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No. 72413-4-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

ALYNE FORTGANG,

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT WOODLAND PARK ZOOLOGICAL SOCIETY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

I. INTRODUCTION

Washington's Public Records Act ("PRA"), ch. 42.56 RCW, seeks to "promote government accountability" by assuring "access to information concerning the conduct of government".[1] RCW 42.17A.001. The PRA, as written, applies to all state and local agencies. Recognizing that in limited instances private entities can act in the same capacity as a state or local agency, the courts have adopted a four-part test to assess whether private entities are the "functional equivalent" of a state or local agency. Balancing 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—courts engage in a "practical analysis" to assess whether private entities are conducting the business of government such that they should be deemed a public agency for the purposes of the PRA. *Worthington v. WestNET*, __ Wn.2d __, __ P.3d __, No. 90037-0, 2015 WL 276401 at *4 (Wash. Jan. 22, 2015). But the extension of the PRA to private entities should occur only where the balance of these factors demonstrates that the entity is, in essence, a government agency in character and operation. Appellant Alyne Fortgang ("Fortgang") here

[1] In 2006, the record disclosure provisions of ch. 42.17 RCW (the Public Disclosure Act, primarily addressing campaign financing) were recodified into the PRA. The recodification did not affect the substantive law relevant to the issues on appeal.

attempts to extend the PRA and apply it to private non-profit organizations that provide a community benefit in part through a contract with a local agency based principally on the total (not relative) public dollars received by the private non-profit. But the Washington PRA does not apply simply because a private non-profit receives public money to fund part of its services. Rather, the courts look to the totality of the non-profit's operations to assess whether it is the functional equivalent of an agency. Fortgang's suggestion that the total dollar amount of public money determines whether the PRA applies is both counter to a "practical analysis", *id.*, and unsupported by law.

Here, the Woodland Park Zoological Society ("WPZS") is not the functional equivalent of an agency. First, with respect to funding, no court has found a non-profit to be the functional equivalent of an agency where it receives less than a significant majority of its funding from public sources. Here, 74% of WPZS's revenue comes from non-public sources. Second, this Court has already held WPZS is not subject to government control. *Sebek v. City of Seattle*, 172 Wn. App. 273, 280, 290 P.3d 159 (2012), *review denied*, 177 Wn.2d 1014 (2013). Further, while the City of Seattle ("City"), contracts with WPZS to support a community benefit—the Woodland Park Zoo ("Zoo")— it does not control WPZS's operations. Third, WPZS does not perform a government function. Operating and

managing a zoo is an activity in which a private or a public entity can choose to engage (or not). It is not a non-delegable exercise of police power or the provision of a core government function—activities that may be subject to the PRA. Fourth, WPZS was not created by government.

Assessing these factors, the trial court properly found that WPZS is not the functional equivalent of a government agency. The trial court's decision should be affirmed.

II. STATEMENT OF THE ISSUES

The PRA applies only to public agencies. WPZS is a private, non-profit organization that receives the majority of its funding from non-public sources, is not under governmental control, and does not perform a governmental function. Was the trial court correct in ruling, under the four-factor "functional equivalent" balancing test set forth in *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999), *review denied*, 138 Wn.2d 1015 (1999), that the PRA does not apply to WPZS?

III. STATEMENT OF THE CASE

A. WPZS—a private, independently governed and operated non-profit organization—manages and operates the Zoo.

In 1965, private citizens formed WPZS to support the Zoo by, *inter alia*, "promot[ing] public interest in and . . . encourag[ing] greater understanding of international wildlife . . . conservation and propagation",

"stimulat[ing] interest in all aspects of [the Zoo]", and "motivat[ing] programs in keeping with educational, scientific and aesthetic interests". Supp. CP 170, 177. WPZS is, and has always been, a private, nonprofit organization incorporated under the laws of Washington and registered with the Secretary of State as a charity. *Id.* WPZS reports to the Internal Revenue Service as a tax-exempt 501(c)(3) charitable organization. *Id.* at 181. Throughout its fifty years of operation WPZS has been governed by an independent, volunteer Board of Directors. *Id.* at 171.

In 2000, the State Legislature authorized cities to contract with non-profit corporations for the overall management and operation of zoos and aquariums. RCW 35.64.010. This action was consistent with a national trend toward privatizing accredited zoos. In response to the state legislation, the City of Seattle enacted an ordinance authorizing the Superintendent of Parks and Recreation to enter into the Management Agreement with WPZS. Supp. CP 266–67 (Seattle City Council Ordinance 120697 (Dec. 17, 2001)). In March 2002, the City entered into a long-term contract (the "Management Agreement") for WPZS to "exclusively manage and operate the Zoo." *Id.* at 210, 217.

Under the Management Agreement, WPZS "administer[s], plan[s], manage[s] and operate[s] the Zoo". *Id.* at 211. WPZS does so as an independent contractor and the Management Agreement specifically

disclaims any "relationship of employment or agency" between the City and WPZS. *Id.* at 242. The City provides fixed levels of financial support to the Zoo designated generally for "operations" and "maintenance." *Id.* at 219–21. The City owns the grounds, while WPZS owns the Zoo animals and operates the Zoo. *Id.* at 226.

