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Court of Appeals No. 43689-2-II
Supreme Court No. 900370

WASHINGTON STATE SUPREME COURT

JOHN WORTHINGTON,
Appellant

V.

WESTNET,
Respondent

PETITIONER'S SUPPLEMENTAL BRIEF

JOHN WORTHINGTON
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 ORIGINAL

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I. INTRODUCTION

Worthington argues WestNET is subject to the RCW 42.56.010 (1) of the Washington State Public Records Act (PRA) outright, because WestNET affiliate jurisdictions had created an Advisory Board and a Drug Enforcement Agency in its WestNET Interlocal agreement. RCW 42.56.010 (1) is clear in that it uses the words any, every and all agencies and boards and is subject to only one interpretation. The interlocal agreement is also clear in that it clearly created a board and agency. If it walks like a duck, acts like a duck and calls itself two different species of duck, it is a duck and the enquiry should end there. If somehow further inquiry is needed the case should be remanded to develop the record.

In addition, the two state acts that helped create the WestNET interlocal agreement, RCW 39.34 and RCW 10.93, could not create immunity from the PRA and OPMA, which contained strong language that spelled out a hierarchy over all other acts.

WestNET is counting on the court to add words to the PRA and RCW 39.34, rendering portions of the PRA meaningless and superfluous. However, the PRA governs all other acts and the immunity is not spelled out in the PRA, so WestNET needs the court to interpret one out of whole cloth.

If remanded to further develop the record, WestNET's actual function as a JAG

grant recipient and records keeping center will be exposed and the court will have a better idea of how WestNET is finagling its way around the PRA to avoid the discovery of federal grant policies that conflict with city, county and state laws. The court will see that WestNET affiliate jurisdictions do not provide the public with viable options for making PRA requests for the agency and board they created. Affiliate jurisdictions police agencies lack any published PRA guidance for WestNET and in some cases they have policies that clearly establish WestNET as a “medical marijuana records keeping center.” Worthington has no problem with expanding the record to show more details about WestNET if the court decides to enquire outside the PRA and the WestNET interlocal agreement.

However, even if this case is remanded to develop the record, a remand will not change the WestNET interlocal agreement, nor will it change the statutory definitions outlined in RCW 42.56.010 (1) and the rest of the PRA. WestNET still had PRA responsibilities, because the creation of its Advisory Board, and Drug Enforcement Agency, clearly brought WestNET within the ambit of the PRA and OPMA.

WestNET affiliate jurisdictions could have facilitated Worthington’s request and had an opportunity to litigate Worthington’s PRA disputes in good faith in a previous PRA case in Pierce County Superior court. If the affiliate jurisdictions were serious about Worthington’s PRA requests they could have answered them in

the Pierce County Superior court case since they were included in the complaint and served upon them. WestNET appeared as a defendant in that case (quacked like a duck) and wrote briefs which were ruled on by the trial court after Worthington had responded. This gave Worthington the impression that WestNET was a stand-alone legal entity (A duck) so he immediately pursued WestNET in Kitsap Superior Court.

The real story behind this case is that Worthington became aware of the Washington State Counter drug program's federal grant influences intent on undermining the Washington State medical marijuana law. Worthington's research of the Washington State Counter Drug Programs, ultimately led him to a confrontation over the counter drug agencies policies in a federal case initiated by WestNET. In sum, Worthington complained about Washington State counter drug programs policies and the Washington State counter drug programs came after him for it, and then proceeded to play a PRA shell game to hide the truth until the statute of limitations on Worthington's legal claims could expire.

If WestNET wins this case multi-jurisdictional drug task forces can continue to play a public records shell game to their advantage, with no incentive to clarify and publish any PRA procedures or hold open public meetings to notify the public of its policies and procedures that are not in concert with city, county, state or federal laws.

If Worthington prevails it will trigger an across the board clarification and publication of PRA and OPMA responsibilities by the 19 Washington State multi-jurisdictional drug task forces and eventually the Washington State National Guard. Then, Washington State drug laws cannot be secretly undermined by its counter drug agencies without being detected by the people or the legislature.

Worthington respectfully requests a remand to the trial court with orders to apply PRA penalties to WestNET, or in the alternative a remand to develop the record to further enquire of WestNET's status under the PRA and OPMA.

II. ISSUES PRESENTED

1. Is WestNET subject to the PRA outright?
2. Did the trial court and Court of Appeals err by failing to give effect to the plain language of the PRA?
3. Did the trial court and Court of Appeals err by ruling the Telford factors did not apply to WestNET?
4. Should the case be remanded to apply the PRA and its penalties?
5. Should the case be remanded to expand the record?

