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No. 92846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALYNE FORTGANG,

Petitioner/Appellant/Plaintiff,

v.

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

Respondent/Defendant.

PETITIONER ALYNE FORTGANG'S
CONSOLIDATED RESPONSE TO *AMICI* BRIEFS

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 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ANSWER TO <i>AMICI</i> ARGUMENTS	4
A. Petitioner Has Not Asked that the PRA Be “Expanded”	4
B. The PRA Is Interpreted Broadly	6
III. CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Spokane Research & Defense Fund v. West Central Community</i> 133 Wn. App. 602, 137 P.3d 120 (2006).....	6
<i>Telford v. Thurston Cnty. Bd. of Comm'rs</i> 95 Wn. App. 149, 974 P.2d 886 (1999).....	3, 7
<i>Worthington v. Westnet</i> 182 Wn. 2d 500, 341 P.3d 995 (2015).....	3, 7
Statutes	
Revised Code of Washington 42.56.020.....	7

I. INTRODUCTION

Amici Seattle Aquarium Society, SEIU *et al.*, Washington

Nonprofits and National Council of Nonprofits, and the Washington State Association of Municipal Attorneys rest their arguments on a fundamental misunderstanding of what relief Petitioner has sought from this Court.

Each of these *Amici* make variations of the same slippery slope argument: if the Court holds the Woodland Park Zoological Society (“WPZS” or “Zoo”) accountable to taxpayers under the Washington Public Records Act (“PRA”), the decision would “sweep[] many private sector service providers” and nonprofits under the scope of the PRA, resulting in a “chilling effect on private entities’ ability to provide needed service” and levy “uncontemplated and incalculably large costs” for PRA compliance. *Amicus* Seattle Aquarium Society Br. at 4, 12-13; *Amici* SEIU *et al.* Br. at 16-17; *Amici* Washington Nonprofits and National Council of Nonprofits Br. at 20; *Amici* Washington State Association of Municipal Attorneys Br. at 7. However, *Amici* are arguing against a straw man.

As Petitioner made clear in her Supplemental Brief, Petitioner asks this Court to affirm and clarify the practical, fact-specific application of the *Thurston Cnty. Bd. of Comm’rs*, 95 Wn. App. 149, 974 P.2d 886 (1999) (“*Telford*”) functional equivalence analysis, and apply that analysis

to hold the Zoo subject to the PRA. In particular, Petitioner has argued that this Court should clarify *Telford* as follows:

- the first *Telford* factor favors disclosure whether the activities being carried out by the private entity generally serve a “public function” or a “public purpose”.
- the second *Telford* factor requires consideration of all functional equivalence facts that may bear weight on the funding, including: the source of the public funds; the dollar amount of public funding; and whether the government is providing other benefits, such as free use of government property, that support the entity, albeit not through actual dollar contributions.
- the third *Telford* factor functional equivalence analysis should include: whether the entity’s records are subject to audit by the government; whether any government officials run the entity or are involved in the entity’s operations; whether there are any government restrictions on how the government facilities are run; and, any reporting requirements imposed by the government.
- The fourth *Telford* factor should consider whether government officials had a hand in creating the entity; whether the entity’s

creation was “set in motion” by statute; and government involvement in the creation of the facilities operated by the entity.

Pet. Supp. Br. at 3-18. This clarification of the fact-specific functional equivalence analysis is not the “sledgehammer” *Amicus* Seattle Aquarium Society warns of; rather, the requested clarification is grounded in prior Court of Appeals decisions that encompass a meaningful case-by-case assessment that accounts for all relevant facts. *Compare Amicus* Seattle Aquarium Society Br. at 13 *with* Pet. Supp. Br. at 1-2. In fact, once the hyperbole is stripped away, what the *Amici* and Petitioner seek is really not all that different – a “case-by-case” analysis under *Telford* that rejects arbitrary bright-line rules in applying the PRA. *See, e.g., Worthington v. Westnet*, 182 Wn. 2d 500, 508, 341 P.3d 995 (2015) (noting courts must engage in a “practical analysis” in deciding whether to apply to PRA to a particular entity); (App. 8) (“[O]ur analysis under *Telford* must be grounded in the unique factual circumstances present in each case.”); *Telford*, 95 Wn. App. at 162 (noting the “functional, case-by-case approach of Washington law.”).

The Court can and should lift the veil on the Zoo and expose the Zoo’s use of hundreds of millions of taxpayer dollars to the transparency mandated by the PRA in a way that avoids the *Amici*’s parade of horrors.