The Management Agreement does not grant the City any control over day-to-day Zoo operations. Rather, WPZS controls, among other things: the operations, employment, and supervision of Zoo staff, including the decision whether to staff the Zoo with WPZS's own employees or independent contractors; the decision to fund and build new structures, exhibits, and visitor facilities; the decision to acquire, sell, or otherwise dispose of Zoo animals; and the housing and care of the animals. *See id.* at 217, 224, 226–29. The Management Agreement assigns all Zoo-related leases from the City to WPZS, giving it "the exclusive option (if the City had such option) of renewing such leases . . . ." *Id.* at 219

WPZS sets charges for admission, subject only to a bargained-for right of approval by the City for increases beyond standards for comparable attractions—a contractual provision intended to ensure that the "Zoo remain accessible to individuals from all economic circumstances." *Id.* at 224. WPZS retains all admission proceeds and

spends them at its discretion. *Id.* Likewise, WPZS exclusively decides whether to offer services such as souvenirs and food to the public, determines the price of such services, and chooses whether to grant franchises or concessions for their provision. *Id.* at 229–30. WPZS determines how to spend the resultant income. *Id.*

In 2013, almost three-quarters of WPZS's revenue came from non-public sources. Earned revenue (revenue from admissions, membership, souvenirs, concessions, community events, investments, etc.) accounted for 51% of total revenue. *Id.* at 171, 183–208. Private contributions provided 23% of the Zoo's support. *Id.* Non-City funding from public sources accounted for 10%. *Id.* Funding from the City accounted for 16% of the Zoo's revenues. *Id.* Pursuant to typical oversight measures employed when private entities receive public funds, WPZS provides monthly, quarterly, and annual reports to the City. *Id.* at 230–32. WPZS is subject to annual, independent audits rather than City audits. *Id.* at 231. The Management Agreement does not require WPZS to observe the requirements of the PRA; instead, it specifies only that one category of documents—"Zoo Animal Records", which pertain to the veterinary management and treatment of Zoo Animals in WPZS's care—must be made available to the public upon request. *Id.* at 231–32.

WPZS is governed by an independent, volunteer Board; in 2014 the Board was made up of 38 Directors. *Id.* at 171. The Management Agreement provides that the City may appoint three members of the Board (subject to the Board's normal election procedures). *Id.* The City has no veto power over the Board's actions and the Superintendent of Parks sits *ex officio* on the Board in a non-voting role. *Id.* WPZS's President and CEO, who is responsible for all Zoo staff, reports to the Board rather than to the City. *Id.* The City does not have the power to dissolve WPZS; rather, WPZS is an independent non-profit corporation terminable according to law. *See* RCW 24.03.220.

B. Fortgang sends a self-styled public records request to WPZS seeking documents concerning the Zoo's elephants and the trial court confirms that WPZS is not subject to the PRA.

On November 6, 2013, Fortgang, in her capacity as co-founder of Friends of Woodland Park Zoo Elephants ("FWPZE"), sent a letter on FWPZE letterhead to WPZS seeking internal WPZS documents concerning the Zoo's elephants.[2] CP 24–25. The November 6 letter requests: 1) keeper notes and medical records for the Zoo's elephants; 2) information on the calculation of time averages the elephants spend in the barn; 3) the records WPZS used to establish the annual cost of keeping

[2] Fortgang's Co-Coordinator at FWPZE has filed two prior lawsuits related to the Zoo's elephant program, both of which were dismissed as a matter of law. *See* Supp. CP 261–62; *Sebek*, 172 Wn. App. 273.

and housing the elephants at the Zoo; 4) information on when the elephant keepers staff the barn; 5) the records WPZS relied upon to calculate funds expended on fighting criticism of the Zoo's elephant program; 6) the total cost to WPZS of the Task Force on the Woodland Park Zoo Elephant Exhibit & Program; 7) the contract between WPZS and Cocker Fennessey for services related to the Task Force; and 8) information on polling and surveying regarding the Zoo's elephant program mentioned in a news article. *Id.*

WPZS responded to Fortgang's letter on November 13, 2013, and explained that it would provide documents "consistent with [its] obligations under the Operating Agreement with the City of Seattle." *Id.* at 26. On December 20, 2013, WPZS again responded to Fortgang's letter, reiterating that WPZS "is a private company and based on [its] Management Agreement with the City [it is] only required to disclose animal records." *Id.* at 27. Nevertheless, in an effort to be transparent WPZS voluntarily provided some documents, despite the lack of a legal obligation under the PRA to do so. *Id.*

On March 12, 2014, Fortgang filed suit alleging violations of the PRA. *Id.* at 1–6. On cross-motions for summary judgment the trial court held as a matter of law that WPZS is not the functional equivalent of a

public agency under *Telford* and that WPZS is not subject to the PRA. *Id.* at 162–64; RP 36:1–8.

IV. ARGUMENT

A. Standard of Review

WPZS agrees with Fortgang's statement of the appropriate standard of review on summary judgment.