III. STATEMENT OF THE CASE

This case arises out of appellant John Worthington's request for public records from the West Sound Narcotics Enforcement Team, (Hereafter "WEST NET") pursuant to the Public Records Act, (Hereafter "PRA"), RCW Chapter 42.56.

On February 5, 2010, Worthington followed up on newly acquired Records from the WSP and attempted to get more records from WestNET. WestNET responded to the request but failed to abide fully by the PRA, and did not provide a redaction log. WestNET provided some records 19 months later.

First, Worthington filed against affiliate jurisdictions in a Pierce County Superior court PRA Case # No. 11-2-13236-1. Ione George of Kitsap County filed a notice of appearance for WestNET without WestNET being an official defendant. Worthington argued WestNET answered for Kitsap County and that Pierce County was also a WestNET member, asserting venue in Pierce County Superior court would be proper since there was no proof of where the record actually resided. Worthington requested the court require that the WestNET entities answer that question in interrogatories but the court refused and ultimately ruled WestNET was not Kitsap County and ordered a transfer of venue to Kitsap County Superior court.

Worthington, decided that since WestNET appeared as a legal entity in a court case, he would start a new case against WestNET without fees. That case, Worthington v. WestNET Kitsap County No.11-2-02698-3 is the subject of the Review by the Washington State Supreme Court..

WestNET claimed it was immune from suit. Worthington argued WestNET was subject to the PRA and won initially. WestNET filed a motion to reconsider and

submitted the WestNET interlocal agreement as proof it was immune from suit.

The JAG grant program contract and official Kitsap County policy to use WestNET as a public records keeping center were not shown to the trial court. The trial court ruled that WestNET was not subject to suit. Worthington filed a motion to reconsider but that motion was denied. Worthington appealed to the Division II Court of Appeals. The COA for Division II upheld the trial court decision. On July 8, 2014, the Washington State Supreme Court accepted Worthington's Petition for Review. Worthington files this timely supplemental brief.

IV. SUPPLEMENTAL ARGUMENT

1. WestNET meets the statutory definition of RCW 42.56.010 (1) outright or after meeting the Telford test.

West NET created an Advisory Board to be the "representative body" for

WestNET shown below in Section 1 b of the WestNET Interlocal agreement:

b. "Advisory Board" means the representative body for the Drug Task Force and shall consist of the Chiefs of Police of the Cities of Bainbridge Island, Bremerton, Port Orchard, Poulsbo and Shelton, the Sheriffs and Prosecutors of the Counties of Kitsap, Pierce and Mason, and the Chief of the Washington State Patrol and Supervisor in charge of the Naval Criminal Investigative Service

(CP 126)

The WestNET interlocal agreement clearly intended to create "Drug Enforcement Agency" as shown below in section 1 d of the agreement:

d ' Drug Task Force" means a drug enforcement agency created by this agreement.

(CP 126)

The statutory definition of an entity subject to the PRA is outlined in RCW 42.56.010 (1), which reads in relevant part:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "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.

As shown above, WestNET meets the statutory definition of an entity subject to the PRA outright in multiple definitions. WestNET is subject to the act because it has a board, whether that board is state or local. WestNET is also subject to the PRA because it is an "drug enforcement agency", whether that agency is state or local.

If WestNET wishes not to be subject to the PRA or OPMA, and wishes the affiliate jurisdictions to be the PRA and OPMA contacts they need to alter the WestNET interlocal agreement so it does not create a board or a drug enforcement agency.

If the legislature wishes to create an exception for any or all local or state

boards and any or all agencies, other state agency or other local public agency, to the PRA and OPMA then they need to clearly so state their intentions in the PRA and OPMA.

There is no possible way for the Washington State Supreme Court to rule in WestNET's favor without rendering the language in RCW 42.56.010 (1), and RCW 42.56.030, useless, or superfluous.

Under the first consideration of statutory construction, courts determine whether the statute is unambiguous. Here, RCW 42.56.010 (1) clearly states with no ambiguity that all agencies state or local and every board state or local are subject to the PRA. WestNET created a board and an agency and when it did so they became subject to the PRA. "In the absence of ambiguity, we will give effect to the plain meaning of the statutory language." (See In re Marriage of Schneider, 173 Wash.2d 353, 363, 268 P.3d 215 (2011)).

