

³*Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886, review denied, 138 Wash.2d 1015, 989 P.2d 1143 (1999)

quasi-private/public agency is subject to the PRA.⁴ Accordingly, the *function* of the agency is a critical factor in that test. Clearly when joining efforts to collaboratively exercise police authority, the actors are performing a governmental function; and any one of the collaborative agencies would be subject to the public records act. Here, however, the question to be addressed is not whether the *function* of WestNET is governmental (which it clearly is) but whether it is an “agency” subject to the Public Records Act. The test, as set forth in *Telford*, is not established to answer this question.

Moreover, purpose of the Telford test is inapplicable. The four factor test created by the Court in *Telford* was necessary so that requestors of public records could hold the quasi public agency accountable. No such accountability is needed here. Because WestNET is a multi-agency task force, and each agency is subject to the PRA, Plaintiff is not without legal recourse for any alleged improper action taken by any member agency (which retains accountability for its actions per the Interlocal Agreement).

Because WestNET exists as an agreement under the authority of RCW 39.34.030; and because that agreement does not establish WestNET

⁴ See also, *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn.App. 185, 181 P.3d 881 (2008).

as a separate legal entity,⁵ Worthington cannot prove any set of facts that would entitle him to relief.⁶ Accordingly, his claim was properly dismissed as it failed to state a claim upon which relief can be granted; Worthington has not and cannot establish that WestNET is an “agency” subject to the public records act.⁷

IV. CONCLUSION

For the foregoing reasons, the Order Granting Defendant’s Motion

⁵ See, RCW 39.34.030(4).

⁶ Indeed, many of the materials submitted by Worthington in support of his Complaint exist *because* WestNET is not a separate legal entity. Pursuant to RCW 39.34.030(4), Interlocal Agreements that *do not* establish a separate legal entity shall contain additional provisions including:

- a) Provision for an administrator or joint board representative administering the joint or cooperative undertaking. In the case of a joint board, public agencies that are party to the agreement shall be represented; and
- b) The manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking. Any joint board is authorized to establish a special fund with the state, county, city, or district treasurer servicing an involved public agency designated “Operating fund ofjoint board,”

The written materials submitted by Plaintiff (such as board minutes and account information) exist because of the *opposite* reason Plaintiff offers them. They do not establish WestNET is a public agency; but exist in response to the statutory requirement of a collective agreement that *does not* establish a separate legal entity.

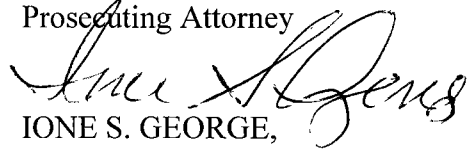
⁷ Though not argued on appeal, the trial court also appropriately rejected Worthington’s assertion that WestNET had “waived” the defense that it does not exist as a separate legal entity. Indeed, how could a task force that is not a separate legal entity waive a legal defense? If it does not exist as a legal entity, how could it take legal action? Moreover, his argument regarding waiver was not supported by the facts Worthington offered. While he asserts he made a public records request of “WestNET”, the documents Worthington provided reflect that he submitted his request to a Kitsap County Sheriff’s Employee (Kathy Chittenden,) and the WestNET member agency “Kitsap County Sheriff’s Office” is the entity that responded to his public records request. (See correspondence from Kitsap County Sheriff’s Office (KCSO) in response to Plaintiff’s public records request as attached to the Declaration of John Worthington as Exhibits A, B, C, D, F and I. CP 26-18; 19-23; 24-28; 29-31; 34-39; and 52-56.

for Dismissal with Prejudice should be affirmed.

Dated February 20, 2013

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Ione S. George".

IONE S. GEORGE,
WSBA No. 18236
Chief Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

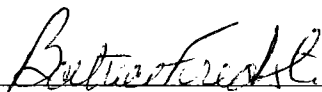
I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

John Worthington
4500 SE 2nd Place
Renton, WA 98059

Via U.S. Mail
 Via email

SIGNED in Port Orchard, Washington this 20th day of February, 2013.



BATRICE FREDSTI, Legal
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KITSAP COUNTY PROSECUTOR

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