B. WPZS, a private non-profit organization governed, managed, and operated independently from the City, is not a government agency subject to the PRA.

The plain language of the PRA defines the agencies to which the statute applies:

> "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, commission, or agency thereof, or other local public agency.

RCW 42.56.010. This definition reflects the PRA's goal "to assure continuing public confidence of fairness of . . . **governmental** processes". RCW 42.17A.001 (quoting text of Initiative 276) (emphasis added). The PRA as enacted in 1972 and as amended many times since by the Legislature has not been expressly extended to private non-profit corporations that contract with government agencies or that accept funds from government agencies.

In *Spokane Research & Defense Fund v. West Central Community Development Association*, 133 Wn. App. 602, 137 P.3d 120 (2006), Division III analyzed whether the PRA's definition of "Agency" applied to a private, non-profit organization. The City of Spokane had constructed a community center on a city park and hired a center manager. *Id.* at 604–05. An advisory committee recommended that a non-profit organization operate the community center. *Id.* at 604. The next year, the West Central Community Development Association ("Association"), a private non-profit corporation, was formed to operate the center under the direction of a private board of directors with the center manager as the executive director. *Id.* The city had no involvement in the Association's day-to-day operations of the center. *Id.* at 605. The Association leased the center from the city for $1.00 per year and provided community programs and services. *Id.* Division III held that the "facts . . . create no ambiguity as to the Association's non-governmental status. The facts do not raise the P[R]A law." *Id.* at 608. Specifically, the court reasoned that the PRA definition of "Agency" did not apply to a private, non-profit organization under the facts of the case:

> The Association is incorporated as a conventional Internal Revenue Code 503(c)(3) charity. The Association does not fall within the City's park department as asserted. . . . [T]he Association was not created to fulfill a legislative mandate. The Association does not make policy or legislate. The Association

> does not execute law or regulate law. The Association does not adjudicate disputes. The Association is not controlled by elected or appointed county officials, is not government audited, and its employees are not paid by a government or enjoy government health or retirement benefits. In short, the Association possesses no material governmental attributes or characteristics. The Association simply rents space from the City, administers public and private grants, subleases space for its own benefit, and operates apart from government control.

Id.

Here, WPZS exhibits the same characteristics as the Association. WPZS is incorporated as a conventional 501(c)(3) charity under the Internal Revenue Code. WPZS is not part of the City's Parks Department. WPZS was not created to fulfill a legislative mandate. WPZS does not make policy, legislate, execute law, regulate law, or adjudicate disputes. The City does not control WPZS (*see infra*), nor pay WPZS employees or provide WPZS employees government benefits. WPZS is not government audited. *See* Supp. CP 231 (providing for independent audits). "In short, [WPZS] possesses no material governmental attributes or characteristics." *Spokane Research & Def. Fund*, 133 Wn. App. at 608. As the Court in *Spokane Research & Defense Fund* held, the PRA's requirements are not raised in this context. *Id.*

C. WPZS is not the functional equivalent of a government agency subject to the PRA.

Giving short shrift to *Spokane Research & Defense Fund*, Fortgang principally relies on *Telford* to argue that WPZS is the "functional equivalent of a government agency" and therefore subject to the PRA. Fortgang's argument, however, distorts *Telford*, posits an unsubstantiated "follow the money" PRA which does not exist in Washington, and ignores other court applications of the "functional equivalent" test. In short, WPZS is not the functional equivalent of an agency subject to the PRA.

In *Telford*, Division II held that a private entity may be subject to the PRA if it is in fact the functional equivalent of a government agency. 95 Wn. App. at 166. The *Telford* court adopted the test citing its genesis under the federal Freedom of Information Act ("FOIA"), the Connecticut Supreme Court's decision in *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d 266 (Conn. 1980), and the Oregon Supreme Court's decision in *Marks v. McKenzie High School Fact–Finding Team*, 878 P.2d 417 (Or. 1994). The rationale underlying the concept is that the process of "getting the business of the government done" should not evade disclosure laws simply because it is performed under the guise of a private entity. *Washington Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 245–46 (D.C. Cir. 1974),

cert. denied, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975) (a case cited in *Telford*).

The court in *Telford* held that the Washington State Association of Counties ("WSAC") and the Washington Association of County Officials ("WACO"), both private entities, were "other local public agencies" for purposes of the PRA. 95 Wn. App. at 158, 166. In reaching its holding, the court applied a four-factor "functional equivalent" balancing test. *Id.* at 161–63. "The factors are: (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." *Id.* at 162. No one factor is determinative in this analysis; rather, courts must engage in a "balancing of factors" in order to conclude under the "functional, case-by-case approach of Washington law" whether the entity in question is the functional equivalent of a public agency for purposes of the PRA. *Id.* Here, the balance of factors makes clear that WPZS is not subject to the PRA.

1. The government funding factor weighs against applying the PRA to WPZS because the majority of WPZS's funding does not come from public sources.