Since the PRA governs all other acts the court should not look to RCW 39.34, the "Interlocal Cooperation Act", and RCW 10.93, the "Mutual Aid Peace Officers Powers Act", for any authority to create immunity from the PRA. Once again the court is bound by unambiguous language in RCW 42.56.030, which clearly states with no ambiguity the following:

In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

As shown above, the PRA governs RCW 39.34, the “Interlocal Cooperation Act”, and RCW 10.93, the “Mutual Aid Peace Officers Powers Act” or any other act. “In the absence of ambiguity, we will give effect to the plain meaning of the statutory language.” (See *In re Marriage of Schneider*, 173 Wash.2d 353, 363, 268 P.3d 215 (2011)).

RCW 42.56.010 (1), is subject to one interpretation that all agencies and every board, other state agency, or other local public agency are subject to the PRA there is no statutory wiggle room. RCW 42.56.030 has only one interpretation that the PRA governs all acts. If the plain language of a statute is subject to only one interpretation, then our inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

It is up to the Washington State legislature and the WestNET affiliate jurisdictions to alter the pertinent statutes and the WestNET interlocal agreement. Worthington respectfully requests the Washington State Supreme Court resist the temptation to render the pertinent statutes meaningless or superfluous, based on an interlocal agreement that was formed pursuant to an act that was ultimately inferior to and governed by the PRA.

If WestNET wishes not to be subject to the PRA or OPMA, and wishes the affiliate jurisdictions to be the PRA and OPMA contacts they need to alter the WestNET interlocal agreement so it does not create a board to “represent them”

or a drug enforcement agency, or publish its PRA and OPMA procedures in the WestNET interlocal agreement, the parties' only binding agreement.

Worthington has argued that WestNET is private because they intended to "operate confidentially and without public input", and were intent on finagling their way around the PRA. If WestNET does not meet the statutory definitions under all agencies or every board, then they would meet the definition of other state agency or other local agency, which were meant to skirt any finagling. While the qualification of "agency" by the word "other" has the positive benefit of not creating a bright line that government agencies can finagle their way around, (*See, e.g., Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 974 P.2d 886 (1999), *review denied*, 138 Wash. 2d 1015, 989 P.2d 1143 (1999)), this definition removes any legislative boundary that such a bright line provides.

Since WestNET meets the statutory definition of RCW 42.56.010 (1) outright there is no need to apply the Telford test. However, if the WestNET interlocal agreement has created some ambiguity the Telford test must be applied. The courts apply the Telford test only if there is some ambiguity about whether a private entity is an agency under the Act. (*See Telford v. Thurston County Bd. of Comm'rs*, 95 Wash. App. 149, 974 P.2d 886 (1999) at 608, 137 P.3d at 122. WestNET clearly meets the criteria in the Telford test.

2. The case should be remanded if further enquiry is needed.

Worthington respectfully argues that the record needs to be expanded to properly guide the courts on issues and decisions that need to look past the PRA, the WestNET interlocal agreement and the two statutes from which it springs. Worthington is concerned that the court is being purposely shielded from many documents that may affirm Worthington's claims that WestNET is subject to the PRA and OPMA.

Worthington has assembled many documents that are not on the record that the Washington State Supreme court should consider. These documents will further define how WestNET actually functions as a "records center". Some documents show that other multi-jurisdictional drug task forces with the same pedigree as WestNET, actually published its own separate PRA procedures in their interlocal agreement. (Olympic Peninsula Narcotics Enforcement Team (OPNET)).

Some documents, like the JAG grant contract and its statement of assurances, may have actually required the WestNET affiliate jurisdictions to waive all immunity as a condition of receiving federal funding. Without those documents on the record the court will never definitively answer whether WestNET affiliate jurisdictions could claim immunity from suit for a federal grant program and its participating federal agencies.

There are also federal court cases which are holding that state law immunities

cannot be claimed for federal grant programs, which can be sued for civil rights violations, or be instructed by Congress to run the program properly. Both of the arguments above were not considered by the *Hervey*¹ court or the *Tahoe*² court, federal court cases Worthington cited in his briefs. A state may waive its immunity either by explicitly specifying its intention to subject itself to suit or by voluntarily participating in federal spending programs where Congress expressed a clear intent to condition receipt of federal funds on a state's consent to waive its sovereign immunity. (See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) ("A state may effectuate a waiver of its constitutional immunity by . . .(waiving its immunity to suit in the context of a particular federal program.")). A waiver of Eleventh Amendment immunity as a condition of the receipt of federal funds should be found "only where stated "by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)) (alteration by Edelman Court). Without the JAG grant contract the court cannot determine if WestNET affiliate jurisdictions waived immunity.

