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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ALYNE FORTGANG,  
Petitioner,

v.

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

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RESPONDENT WOODLAND PARK ZOOLOGICAL SOCIETY'S  
RESPONSE TO BRIEFS OF *AMICI CURIAE*

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 ORIGINAL

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## I. INTRODUCTION

Washington's Public Records Act, ch. 42.56 RCW ("PRA"), by its terms applies to agencies, not private entities. All amici argue that the functional, four-part test articulated in *Telford v. Thurston Cty. Bd. of Comm'rs*, 95 Wn. App. 149, 974 P.2d 886 (1999) is appropriate to determine when a private entity acts as an agency for purposes of the PRA. But amici disagree on *Telford's* application. Respondent Woodland Park Zoological Society ("WPZS") agrees with those amici who rightly argue for a narrow application of the *Telford* factors as most consistent with the language and history of the PRA.

WPZS opposes, however, the broad extension of the PRA urged by amicus Washington Coalition for Open Government ("WCOG"). As to the government funding factor, WCOG suggests that this Court should weigh heavily WPZS's receipt of levy funds from King County (the "County"). But it is unclear how WPZS's receipt of funding from the County illuminates whether WPZS is the functional equivalent of the City of Seattle (the "City"), a separate and distinct public entity. Similarly, WCOG's focus on the raw amount of public funds a private nonprofit organization receives, without comparison to its overall revenue, provides little insight into whether a nonprofit entity is acting as a government agency. Instead, the appropriate funding inquiry under *Telford* is whether

a high level of public funding is being provided, not the raw amount. Finally, WCOG's emphasis on public funding coming from a voter-approved levy is a distinction without substantive difference. The specific source of public funds used to support private nonprofits providing community services does not illuminate whether the private entity is conducting the work of government. Whether government funds come from sales, property, or B&O taxes raised for general government purposes and expended for a particular purpose or a special levy imposing an increase in those taxes for a particular purpose, the funding is all taxpayer money being spent for a purpose approved by a legislative body (i.e. the City Council or the people acting in a legislative capacity).

The sweeping interpretation of the government funding factor that WCOG and Petitioner propose would judicially amend the PRA to be a follow-the-money public records statute and extend it to large number of private nonprofits. Besides having no basis in Washington's PRA, WPZS shares the other amici's concerns that such a broad application of the PRA would divert much-needed funding away from programming public services and disincentivize essential collaboration between governments and nonprofits. Accordingly, this Court should affirm the Court of Appeals and construe the *Telford* test narrowly to extend the PRA only to

private nonprofit organizations that actually act as agencies and perform the conduct of government.

## II. ARGUMENT

### A. **The PRA applies to government agencies only, not private nonprofit organizations.**

The plain language of the PRA applies to government agencies only. RCW 42.56.070(1) (“each agency, in accordance with published rules, shall make available for public inspection and copying all public records”); RCW 42.56.010(1) (defining “agency” to include all levels of state and local government).<sup>1</sup> It is undisputed that WPZS is not a public agency. Accordingly, WPZS should not be subject to the PRA.

WPZS agrees with amicus Washington State Association of Municipal Attorneys (“WSAMA”) that the phrase “other local public agencies” in the PRA’s definition of “agency” does not license the extension of the PRA to private nonprofit organizations, such as WPZS. In *Telford*, the Court of Appeals used the “other local public agencies” language in the statutory definition as a hook to extend the PRA to the Washington State Association of Counties (“WSAC”) and the Washington Association of County Officials (“WACO”)—two government

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<sup>1</sup> The PRA defines “agency” to include “all state agencies and all local agencies.” RCW 42.56.010(1). It further defines “state agencies” to include “every state office, department, division, bureau, board, commission, or other state agency.” *Id.* It further defines “Local agency” to include “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.” *Id.*

associations that “serve a public purpose, are publicly funded, are run by government officials, and were created by government officials.” 95 Wn. App. at 165. The application of the PRA to WSAC and WACO was based on the rationale that “[a]lthough WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency.” *Id.* at 165. The *Telford* court did not hold, however, that the term “other local public agencies” is a broad catchall for private nonprofits. Where a private entity does not embody the “essential functions and attributes . . . of a public agency,” the PRA does not apply.