Fortgang places principal focus on the second *Telford* factor, the level of government funding. But her argument on funding misstates the law and the holding of *Telford*. First, Fortgang incorrectly suggests that

the government funding factor is "the most significant" *Telford* factor for this Court's consideration. *See, e.g.*, App. Br. at 16 (describing the government funding factor as "the most significant in this Court's analysis"). Fortgang cites no Washington authority for this proposition. Nor could she. And none of the cases cited in *Telford* suggest that the level of funding is of particular importance over the other factors. Indeed, funding is rarely discussed in the federal FOIA cases at all.[3] *Cf. Forsham v. Harris*, 445 U.S. 169, 181–82, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980) (government control of funds of non-profit rather than fact of government funding key). Rather, *Telford* specifically calls for the consideration and balancing of all four factors to determine when the PRA applies to a private entity—government funding is just one of the factors to be considered in the analysis. 95 Wn. App. at 162 ("A balancing of factors, however, is more suitable to the functional, case-by-case approach of Washington law.").

Second, Fortgang disingenuously misstates the *Telford* court's holding in regard to funding. Fortgang asserts that a parenthetical description of a case cited by the *Telford* court as analogous, rather than as directly on point, represents a holding of the court. *See* App. Br. at 15

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[3] None of the federal FOIA cases cited in *Telford* discuss funding. *See Pub. Citizen Health Research Grp. v. Dep't of Health, Educ. & Welfare*, 668 F.2d 537, 543–44 (D.C. Cir. 1981); *Rocap v. Indiek*, 539 F.2d 174, 180–81 (D.C. Cir. 1976); *Washington Research Project, Inc.*, 504 F.2d at 245–46.

(discussing *Weston v. Carolina Research & Development Foundation*, 401 S.E.2d 161 (S.C. 1991)). *Weston* is appropriately identified as a "*Cf.*" citation by the *Telford* court because the South Carolina FOIA discussed in *Weston* is a so-called "follow-the-money" statute. It defines public bodies subject to the Act to include "any organization, corporation, or agency **supported in whole or in part by public funds or expending public funds**." *Weston*, 401 S.E.2d at 163 (emphasis added). Washington's PRA is not a "follow-the-money" statute and contains no analogous provision. The *Weston* holding about en masse payment of a block of public funds thus is not controlling in Washington and was not, contrary to Fortgang's suggestion, a holding by the *Telford* court of Washington law. That under the language of the South Carolina FOIA a private non-profit which receives millions of dollars in block funding would be subject to that state's FOIA does not mean a similar Washington non-profit is subject to the PRA. The issue in Washington is not whether the non-profit is supported in part by public funds or expends public funds or receives public funds in a block grant. The issue is the "level" of government funding relative to the funding of the non-profit as a whole. *Telford*, 95 Wn. App. at 162.

The government funding factor when properly considered weighs against applying the PRA to WPZS. Seventy-four percent of WPZS's

revenue comes from non-public sources. Supp. CP 171. No court has applied the *Telford* or a similar government funding factor to find that an entity receiving even the **majority** of its funds from non-public sources (let along almost three quarters of its funding) is subject to the PRA. In fact, the case law is entirely to the contrary. In *Spokane Research & Defense Fund*, the court held that the Association's income from private sources, accounting for only 25% of the Association's funding, was sufficient to make this factor weigh against application of the PRA. 133 Wn. App. at 609. And in both cases where courts have applied the funding factor in favor of application of the PRA, public funding accounted for the significant majority of the private entities' budgets. *Telford*, 95 Wn. App. at 155, 165 (noting that "**[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") (emphases added); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 195, 181 P.3d 881 (2008) (twice mentioning that "**[n]early all** of TCAC's operating budget comes from public money" and "**the bulk** of its funding [is] from taxpayer money") (emphases added). Other states have come to the same conclusion. *See Bd. of Trustees of Woodstock Academy*, 436 A.2d at 271 (cited in *Telford*) (holding entity subject to public records law where it

was "nearly entirely (over ninety-five percent) publicly financed"); *Kubick v. Child & Family Servs. of Michigan, Inc.*, 429 N.W.2d 881, 883 (Mich. App. 1988) (cited in *Spokane Research*) ("[G]overnment funding for defendant did not reach the fifty percent mark. Funding that amounts to less than half the total funding of a corporation does not amount to chief, principal or primary funding . . . defendant is not a public body for the purposes of the FOIA.").

Thus, although Washington courts have not established a bright line test for what level of government funding is required for this factor to weigh in favor of applying the PRA, *Telford* and its progeny suggest strongly that a private entity must receive at least a significant majority of its funds from public sources. The test is not, as Fortgang contends, whether the amount received is "substantial" in total dollar amount. App. Br. at 16.[4]

Considering the level of government funding **relative** to an entity's overall revenue makes sense in light of the PRA's focus on "access to information concerning the conduct of government." RCW 42.17A.001. The functional equivalent test provides an analytical framework for courts to determine whether a private entity is engaged in the "conduct of

[4] Accountability for taxpayer monies is still accomplished under the framework Washington courts have applied. One can make PRA requests to the public agency providing the funding for an accounting of public investments and any related audits.

government" such that it should be subject to the PRA. The level of public funding the entity receives is one factor that informs the analysis. If the entity's operations are almost entirely funded by government (or even a significant majority funded), the likelihood that the entity is in actuality carrying out government functions at the behest of government increases. But if government funds make up only a small percentage of an entity's overall budget, the likelihood that the entity exists solely to carry out the conduct of government decreases. The total dollar amount of public funds received, divorced from the entity's overall budget and operations, tells a court little about whether the entity is engaged in the conduct of government. To hold otherwise would mean that private entities could be deemed the functional equivalents of public agencies based not on their characteristics and operations, but solely on the size of public support received. That is not the law in Washington.