The immunity from suit argument is a red herring because immunity from suit

¹ *Hervey v. Estes*, 65 F.3d 784, 792 (9th Cir. 1995)

² *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 n. 20, 99 S.Ct. 1171, 1177 n. 20, 59 L.Ed.2d 401 (1971)

does not extend to the PRA and its agencies, boards or other state or local public agencies. The PRA contains no requirements to give 60 days' notice prior to filing suit and is designed for quick public access to public records. The PRA is a penalty for failing to abide by the PRA and is a judicial review of an agency or board action.

Worthington's original attorney John Andrews felt that the statutes argued on the record and the interlocal agreement were enough to make a determination in this case and Worthington ultimately agrees. However, Worthington is concerned that the justices will be influenced by matters not on the record and may make assumptions that are not supported by the limited briefing in this case.

Some Justices may have misconceptions that affiliate jurisdictions complied with the PRA and OPMA requirements for WestNET separately, after creating language in the interlocal agreement that appointed the Advisory Board to be the "representative body." This scenario does not pass the straight face test, and further briefing will not change the duties of the advisory board to represent the entities.

The PRA's central purpose: to make government transparent so that citizens "[remain] informed so that they may maintain control over the instruments that they have created.(See WASH. REV. CODE § 42.56.040 (2008). *See also* Progressive Animal Welfare Soc. v. Univ. of Wash., 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994).Citizens may want to maintain control over government

institutions for different reasons, whether for lawmaking, *See* WASH. REV. CODE § 42.30.010 (2008). The Legislative Declaration for the Open Public Meetings Act includes the same language as the Public Records Act construction section the exercise of police power, (*See, See* *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 194–95, 181 P.3d 881, 886 (2008).. at 155, 181 P.3d at 881). Or the expenditure of public funds. (*See* *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319, 328, 890 P.2d 544, 549 (1995) (“Certainly, there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly.”).

Here, WestNET affiliate jurisdictions provide none of the above. They have allowed WestNET to create and enforce illegal medical marijuana plant limits without any public input or public notice. They have operated as a police power that is neither city, county, state or federal by enforcing a 27 plant medical marijuana plant limit that is listed nowhere except in WestNET policy board meetings and emails. They used forward looking infra-red (FLIR) on non-target housing without warrants and engaged in door to door snooping on the public under the guise of calibrating equipment.

Now they are in the position of accepting a federal JAG grant to eradicate marijuana, while at the same time being bound by Initiative I-502 which proposes to sell marijuana to the public. How will WestNET comply with the terms of the

JAG grant and I-502? If the WestNET medical marijuana plant limit creation and enforcement policy is any indication, any WestNET policies on the issues of I-502 will be created in private with no public input or administrative appeals process.

Furthermore, the policy will once again not be city, county, state or federal, it will be hybrid policy that walks the tight rope of federal grant compliance and state law malfeasance. The Washington State citizens will not have any say in how laws are made, police power is used or how public money is spent.

WestNET affiliate jurisdictions have not dealt with WestNET PRA policies, And OPMA policies properly. WestNET PRA procedures need to be published for the public to resort to prior to filing PRA claims.

If Worthington loses this case, WestNET affiliate jurisdictions will continue the practice of playing the PRA shell game and avoiding public meetings so they can continue to take federal funds that are tethered to federal policies that conflict with state laws. The public will continue to be kept in the dark while their state laws are undermined and their state funds are diverted without their knowledge.

V. CONCLUSION

Worthington respectfully requests a remand to the trial court with orders to apply the PRA and its penalties to the drug enforcement agency WestNET or its advisory board. In the alternative, Worthington respectfully requests a remand to expand the record to enquire further of WestNET's status under the PRA and OPMA.

RESPECTFULLY SUBMITTED, this 6TH day of August, 2014.

BY John Worthington
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Declaration of Service

I declare that on the date and time indicated below, I caused to be served
By Email to WEST NET and WAPA, a copy of the documents and pleadings listed
below upon the attorney of record for the defendants herein listed and indicated
below.

1. SUPPLEMENTAL BRIEF

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I declare under penalty of perjury under the laws of the United States that the
foregoing is True and correct.

Executed on this 5th day of August, 2014

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Here is the Petitioner's supplemental brief