The State Auditor’s Office recently issued a study on the impact of the PRA that sheds some light on the types of entities that fall within the “other local public agencies” category.<sup>2</sup> The State Auditor’s Office surveyed all agencies subject to the PRA, including a category it considered “[o]ther governments.” In describing its methodology, the State Auditor’s Office identified that its survey of “other governments” included economic/industrial authorities, emergency management services, government associations, housing authorities, insurance/risk pool management, local/regional trauma care councils, public development authorities, regional planning councils, regional support/community

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<sup>2</sup> Wash. State Auditor’s Office, Performance Audit, the Effect of Public Records Requests on State and Local Gov’ts (Aug. 29, 2016), *available at* [http://www.sao.wa.gov/state/Documents/PA\\_Public\\_Records\\_Requests\\_ar1017396.pdf](http://www.sao.wa.gov/state/Documents/PA_Public_Records_Requests_ar1017396.pdf).

networks, transportation authorities, and water conservancy boards.<sup>3</sup> This description encompasses the two entities at issue in *Telford*, which were government associations. 95 Wn. App. at 152-56. Notably absent from the State Auditor's Office's description of the entities subject to the PRA is any mention of private nonprofit organizations. This interpretation of "other public agencies" is consistent with the PRA's purpose to effectuate public access to "information concerning the conduct of government." RCW 42.17A.001(11) (emphasis added). And the State Auditor's definition of agencies is consistent with *Telford* in excluding private nonprofit organizations, such as the Zoo, from the PRA.

**B. The *Telford* test's government funding factor should weigh the level of public funding, not the raw amount or source of funds received.**

The parties and amici agree that, if this Court elects to extend the PRA in limited circumstances, it should adopt the functional equivalent analysis articulated in *Telford*. Under *Telford*, courts weigh four factors to determine if a private entity should be subject to the PRA as the "functional equivalent" of a public agency: (1) whether the private entity is performing a governmental function, (2) the level of government funding, (3) the level of government control, and (4) whether the entity was created by government. *Telford*, 95 Wn. App. at 162. The parties and

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<sup>3</sup> *Id.* at \*38.

amici disagree as to the proper application of the government funding factor.

Under all Washington case law to date, the *Telford* test examines the level of government funding received relative to overall revenue as one factor in determining whether an entity is engaged in the conduct of government. *Telford*, 95 Wn. App. 162; *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 195, 181 P.3d 881 (2008); *Spokane Research & Def. v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006); *see also Bd. of Trustees of Woodstock Academy*, 436 A.2d 266, 271 (Conn. 1980) (cited in *Telford*). The Court of Appeals properly considered the level of government funding in determining that the government funding factor weighs against applying the PRA to WPZS. Indeed, in 2013, funding from the City accounted for only 16 percent and non-City funding from public sources accounted for only 10 percent of total WPZS revenue; almost three-quarters of WPZS's revenue came from non-public sources. Supp. CP at 171, 183–208.

Petitioner and WCOG argue that the government funding factor should consider the raw amount of funds received, not the overall level of public funding. WCOG Br. 8-9. But Petitioner and WCOG point to no authority interpreting the government funding factor in the way they suggest, and WPZS is aware of none. As WPZS addressed in its

supplemental brief, interpreting the government funding factor to consider raw amount, not overall level, of public funding is inconsistent with the PRA's language and purpose and would have sweeping impacts on the nonprofit sector. Supp. Br. 13-14. Considering the level of public funding overall is designed to capture only the circumstances with which the PRA is concerned: when a government agency has outsourced the "workings of government" to a private entity. *See Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015) (purpose of PRA is "access to information concerning the workings of the government"). The amount of public funding WPZS receives reflects the breadth of its programs, not the nature of its relationship with the government agencies that provide that funding.<sup>4</sup>