Fortgang's new effort on appeal to tie FWPZE's document requests to the amount of public funding directed towards the Zoo's elephant program mischaracterizes the record and is beside the point. Fortgang's requests primarily seek internal documents reflecting the keeping and care of the Zoo's elephants and WPZS's public outreach efforts related to the elephant program, not public funding. CP 24–25. Fortgang cites no authority for the proposition that the subject of the

request, simply because it is controversial, can transform a private entity into a public agency to which the PRA applies. Therefore, Fortgang's argument on this point is not only factually inaccurate, it is legally irrelevant.

Finally, Fortgang's remaining suggestions regarding WPZS's funding, such as implying this factor tips in favor of applying the PRA because the Zoo is eligible to "apply for grants" in the City's name and has benefited from in-kind donations of City land, are unsupported. App. Br. at 9. Fortgang does not identify a single time the grant provision has been triggered (or even how such an ability to apply for a grant constitutes government funding). And that the City allows WPZS to use City land is of no note. A similar argument was made and rejected in *Spokane Research & Defense Fund* where the court noted the non-profit was leasing its structure from the city in a city park for "$1.00 per year". 133 Wn. App. at 605. Moreover, there is no evidence in the record concerning the value of the benefit to WPZS of using City land. Regardless, the City provides support to many non-profits through low- or no-rent use of City land including the Seattle Asian Art Museum in Volunteer Park and the Museum of History and Industry (MOHAI) in the City's Armory Building in South Lake Union Park. To hold that private non-profits that benefit

from the use of City land or receive substantial funding from the City are subject to the PRA would set an inappropriate and troubling precedent.

Governments often turn to partnerships with non-profit organizations to provide benefits and services to the community while leveraging scarce public resources. For example, government provides substantial funding to private non-profits such as the Downtown Emergency Service Center (housing for homeless populations),[5] El Centro de la Raza (services for the Latino community),[6] the Boys & Girls Clubs of King County (recreational activities for children),[7] and Solid Ground (programming to end poverty).[8] Ruling that the PRA reaches to these organizations by virtue of their receipt of government funds or use of government land would chill non-profit organizations' interest in partnering with government. The result would be decreased public–private collaboration and reduced community benefits. This Court should reject Fortgang's unsupported invitation to create such a disincentive.

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[5] *See* http://www.desc.org/documents/Annual_Reports/DESC_2012_Annual_Report.pdf (last visited January 16, 2015).

[6] *See* http://www.elcentrodelaraza.org/wp-content/uploads/2014/11/Annual-Report-2013-Web.pdf (last visited January 16, 2015).

[7] *See* http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=7382#.VLmYl0fF92s (last visited January 16, 2015).

[8] *See* http://www.solid-ground.org/AboutUs/Documents/SolidGroundCommunityReport.pdf (last visited January 16, 2015).

The level of government funding relative to overall funding is one factor for this Court to consider in determining whether WPZS is the functional equivalent of a public agency for purposes of the PRA. Almost three quarters of WPZS's funding comes from non-public sources. Accordingly, this factor weighs against a finding that WPZS is subject to the PRA.

2. WPZS is not subject to government control.

The government control factor also weighs against applying the PRA to WPZS.[9] This Court has already determined as a matter of law that the City does not exercise a "right of control" over WPZS. *Sebek*, 172 Wn. App. at 280. In *Sebek*, Fortgang's Co-Coordinator at FWPZE alleged on appeal that WPZS is a de facto City agency or an arm of the City and should be prevented from taking allegedly illegal acts related to its elephant program. *Id.* at 279–80. In rejecting this claim, this Court explained that "[t]he question of whether an entity operates as an 'arm' of a government agency or a 'de facto' part of a government agency turns on whether the agency exerts a 'right of control' over the entity." *Id.* at 280 (citing *Dolan v. King County*, 172 Wn.2d 299, 312–13, 258 P.3d 20

[9] *Telford* states the factor as "the extent of government involvement or regulation", but analyzes it under the framework of "Government Control". 95 Wn. App. at 162, 165. The *Clarke* court did the same, 144 Wn. App. at 195, while the *Spokane Research & Defense Fund* court simply renamed the factor "the amount of government control", 133 Wn. App. at 608.