II. ANSWER TO *AMICI* ARGUMENTS

A. Petitioner Has Not Asked that the PRA Be “Expanded”

Amicus Seattle Aquarium Society’s principal argument is that the Court should affirm the Court of Appeals in that the Zoo “is not an agency subject to the requirements of the PRA” and that the Court should not apply the PRA to “any nonprofit organization that received” money from public agencies. *Amicus* Seattle Aquarium Society Br. at 3, 5. These arguments miss the mark. Petitioner calls for consideration of all relevant facts and a balancing that recognizes that, in some circumstances, certain significant facts do and should outweigh others under *Telford*. Such balancing will protect the *Amici* and not create a wholesale and unworkable extension of *Telford* to the “50,000 nonprofit organizations in Washington State.” *Id.* at 4.

First, *Amicus* Seattle Aquarium Society misstates the holding of the Court of Appeals below. The Court of Appeals never held that the Zoo was outside the purview of the PRA. In contrast, the Court of Appeals correctly framed the case: “The key issue presented here is whether WPZS is the functional equivalent of a government agency for purposes of the PRA. We apply *Telford*’s four factor test to resolve this issue.” A-6.

Second, *Amicus* Seattle Aquarium Society grossly misstates the potential application of *Telford* sought by Petitioner under the funding inquiry. It is not that any government funding of any amount should trigger application of the PRA under a functional equivalence analysis. *Amicus* Seattle Aquarium Society Br. at 5. To the contrary, the functional equivalence analysis urged by Petitioner would avoid the very scenario *Amici* fear. Grants are not at issue in this case; what is at issue is a tax levy, which is a payment directly from taxpayer dollars, voted on and approved by the taxpayers themselves, that has resulted in over \$123,000,000 in City and County taxpayer money being allocated to the Zoo through a combination of levy proceeds, multi-million dollar annual allotments from the City General Fund, and annual maintenance payments, not to mention the in kind benefits of free use of 92 acres of prime City parkland. (A-25—A-26).

As *Amicus* Washington Coalition for Open Government correctly illustrates, the levy funds are used by the Zoo for unrestricted “general purposes.” *Amicus* Washington Coalition for Open Government Br. at 5, 7. This distinguishes the tax levy funds at issue from the “4culture” grants and funds referenced by the *Amicus* Seattle Aquarium Society and aligns Petitioner’s approach with that of *Spokane*, where the Court of Appeals distinguished between an entity’s receipt of government grants (which, on

balance, was not sufficient for application of the PRA) and other sources of government funding, such as assessments. 133 Wn. App. 602, 609, 137 P.3d 120 (2006).

Petitioner does agree with *Amicus* Seattle Aquarium Society that nonprofits, including the Zoo, “perform useful public functions.” *Amicus* Seattle Aquarium Society Br. at 8. That is why some of them, such as the Zoo, should be subject to the PRA. Importantly, it is only the use of money towards these public functions that Petitioner has sought records:

Where a private entity that was not created by the government may be performing a government function in some respects, but not others, only those records relating to the government function should be considered “public records.” Records relating to the internal governance of the entity, for example, are not “public records” subject to the PRA. *See Cedar Grove*, 188 Wn. App. at 720. Here, Petitioner sought records related to municipal zoo operation, not of the WPZS in its private functions. (CP 24-25).

Pet. Supp. Br. at 19-20. Seeking this information from the Zoo is not an act of “alchemy”; it is simply what the PRA mandates. *Amici* Washington Nonprofits and National Council of Nonprofits Br. at 19.

B. The PRA Is Interpreted Broadly

Amici Washington Nonprofits and National Council of Nonprofits argue that Petitioner “misses the central point” when stating that the “PRA is to be construed broadly.” *Amici* Washington Nonprofits and National

Council of Nonprofits Br. at 10. However, it is the *Amici* who ignore case law in their effort to cabin the PRA and keep taxpayers in the dark.

Telford highlighted the PRA's goal of providing "full access to public records," and the need to "liberally construe[]" the PRA to achieve that goal. 95 Wn. App. at 158. And, this Court has already recognized that the PRA reflects the need for "the public [to] have full access to information concerning the workings of the government . . . [a]ccordingly, courts must avoid interpreting the PRA in a way that would tend to frustrate that purpose.") *Worthington*, 182 Wn.2d at 507 (citations and internal quotations omitted). *Amici* never cite these cases at all. Indeed, the fact that "functional equivalence" never appears in the PRA is beside the point. *Amici* Washington State Association of Municipal Attorneys Br. at 4-5. The term "other local public agency" is, and that is the term that Washington Courts have construed using the functional equivalence analysis first adopted in *Telford*. RCW 42.56.020.