WCOG also argues that the government funding factor should consider the source of public funds, including whether an entity receives direct funds through a voter-approved levy. This argument misunderstands the nature and purpose of a tax levy. Government agencies have numerous mechanisms for raising funds, including sales, property, and B&O tax increases and voter-approved tax levies. Although

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<sup>4</sup> WPZS agrees with amici SEIU Healthcare Northwest Training Partnership, Association of Washington Public Hospital Districts, Community Health Plan of Washington, Coordinated Care of Washington, Inc., Planned Parenthood of the Great Northwest and the Hawaiian Islands, and Washington State Hospital Association ("Provider Amici") that the level of government funding an entity receives should not be dispositive in and of itself. Provider Amici Br. 11-14. As Provider Amici point out, there are likely circumstances where, on balance of the four factors, a private entity that receives all or most of its funding from public sources is not a "functional equivalent" of a government agency under *Telford*.

a government agency may raise sales, property, or B&O taxes for general government purposes, the local legislative body then approves the expenditure of those funds for particular purposes, such as funding certain nonprofit services. A voter-approved tax levy may combine the taxing mechanism with the particular purposes for which the funds may be used. But whether funding is raised through a council-approved tax or a voter-approved tax, the end result is the same: the funding is spent for a particular purpose approved by a legislative body. Whether the public investment is made from the general fund or a specific levy fund is irrelevant to determining whether a private nonprofit is carrying out the workings of government such that it should be treated as the functional equivalent of the government agency for purposes of the PRA.

Moreover, this argument makes no sense under the facts at issue here. First, WCOG argues that WPZS's receipt of levy funds from County somehow illustrate that WPZS is a functional equivalent of the City. WCOG Br. 7-9. WCOG provides no authority in support of the proposition that receipt of funds from one government agency is probative of whether a private entity is the functional equivalent of another government agency.

Second, the City's disbursement of levy funds to WPZS provides little insight into whether WPZS is the City's functional equivalent.

WPZS is not a named beneficiary of the 2008 Seattle Parks and Green Space Levy (“Parks Levy”).<sup>5</sup> Those funds are distributed to WPZS and other recipients for the completion of specific projects or in return for specific services that the legislative body has decided are worthy of public support (i.e., providing some support for operation of a zoo).<sup>6</sup> The voter-approved Seattle Parks District designates funds to “maintain, operate and improve its parks, community centers, pools and other recreation facilities (including, without limitation, open spaces, zoo and aquarium facilities).”<sup>7</sup> Like the Parks Levy, funding is allocated annually for specific approved projects or purposes, which are reviewed and approved by a citizen oversight committee in open public meetings.<sup>8</sup> WPZS’s expenditure of those funds is not unrestricted—it must spend levy funds it receives for the specific services or projects for which the funds were approved and

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<sup>5</sup> City of Seattle Ordinance 122749, available at <http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s3=&s4=122749&s2=&s5=&Sect4=AND&l=20&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F~public%2Fcbory.htm&r=1&f=G>.

<sup>6</sup> Seattle Parks and Recreation, Current Projects, available at <http://www.seattle.gov/parks/about-us/current-projects> (identifies the use of levy funds for the creation of a sensory garden on Zoo grounds).

<sup>7</sup> City of Seattle Ordinance 124468, available at <http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=124468&S2=&Sect4=AND&l=0&Sect1=IMAGE&Sect2=THESON&Sect3=PLURON&Sect5=LEG12&Sect6=HITOFF&d=LEGA&p=1&u=%2F~public%2Flegisearch.htm&r=3&f=G>.