(2011)). Examining the Management Agreement, this Court found that "the Agreement makes it clear that the Zoo Society controls what exhibits are to be displayed, how they are to be displayed, what animals the Zoo Society decides to purchase, and how the Zoo Society decides to care for the animals." *Id.* Accordingly, this Court rejected the argument that the City exercises a right of control over WPZS. *Id.* [10]

Even if *Sebek* had not already settled the question, the Management Agreement itself makes clear that WPZS is not government-controlled. First, WPZS exclusively manages and operates the Zoo. Supp. CP 217. The Agreement explicitly states that the relationship between WPZS and the City is solely that of owner and independent contractor. *Id.* at 242. The City has no control over WPZS's day-to-day operations, including building new exhibits, structures, and visitor facilities, setting and collecting admission charges and spending admission proceeds, contracting for the provision of visitor services such as souvenirs and food, and Zoo staffing. *Id.* at 224, 227–30.

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[10] The Washington Supreme Court has yet to adopt *Telford*'s four-part functional equivalent balancing test, although it recently recognized in dicta that: "*Telford* and *Clarke* are instructive insofar as they support the position that in determining whether a particular entity is subject to the PRA, courts engage in a practical analysis." *Worthington v. WestNET*, __ Wn.2d __, __ P.3d __, No. 90037-0, 2015 WL 276401, at *4 (Wash. Jan. 22, 2015). Should this Court instead choose to apply the *Dolan* de facto agency test to determine if the PRA applies to private entities, the PRA still would not apply based on the reasoning in *Sebek*.

Second, and contrary to Fortgang's claims, the City does not govern the acquisition or disposition of Zoo animals nor does it oversee their care. WPZS owns the Zoo animals, is responsible for their housing, care, and exhibition, and has the sole authority to acquire or dispose of Zoo animals. *Id.* at 226.[11] The Agreement specifies that WPZS will care for Zoo animals "in accordance with all federal, state and local laws and regulations," the Zoo's 1976 Long-Range plan developed as a means to guide the Zoo's evolution as a state-of-the-art institution, and the "policies and guidelines adopted by the AZA."[12] *Id.* These terms do not evince City control. All entities operating within the City must abide by federal, state, and local laws, and zoos are independently obligated to follow all federal, state, and local laws and regulations in order to maintain AZA accreditation. The City has no zoo animal care policies and the AZA animal care standards followed by WPZS are developed by independent AZA committees, not by the City.[13] This contrasts with the government control Division III found in *Clarke*. In that case, a private animal control

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[11] The Management Agreement states that the acquisition, sale or other disposition of Zoo animals must accord with federal, state, or local laws, including any existing or adopted acquisition and disposition policies approved by the City. *Id.* The City of Seattle has no Zoo animal acquisition or disposition policies.

[12] The Association of Zoos and Aquariums is a nonprofit organization that accredits zoos and aquariums that have met rigorous management and animal care standards. The AZA's accreditation standards and policies are available at: https://www.aza.org/uploadedFiles/Accreditation/AZA-Accreditation-Standards.pdf (last visited January 15, 2015).

[13] *See* https://www.aza.org/animal-care-and-management/.

entity could only provide euthanasia services in conformance with an Animal Control Plan developed by a government agency. *See Clarke*, 144 Wn. App. at 195. Therefore, **how** the entity provided the services on a day-to-day basis was subject to government control. *See id.*; Interlocal Cooperative Agreement Between the Cities of Richland, Pasco, Kennewick Washington for Animal Control, § 3(e) (*available at* http://www.mrsc.org/contracts/R5-C118-05.pdf). WPZS's contractual requirement to follow applicable laws and general policies is a far cry from such government determinations as to how everyday services are carried out.

Third, Fortgang makes much of the Management Agreement's fiscal reporting requirements but ignores the fact that WPZS's reporting requirements to the City are no more than statutorily-required oversight measures designed "to ensure public accountability of the entity and its performance in a manner consistent with the contract." RCW 35.64.010(5). Financial reporting rules are a standard requirement for receiving public funds and "[p]rudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government." *Dolan*, 172 Wn.2d at 317. *See also Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 913 (7th Cir. 1987) ("Fiscal accountability to a public agency does not convert a nonprofit corporation

into an arm of government."). That these oversight requirements are particularly attenuated from government control is further evidenced by the fact that financial audits of the Zoo are performed by an independent auditor, not the City's auditor. Supp. CP 231. The City's fiscal oversight of its contractual partner does not amount to City control over how the Zoo is run and does not constitute governmental control sufficient to render WPZS subject to the PRA under *Telford*.

Fourth, Fortgang's argument that the City exercises control over WPZS because it may appoint three Directors for election to the WPZS Board also falls flat. In 2014 the WPZS Board was comprised of 38 Directors. Supp. CP 171. Three seats on a Board of 38 is a far cry from the government control described in *Telford*, where the court found that "[b]oth WSAC and WACO are **completely** controlled by elected and appointed county officials" and there "is **no** private sector involvement or membership." 95 Wn. App. at 155, 165 (emphases added). Here, the City has no power to veto the Board's actions or to override WPZS's discretionary decisions regarding the operation or expansion of the Zoo, the care of the animals, staffing decisions, relationships with third parties, or any of the other myriad discretionary functions of WPZS. WPZS's President and CEO reports to the Board rather than to the City. And the

City has no power to dissolve WPZS, an independent non-profit corporation terminable according to law. *See* RCW 24.03.220.

