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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.

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

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TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS 1

II. INTRODUCTION..... 1

III. ISSUES PRESENTED..... 2

IV. STATEMENT OF THE CASE..... 2

V. ARGUMENT 5

 A. Private entities are subject to PRA disclosure requirements if they function like government agencies..... 5

 B. Under the facts of this case, the government funding factor weighs in favor of disclosure..... 7

VI. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Neighborhood Alliance of Spokane County v. County of Spokane, 172
Wn.2d 702, 261 P.3d 119 (2011)..... 5

Telford v. Thurston County Board of Commissioners, 95 Wn. App.149,
974 P.2d 886 (1999)..... passim

Worthington v. Westnet, 182 Wn.2d 500, 341 P.3d 995 (2015) 6

Statutes

RCW 42.56.010 5

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*”), *review 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 is fact specific and should be applied on a case-by-case basis. *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 should be no “significant majority” test on the amount of government funding.

III. ISSUE PRESENTED

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

IV. STATEMENT OF THE CASE

Amicus relies upon the statements of the case provided by the parties to the Court below. *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* COA Appellant’s Brief,

pp. 6-7, *citing* CP 34. The Zoo continues to receive taxpayer funds directly through a parks levy. *See* COA 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.¹ The ballot language stated:²

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:

Approved?

Rejected?

¹ *See Parks, Trails, and Open Space Replacement Levy*, King County Parks, available at <http://www.kingcounty.gov/recreation/parks/about/levy.aspx> (accessed on September 7, 2016).

² *See Proposition No. 1 Parks Levy Measure Info*, King County Elections, available at <http://aqua.kingcounty.gov/elections2/contests/measureinfo.aspx?cid=46026&eid=1256> (accessed on September 7, 2016).

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.” A Parks Levy Citizen Oversight Board was established by the levy legislation in 2008.³

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.⁴

The levy ordinance authorizing the levy proposition to be on the August 2013 ballot broadly defines how the property tax levy funds would be used, including “funding environmental education, maintenance,

³ See footnote 1.

⁴ 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 (accessed September 7, 2016).

conservation and capital programs at the Woodland Park Zoo.”⁵
Respondent concedes that it receives levy funds for “general purposes.”
COA Respondent’s Answer to Amicus Curie, p. 8.

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

⁵ King County Ordinance 17568, King County at pp 8-9, Section 4.E, available at <http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Ordinance%2017568.pdf> (accessed September 7, 2016).

Court has not provided guidance on the *Telford* factors, it has noted in *dicta* that courts should engage in a “practical analysis” when determining whether a particular private entity is subject to the PRA. *Worthington v. Westnet*, 182 Wn.2d 500, 508, 341 P.3d 995, 999 (2015).

The second factor of the *Telford* test is the level of government funding. *See id.* at 508, 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.

Every year, the Zoo receives millions of taxpayer dollars from a voter-approved park levy and has broad discretion to use these dollars, similar to the public agencies also funded by the same levy. *Amicus* urges this Court to consider these facts in weighing whether the Zoo is the “functional equivalent” of a government agency subject to the PRA.⁶

The Zoo is unique in that it was named as a beneficiary, along with King County and cities, of the parks levy funds. The levy ordinance broadly defined how the Zoo may use the property tax levy funds: “funding environmental education, maintenance, conservation and capital programs at the Woodland Park Zoo.” The Zoo’s use of the levy funds do not appear to be restricted, which it concedes. *See* COA Respondent’s Answer to *Amicus Curie*, p. 8 (“WPZS receives funds for general purposes”). The fact that taxpayers voted to directly fund a private entity through property taxes should be taken into consideration in “level of government funding” prong of the *Telford* analysis. It is not dispositive, but it should be significant.

Amicus also requests this Court to expressly reject Respondent’s argument that receipt of taxpayer funds for general or specific purposes “is a distinction without a difference.” *See* COA Respondent’s Answer to *Amicus Curie*, pp. 8-9. Most other private non-profit entities receive

⁶ The Zoo addressed receipt of levy funds under the “governmental function” factor arguing that its receipt of levy funds does not mean that it performs a government function. *See* COA Respondent’s Brief, p. 30, fn. 14.

government funds on a fee-for-service basis or are granted specific amounts for specific purposes. Like the quasi-public agencies in *Telford*, however, the Zoo is not required to provide specific services in exchange for receiving the public 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.

Respondent seems to argue that its annual reports, accounting documents and contract compliance documents provided to the County are sufficient for public oversight of levy funds. *See* COA Respondent's Answer to Amicus Curie, pp. 7-8 ("a citizen concerned with how King County Levy funds are used need only make a public records request to King County to receive a full accounting."). However, where a private entity exercises broad discretion on how the public funds are spent, the public's interest is broader than accounting for where the public funds actually went. Ms. Fortgang's request for records, for example, included documents that would provide information on an alleged \$480,000 spent in fighting criticism of the Zoo's elephant program. *See* Petition for Review, pp. 3-4. Without access to records like the ones Ms. Fortgang has requested, how is the public able to know whether taxpayer money is being spent in the public interest?

Finally, a "significant majority" test on the level of government funding factor is too rigid for a *Telford* analysis. *Amicus* urges this Court

to assign little weight to the Zoo's argument that millions of taxpayer dollars are not significant compared with the rest of its budget. Appellant fully addresses the Zoo's "significant majority" argument, and *Amicus* concurs. See COA Appellant's Reply Brief, 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 12th day of September, 2016.

By 
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CERTIFICATE OF SERVICE

I, Margaret Pak Enslow, 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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Attached please find the following documents for filing in the case Alyne Fortgang v. Woodland Park Zoological Society, Case No. 92846-1:

1. Motion for Leave to File Amicus Curiae Brief; and
2. Brief of Amicus Curiae of the Washington Coalition of Open Government.

Thank you,

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