

No. 92846-1

No. 72413-4-1

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

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ALYNE FORTGANG,

Appellant,

v.

WOODLAND PARK ZOO a/k/a WOODLAND PARK ZOOLOGICAL

SOCIETY,

Respondent.

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**BRIEF OF *AMICUS CURIAE* OF THE WASHINGTON  
COALITION OF OPEN GOVERNMENT**

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## I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG” or “*Amicus*”) is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know about the conduct of public business and matters of public interest. WCOG represents the interests of individuals and organizations concerned with preserving and protecting Washington’s laws promoting transparent and open government, including the Public Records Act (“PRA”). Its members are frequent users of the PRA, on which they rely to inform the public and keep the government accountable to the governed. WCOG’s mission is to foster the cornerstone of democracy: open government, supervised by an engaged and informed citizenry. To that end, WCOG conducts public workshops and forums around the state, involving the public, public officials, and the media in discussing government accessibility.

*Amicus* has reviewed the documents and pleadings in this case and are familiar with the issues and arguments raised by the parties.

## II. INTRODUCTION

The parties have presented fact-specific arguments on whether the Woodland Park Zoological Society (the “Zoo”) is or is not subject to the PRA under *Telford v Thurston County Board of Commissioners*, 95 Wn. App.149, 974 P.2d 886 (1999) (“*Telford*”), *reviewed denied*, 138 Wn.2d 1015 (1999). In *Telford*, the Div. II Court of Appeals set forth a four part

balancing test to assess whether a private entity is a “functional equivalent” of a government agency. *Id.* at 162. This test must be applied on a case-by-case basis and is fact specific. *Id.*

*Amicus* argues that the fact that the Zoo obtains taxpayer funds directly through a voter-approved levy weighs in favor of finding that the Zoo is the “functional equivalent” of a government agency under the second *Telford* factor, “the level of government funding.” *Amicus* generally agrees with Appellant that there is no “significant majority” test on the level of government funding factor.

### **III. ISSUES PRESENTED**

Does the fact that the Zoo receives taxpayer funds directly through a voter-approved county parks levy weigh in favor of disclosure under the “government funding” factor of the *Telford* test?

### **IV. STATEMENT OF THE CASE**

The parties raise numerous factual issues. Appellant discusses the Zoo’s receipt of levy funds but does not provide much detail. Respondent underscores the Zoo’s receipt of levy funds, addressing it only in a footnote. *Amicus* provides additional facts available to the public that are pertinent to the Zoo’s receipt of taxpayer funds through voter approved levies, which should be considered as part of the application of *Telford*.

In November 2000, while the City was operating the zoo, the City placed the Neighborhood Parks, Green Spaces, Trails and Zoo levy lid lift

on the ballot. It was approved by the voters. *See* Appellant's Brief, pp. 6-7, *citing* CP 34. The Zoo continues to receive taxpayer funds directly through a parks levy. *See* Respondent's Brief, p. 30 fn. 14.

In the August 2013 Primary and Special Election, King County voters approved Proposition No. 1, the Parks, Trails, and Open Space Replacement Levy.<sup>1</sup> The ballot language stated:<sup>2</sup>

King County  
Proposition No. 1

Levy for parks, trails, and open space  
The King County council has passed Ordinance 17568 concerning funding for parks, trails, recreational facilities and open space. This proposition would replace two expiring levies and fund maintenance and operations of the King County parks system; trails and open space for recreation, habitat and water quality; city parks; and zoo programs, all subject to citizen oversight. This proposition authorizes an additional property tax of \$0.1877 per \$1,000 of assessed value for collection in 2014 and authorizes increases by the annual percentage change in the CPI or the limitation in 84.55 RCW, whichever is greater, for five succeeding years. Should this proposition be:

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<sup>1</sup> *See How are we funded?*, King County Parks, available at <http://www.kingcounty.gov/recreation/parks/about/levy.aspx> (accessed on March 12, 2015).

<sup>2</sup> *See Proposition No. 1 Parks Levy Measure Info*, King County Elections, available at <http://your.kingcounty.gov/elections2/contests/measureinfo.aspx?cid=46026&eid=1256> (accessed on March 12, 2015).

O Approved?

O Rejected?

Specifically, the ballot language states that the levy proceeds would “fund maintenance and operations of the King County parks system; trails and open space for recreation, habitat and water quality; city parks; and zoo programs, all subject to citizen oversight.” The reference to “citizen oversight” is referring to the Parks Levy Citizen Oversight Board, established by the levy legislation in 2008.<sup>3</sup>

A May 2013 voter information brochure styled “Frequently Asked Questions” stated:

**What would the Woodland Park Zoo receive from this levy?**

An estimated \$4.2 million per year would support the Zoo, a continuation of the level provided under the current 2008-2013 Open Space and Trails Levy. Levy proceeds for the Zoo are designated for environmental education programs, with emphasis on accessibility for traditionally underserved populations in the county; horticulture and maintenance of buildings and grounds; conservation and animal care for rare, threatened or endangered Pacific Northwest species; and for board-approved capital projects/campaigns in existence as of December 31, 2012. In 2012, proceeds from the 2008-2013 Open Space and Trails Levy accounted for approximately 12 percent of the Zoo’s total operating revenues.<sup>4</sup>

The levy ordinance authorizing the levy proposition to be on the August 2013 ballot identifies how the property tax levy funds would be used,

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<sup>3</sup> See footnote 1.