The appropriate liberal application of the PRA by lower courts has not, and will not after this case, result in "absurd results such as applying [the PRA] to the records of the federal government [or] state and local governments in Oregon or Idaho." *Amici* Washington Nonprofits and National Council of Nonprofits Br. at 11. Nor will all private entities that partner with local governments be "transformed" into public agencies.

Amici Washington State Association of Municipal Attorneys Br. at 6. In fact, Petitioner argues for the largely the same “case-by-case” analysis that *Amici* Washington Nonprofits and National Council of Nonprofits seek: “an analysis that encompasses a meaningful case-by-case assessment that accounts for all relevant facts.” *Compare Amici* Washington Nonprofits and National Council of Nonprofits Br. at 11 with Pet. Supp. Br. at 1-2.¹

It is not “magic” that makes the Zoo subject to the PRA; rather, it is the fact that the Zoo performs a governmental function, is subject to government control, and receives a large general allocation of government taxpayer funds to support its overall general operations. *Amici* Washington Nonprofits and National Council of Nonprofits Br. at 16. Where taxpayers have specifically directed millions of their tax dollars to support an organization, the level of government involvement necessary to tilt this factor in favor of applying the PRA should be reduced and entities like the Zoo, which on balance possess governmental attributes and are not “wholly independent entities,” will appropriately be subject to the PRA. *Amici* Washington State Association of Municipal Attorneys Br. at 6-7.

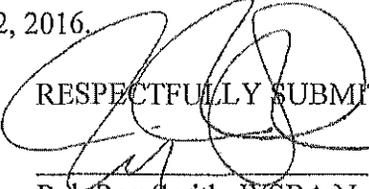
¹ *Amici* Washington Nonprofits and National Council of Nonprofits falsely suggest that Petitioner asks this Court to “rewrite the statute so that the line is drawn” on a particular amount of funding to trigger the PRA. *Amici* Washington Nonprofits and National Council of Nonprofits Br. at 13. To the contrary, it is the Zoo’s argument, adopted by the Court of Appeals, that sought a bright line when it invoked the “majority of the entity’s total funding” test. A-13, A-15.

There is simply no reason to believe that a ruling in favor of Petitioner will do anything other than ensure that lower courts apply the functional equivalence doctrine consistently and in accordance with the PRA's broad mandate for appropriate public disclosure. Applying the functional equivalence analysis in the manner urged by Petitioner, the WPZS will be held subject to the PRA without creating an unwarranted intrusion into the operation of other nonprofits that are not the functional equivalent of a public agency. It is the Court of Appeal decision that creates a slippery slope, creating a blueprint with a very low bar for governments to structure private partnerships to evade the purpose of the PRA.

III. CONCLUSION

This Court should reject the restrictive analysis of the PRA urged by the Zoo and its *Amici*, and instruct Washington courts to eschew bright line rules in favor of a practical, case-by-case analysis that will further PRA's broad mandate of ensuring public oversight of the business of government and the expenditure of public funds.

DATED October 12, 2016.


RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

I certify that on October 12, 2016, I caused one original and one true and correct copy of **PETITIONER ALYNE FORTGANG's CONSOLIDATED RESPONSE TO AMICI BRIEFS** to be filed with the Supreme Court and served electronically, via email, per the electronic service agreement, to the following parties by the method(s) indicated below:

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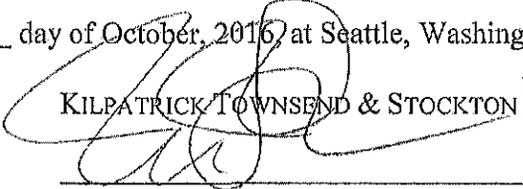
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DATED this 12th day of October, 2016, at Seattle, Washington.


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Subject: Fortgang v. Woodland Park Zoo, Case No. 92846-1 - Petitioner's Consolidated Response to Amici Briefs

Good morning –

On behalf of Rob Roy Smith (WSBA No. 33789), attorney for Petitioner Alyne Fortgang, please find attached for filing *Petitioner Alyne Fortgang's Consolidated Response to Amici Briefs*, in case number 92846-1.

Thank you,
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