Finally, WPZS's independence from City control is similar to that of the Association in *Spokane Research*. In that case, the court held that the Association, despite administering programs in a community center built with public funds and located on a public park, was not controlled by the city where the city was not involved in day-to-day operations and the city's contract with the Association contained an independent contractor clause. 133 Wn. App. at 609. This independence is entirely different from the levels of government control found in *Telford*, where WSAC and WACO were "completely controlled" by public officials, 95 Wn. App. at 165, and *Clarke*, where the contracting animal control services provider could administer euthanasia services only in the manner approved by the local Animal Control Authority. 144 Wn. App. at 195. The government control factor weighs against applying the PRA.

3. Operating a zoo is not a governmental function.

Not every service a government could provide constitutes a governmental function as that term is employed in the *Telford* PRA functional equivalent analysis. In *Spokane Research*, for example, the court held that the operation of a center to provide community services to benefit low and moderate income residents was not a governmental

function. 133 Wn. App. at 609. "While the government often provides social programs," the court reasoned, "serving public interests is not the exclusive domain of the government." *Id.* Operating a zoo is not a mandatory government function nor is it one exclusively handled by government entities, as demonstrated by the existence of numerous private zoos in the United States, including in Washington. Operating a zoo, just as providing other community services to benefit local residents, can be wholly "delegated to the private sector" and therefore is not a governmental function for the purposes of a PRA analysis. *See id.* (quoting *Telford*, 95 Wn. App. at 164).

This distinction is made clear by the cases where courts have found that private entities are performing governmental functions for purposes of the PRA. In *Clarke*, the court held that TCAC, a private, for-profit animal care and control entity was the functional equivalent of a public agency for purposes of the PRA because the entity was exercising governmental police powers that could never be "wholly delegated to the private sector." 144 Wn. App. at 194–95. State and local laws govern animal control services and entities providing such services enforce laws and regulations related to the prevention of cruelty to animals. *Id.* at 192, 194 (citing ch. 16.52 RCW). Cities and counties may contract with private animal care and control agencies to perform these services but when they do so the

contracting entity operates as if it were the city or county and is subject to the same laws. *Id.* at 192–93. Accordingly, the employees of a private entity take oaths as animal control officers, enforce the local animal control regulations, and execute police powers in carrying out their duties (including impounding and destroying private citizens' pets). *Id.* In so doing, they must "comply with 'the same constitutional and statutory restrictions concerning the execution of police powers imposed on law enforcement officers who enforce [state animal control laws].'" *Id.* at 193 (quoting former RCW 16.52.015(2)).

Similarly, in *Telford* the court held that WSAC and WACO performed the governmental function of "statewide coordination of county administrative programs" which the Legislature had specifically declared to be a public purpose. 95 Wn. App. at 163. The court noted that WSAC and WACO "largely determine the manner in which county programs are administered." *Id.* WSAC and WACO, furthermore, were mentioned in 35 statutes in addition to their enabling legislation. *Id.* Those statutes imposed additional, non-delegable public duties on the organizations such as appointing persons to state and county boards and committees, participating in state boards and commissions, and consulting with state and county officials. *Id.* at 163–64. These are all core government functions related to the operation of local government.

Operating a zoo, however, implicates neither the non-delegable exercise of police powers nor the core functions of local government. Rather, state law specifically allows the City to transfer the operation and management of a formerly public zoo to private interests, subject only to financial oversight measures designed to ensure accountability in the expenditure of City funds "consistent with the contract." RCW 35.64.010. Operating a zoo is a non-core activity the City expressly may contract away. There is no duty in operating a zoo that must remain with the City.

Fortgang argues that because the City used to operate the Zoo, operation of a zoo is a government function. But the mere fact that a government chooses to provide an optional service does not automatically render the provision of that service a core government function. Fortgang's circular reasoning in this regard is unsupported by citation to any on-point case law. Instead, Fortgang cites a case addressing the distinction between governmental and proprietary activities and services in a park in the context of state excise taxes. *See City of Seattle v. State*, 59 Wn.2d 150, 367 P.2d 150 (1961). Whether a municipality's provision of towel and suit rentals, pony rides, and space rental for mobile concession vehicles on parks department property is an exercise of governmental or propriety power for the purposes of taxation has no bearing on whether operation of a zoo is a core government function for the purposes of the

PRA. Likewise, *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), is inapposite. *Okeson* holds that the provision of city street lighting is a public governmental function the costs of which "must be borne by Seattle's general fund" rather than a proprietary function for which utility customers may be charged. *Id.* at 545. By no means does that holding force the conclusion that operating a zoo is a government function under *Telford.*

Further, the fact that while the City was still operating the Zoo it placed a levy on the ballot to provide increased funding for the City's parks and recreation programs, which at that time included the Zoo, is simply not relevant to this Court's governmental function analysis. The City subsequently decided to get out of the business of running a zoo and contracted with a private entity to that end.[14]

To the extent Fortgang attempts to suggest that WPZS is managing City parks and therefore performing a government function simply by virtue of the fact that the Zoo is located on City park land, Fortgang is mistaken. The Court in *Spokane Research* rejected the argument that