<sup>8</sup> Seattle Park Dist., Resolution 1, Attachment 1, An Interlocal Agreement between the City of Seattle, Washington, and the Seattle Park District (Sept. 30, 2014), available at <http://www.seattle.gov/Documents/Departments/ParkDistrict/About/Park%20DistrictInterlocal%20AgreementAdopted.pdf>; Seattle Parks Dist., Meeting Agendas and Minutes, available at <http://www.seattle.gov/seattle-park-district/governing-board/meeting-agendas-and-minutes>.

disbursed pursuant to contractual agreement. WPZS could not, for example, take City levy funds and use them to open a new zoo in Everett or Spokane. The levy funds are not a blank check to WPZS as WCOG suggests.

As a result, WCOG's concerns about transparency are misguided. WCOG focuses on the County levy funds. But the ordinance authorizing the County levy and the contract enabling the distribution of levy funds to WPZS provides for ample citizen oversight. The county ordinance provides for the establishment of a parks levy citizen oversight board. Ordinance 17568, § 7.<sup>9</sup> The board is responsible for "review[ing] the allocation of levy proceeds and progress on achieving the purposes of [the levy proposition]." *Id.* WPZS's contract with the County contains several provisions that ensure public oversight for County Levy funds. For example, the contract requires WPZS to provide the county with annual reports including a "general summary of the Zoo's operations and a complete financial accounting for all funds, including use of County Levy Proceeds".<sup>10</sup> App. 5, § 4.2. WPZS also must provide the County with an annual certification of the total dollar amount of county funds expended

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<sup>9</sup> King County Ordinance 17568, available at <http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Ordinance%2017568.pdf>.

<sup>10</sup> WPZS attached the 2014 version of the contract at Appendix 1-22 to WPZS's Combined Answer to Briefs of Amici Curiae Washington Coalition for Open Government and Animal Legal Defense Fund filed with the Court of Appeals in this case. Citations in this Brief to the contract refer to that Appendix.

by WPZS identified by category “(i.e. environmental education, conservation programs, and capital improvement projects)”. *Id.* § 4.3. The contract also requires cooperation with any state or county auditors. *Id.* at 16–17, § 14.4. A citizen concerned with how WPZS is using County Levy funds need only make a public records request to the County to receive that information.

The sweeping interpretation of the government funding factor that Petitioner and WCOG suggest finds no support in the plain language or the purpose of the PRA. Indeed, accepting Petitioner’s and WCOG’s position would result in a judicial rewriting of the PRA into a “follow-the-money” public disclosure law. The Court of Appeals properly rejected that interpretation to conclude that the government funding factor weighs against application of the PRA to WPZS, which receives only ten percent of its funding from the City and only a quarter of its funding from public sources overall.

**C. Interpreting the government funding factor as Petitioner and WCOG suggest would extend the PRA to and impede the services provided by many nonprofits.**

The interpretation that Petitioner and WCOG propose would extend the PRA to a large number of private nonprofit organizations that receive public funding, without regard to the scale or nature of their programs. WPZS agrees with the Seattle Aquarium Society, WSAMA,

Provider Amici, and Washington Nonprofits and the National Council of Nonprofits (“Nonprofit Amici”) that the characteristics upon which the Petitioner and WCOG ask this Court to extend the PRA to WPZS are shared by many nonprofits. Applying the PRA broadly to the nonprofit sector would have far-reaching consequences that the voters could not have intended in enacting the PRA.

As Nonprofit Amici noted, focusing on the raw amount of public funds received would implicate a significant number of private entities providing community services. Nonprofit Amici are correct that it is not unusual for nonprofit organizations to receive millions of dollars a year to provide community benefits, especially where—like the Zoo—an organization’s programs are designed to reach large audiences. For example, the YWCA of Seattle-King County-Snohomish County and its subsidiaries received \$18,579,858 in government fees and grants in 2015 alone and \$17,709,247 in 2014.<sup>11</sup> The YMCA of Greater Seattle received \$11,698,451 in public funding in 2015, which is approximately 15 percent of total revenue.<sup>12</sup> The Mountains to Sound Greenway, a nonprofit organization advocating for the conservation of land along the Interstate

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<sup>11</sup> YWCA, Consolidated Financial Statements for the year ended Dec. 31, 2015, at \*4, available at <http://www.ywcaworks.org/document.doc?id=541> (last visited Oct. 12, 2016).