<sup>4</sup> See *King County Parks, Trails, and Open Spaces Replacement Levy, Frequently Asked Questions*, King County Parks, available at [http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Parks%20Levy%20FAQ\\_FINAL.pdf](http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Parks%20Levy%20FAQ_FINAL.pdf) (accessed March 12, 2015).

including “funding environmental education, maintenance, conservation and capital programs at the Woodland Park Zoo.”<sup>5</sup>

## V. ARGUMENT

### A. Private entities are subject to PRA disclosure requirements if they function like government agencies.

The PRA is a strongly worded mandate for the broad disclosure of public documents. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011). It was passed by voter initiative and stands for the principle that “full access to information concerning the conduct of government on every level must be assured as fundamental and necessary precondition to the sound governance of a free society.” *Id.* at 714-15. The PRA applies to government agencies, which includes any “other local public agency.” *See* RCW 42.56.010.

Interpreting the PRA broadly, Washington courts have applied a four part “functional equivalent” test to determine whether private entities are other “agencies” subject to the disclosure requirements of the PRA. *See Telford v. Thurston County Bd. of Comm’rs*, 95 Wn.App. 149, 161, 974 P.2d 886 (1999) (“*Telford*”) (discussing and applying functional equivalent test in other jurisdictions). Though the Washington Supreme Court has not provided guidance on the *Telford* factors, it has noted in

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<sup>5</sup> King County Ordinance 17568, King County, available at <http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Ordinance%2017568.pdf> (accessed March 12, 2015).

*dicta* that courts should engage in a “practical analysis” when determining whether a particular entity is subject to the PRA. *Worthington v. Westnet*, \_\_\_ Wn.2d \_\_\_, 341 P.3d 995, 999 (2015).

The second factor of the *Telford* test is the level of government funding. *See id.* at 999, fn. 5. The entities at issue in *Telford* were the Washington State Association of Counties (“WSAC”) and the Washington Association of County Officials (“WACO”), two quasi-public organizations consisting of county officials. *Telford*, 95 Wn.App. at 153-54. WSAC and WACO obtained most of their funding from county expense funds via membership dues. *Id.* at 164. The membership dues were not paid as consideration for service provided but paid in a lump sum “before services are rendered.” *Id.*; *see also id.* at fn. 22 (lump sum or installments paid in advance of services provided). This violated the statutes authorizing the organizations, which required that they be reimbursed for services rendered. *See id.* at 159-60. Under these facts, Div. 2 of the Court of Appeals found that the government funding factor weighed in favor of disclosure. The Court of Appeals reasoned that “[t]o allow counties to allocate a block of public funds to be spent entirely at the discretion of the associations as if the funds were private violates the clear intent of the statutes.” *Id.* at 164. The purpose of requiring WSAC and WACO to request reimbursement “evidenced an intent to protect against misuse of county funds.” *Id.* at 160.

**B. Under the facts of this case, the government funding factor weighs in favor of disclosure.**

*Amicus* believes it is significant that the Zoo receives millions of dollars in funding directly from a voter-approved park levy that specifically named the Zoo as a beneficiary. Receipt of direct funds through a taxpayer levy weigh in favor of finding that the private entity is the “functional equivalent” of a government agency subject to the PRA.

The ballot language that voters read when approving to renew the Parks levy states the Zoo is “subject to citizen oversight.” The levy ordinance broadly defines how the Zoo must use the property tax levy funds: “funding environmental education, maintenance, conservation and capital programs at the Woodland Park Zoo.” Thus, the Zoo’s use of the levy funds, practically speaking, do not appear to be restricted.

Like the quasi-public agencies in *Telford*, the Zoo is not required to provide services in exchange for receiving the parks levy funds. Under the reasoning of *Telford*, allowing the Zoo to spend a block of public funds at its own discretion without public oversight, as if the funds were private, violates the clear intent of the PRA. *See Telford*, 95 Wn.App. at 164.

The Zoo argues that its receipt of levy funds does not mean that it performs a government function. *See* Respondent’s Brief, p. 30, fn. 14 (addressing receipt of levy funds under “governmental function” factor). It argues that organizations like the Boys and Girls Club and the YMCA receive levy funding too. *Id.* (“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”). However, most other private non-profit entities receive government funds on a fee-for-service basis or are granted specific amounts for specific purposes. The Zoo is unique in that it was named as a beneficiary, along with King County and cities, of the parks levy funds. Presumably, when voters approved of the parks levy, they understood that the Zoo would receive some of the funds and be subject to “citizen oversight” like other governmental agencies receiving levy funds.

This rationale applies regardless of whether the levy funds constitute less than a majority of the organization’s funding. *Amicus* urges this Court to assign little weight to the Zoo’s argument that millions of tax payer dollars are not significant compared with the rest of its budget. Appellant fully addresses the Zoo’s “significant majority” argument, and *Amicus* concurs. See Appellant’s Reply, pp. 2-8.

## VI. CONCLUSION

Receipt of direct funds through a taxpayer levy weighs in favor of finding that the private entity is the “functional equivalent” of a government agency subject to the PRA. Here, the Zoo’s funding comes directly from the taxpayers instead of through a government’s discretionary acts. This fact cuts in favor of finding that the Zoo is a “functional equivalent” to a government agency even if the levy funds are not a “significant majority” of its funding.

Respectfully submitted this 16th day of March, 2015.

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**CERTIFICATE OF SERVICE**

I, Tatyana Stakhnyuk, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows, with the parties' agreement to accept email service:

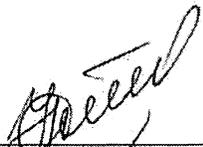
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