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[14] Nor does the fact that WPZS currently receives some City funds raised via a levy support Fortgang's argument. The City frequently directs levy funds to private non-profits that provide services and benefits to the public. *See, e.g.*, 2004 Families and Education Levy Seven Year Summary and 2011–12 School Year Annual Report, at pp. 52–54 (*available at* http://www.seattle.gov/Documents/Departments/OFE/Results/Reports/Annual/AR_2011-12SY.pdf). Receipt of levy funds does not mean that the Boys & Girls Club or YMCA, for example, perform a government function. The same is true for WPZS.

location on city park land makes an entity a part of the city's parks department. 133 Wn. App. at 606. And the Management Agreement provides only that WPZS shall "maintain and operate" the Woodland Park Rose Garden and two small parks adjacent to the Zoo's fence (the "Neighborhood Parks"), but that Seattle Parks and Recreation is responsible for the maintenance and upkeep of the children's play area and has the sole authority to "determine the uses of the Woodland Park Rose Garden and the Neighborhood Parks." Supp. CP 218. The Zoo maintains these parks by mowing the grass and caring for the plants. This does not amount, as Fortgang appears to suggest, to the management of City parks.

Finally, the laws enabling the privatization of a city's former zoo operations give no indication that either the Legislature or the City consider operation of a zoo to be a government function. RCW 35.64.010 is silent as to the application of the PRA or any other public agency regulatory provisions when cities choose to contract with non-profit corporations for the management and operation of zoos. This silence is notable when compared, for example, to RCW 16.52.015, which specifically provides that the officers of animal control agencies contracting with cities or counties to provide animal control services "shall comply with the same constitutional and statutory restrictions concerning the execution of police powers imposed on law enforcement officers."

Furthermore, the Management Agreement itself does not specify that the PRA applies. Instead, the Agreement requires WPZS to provide only one category of documents to the public upon request—"records pertaining to the veterinary management and treatment of Zoo Animals in its care." Supp. CP 231–32. If the City believed that it was delegating a government function to WPZS it would not have included this contractual provision because under the PRA WPZS would be required to provide **all** of its non-exempt records to the public. The inclusion of the Zoo Animals Records provision, therefore, is an affirmative finding that the City believes the PRA does not apply to WPZS.

The operation of a zoo provides a community benefit which it is not incumbent on the government to deliver. Here, the City chose to get out of the business of operating a zoo and, pursuant to state law, contracted with a private non-profit corporation to take over the Zoo's management and operations. WPZS is not performing a governmental function and as a result this factor weighs against applying the PRA to WPZS.

4. WPZS was not created by the government and has operated as an independent, private non-profit organization for almost 50 years.

The fourth and final factor under the *Telford* functional equivalent analysis is "whether the entity was created by government." *Telford*, 95

Wn. App. at 162. WPZS was formed by private citizens in 1965 as an independent, private non-profit organization under Washington law. Supp. CP 170. The government had nothing to do with WPZS's creation therefore this factor weighs against application of the PRA. *See Clarke*, 144 Wn. App. at 195 (holding that TCAC, formed as "a private corporation, by private citizens" was not an entity created by the government hence "this factor weighs against P[R]A application").

Fortgang's suggestion to ignore the actual origin of the private entity as applied by *Telford* and its progeny should be rejected. That the City operated the Zoo previously is irrelevant to whether WPZS is government-created. *See Spokane Research*, 133 Wn. App. at 609–10 (holding Association was not created by government despite city setting in motion the events that led to its creation and developing the community center from which the Association operated). Neither the fact that the City raised money to support the Zoo via a levy lid lift while the Zoo was still operated by the City nor the presence of three City-appointed members on WPZS's 38-member Board of Directors has any bearing on the **origin** of WPZS. Fortgang's attempt to obfuscate the proper legal standard is without merit.

V. CONCLUSION

Each of the four *Telford* factors weighs against applying the PRA to WPZS. WPZS receives almost three-quarters of its revenue from non-public sources. WPZS operates independently from, and is not controlled by, the City. WPZS is not performing a government function. And WPZS was not created by government; rather, it was privately created fifty years ago as a non-profit organization. WPZS is not the functional equivalent of a public agency. The fact that Fortgang's document requests touch on a matter of public controversy does not alter this analysis. Simply put, WPZS is not engaged in the conduct of government therefore it should not be treated as a public agency for purposes of the PRA.

WPZS respectfully requests that the Court affirm the trial court's order granting summary judgment in favor of WPZS.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

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CERTIFICATE 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 30th day of January, 2015 I caused a true and correct copy of the foregoing document to be filed with the Court of Appeals and served electronically, via email, per the electronic service agreement, to the parties listed below:

Rob Roy Smith Christopher T. Varas KILPATRICK, TOWSEND & STOCKTON, LLP 1420 Fifth Avenue, Suite 4400 Seattle, WA 98101	Email: rrsmith@kilpatricktownsend.com Email: cvaras@kilpatricktownsend.com

Attorneys for Plaintiff

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

DATED this 30th day of January, 2015.

Sydney Henderson