<sup>12</sup> YMCA of Greater Seattle, 2015 Impact Report, available at <http://www.seattleymca.org/Documents/Annual-Report2015-FINAL.pdf> (last visited Oct. 12, 2016).

90 corridor, received \$10.8 million in government grants and contracts from 2005 to 2015.<sup>13</sup>

Under Petitioner's and WCOG's logic, the PRA should apply to the YWCA, the YMCA, the Mountains to Sound Greenway, and many other private nonprofit organizations simply because they—like WPZS—receive tens of millions of dollars in government funding. But in these situations the dollar amount of government funding reflects the magnitude and impact of the organizations' programs and government's policy choice to support them. The raw dollar amount by itself provides no insight into either whether the nonprofit is operating as a government agency or whether the oversight provided by public officials is inadequate.

Moreover, such a broad application of the PRA would create a disincentive for nonprofits to partner with government. Many nonprofits are underfunded and understaffed, and the cost of complying with the PRA would divert already scarce funds away from essential public programs. Ultimately, the result will be less collaboration between nonprofits and government and reduced public benefits in our

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<sup>13</sup> Mountains to Sound Greenway, Annual Report, 2014-15 (2016), *available at* <http://mtsgreenway.org/about/publications/2014-2015-greenway-annual-report> (last visited Oct. 12, 2016); Mountains to Sound Greenway, Annual Reports and Publications, Mountains to Sound Greenway Trust Annual Reports, *available at* <http://mtsgreenway.org/about/publications> (last visited Oct. 12, 2016).

communities. This Court should reject the sweeping interpretation of the government funding factor proposed by Petitioner and WCOG.

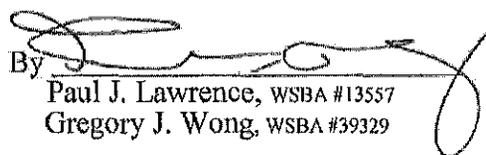
### III. CONCLUSION

Seattle Aquarium Society, WSAMA, Provider Amici, and Nonprofit Amici appropriately argue for a narrow interpretation and application of the *Telford* test. Such a view is consistent with the language and history of the PRA. Adopting a broader interpretation would require this Court to re-write the PRA in a manner that is contrary to its plain language and purpose.

Moreover, the Court should reject the Petitioner and WCOG's efforts to focus the *Telford* test principally on the source and amount of taxpayer funds contracted for a non-profit's services, rather than the level of public funding overall. The interpretation advanced by the Petitioner and WCOG is inconsistent with the language and history of the PRA, would impede the ability of nonprofits to collaborate with government agencies to provide important services, and is unsupported by the facts of this case.

RESPECTFULLY SUBMITTED this 12th day of October, 2016.

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Petitioner/Appellant/Plaintiff,

v.

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

Respondent/Defendant.

PROOF 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 12th day of October, 2016 I caused a true and correct copy of Respondent Woodland Park Zoological Society's Answer to Briefs of Amici Curiae to be filed with the Supreme Court and served electronically, via email, per the electronic service agreement, to the parties listed below:

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

DATED this 12th day of October, 2016.

  
Katie Dillon

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**Subject:** Fortgang v. Woodland Park Zoological Society: Cause No. 92846-1 - WPZS' Response to Briefs of Amicus Curiae  
**Attachments:** WPZS' Response to Briefs of Amici Curiae.pdf; WPZS Proof of Service.pdf

On behalf of Gregory J. Wong (WSBA No. 39329), attorney for Woodland Park Zoological Society, attached please find Respondent Woodland Park Zoological Society's Response to Brief of Amicus Curiae.

*Please note that our reception, address suite number and zip code have changed.*

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