(COA No. 85636-7)
103339-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STEVE HORVATH,

Petitioner/Plaintiff,

v.

DBIA SERVICES d.b.a. METROPOLITAN
IMPROVEMENT DISTRICT,

Respondent/Defendant.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals and the superior court both correctly concluded that DBIA Services is not the functional equivalent of a public agency subject to the Public Records Act, Chapter 42.56 RCW. This determination is highly fact-specific, turning on the application of the four-factor *Telford* test to the undisputed facts. The crux of Petitioner's arguments at the superior court and Court of Appeals was that the court should apply the *Telford* test to a geographic assessment area, the Metropolitan Improvement District, and not DBIA Services, the entity to which he directed his records request and the entity he actually sued. Regardless of the standard of review applied, the undisputed facts and clearly established law demonstrate that DBIA Services has not effectively assumed the role of government.

II. STATEMENT OF THE CASE

A. Parking and Business Improvement Areas

Under Chapter 35.87A RCW, private citizens may petition a county, city, or town to establish a parking and business

improvement area ("PBIA") in order to "aid general economic development and neighborhood revitalization, and to facilitate the cooperation of merchants, businesses, and residential property owners which assists trade, economic viability, and liveability." RCW 35.87A.010.

Assessments from the PBIA can be used for acquiring and constructing parking, decorating public places in the area, sponsoring or promoting public events, providing music, providing maintenance and security for public areas, providing transportation services, and managing and promoting retail trade activities. RCW 35.87A.010(1).

After receiving a citizen petition, the local legislative body adopts an ordinance to establish the PBIA, describing the PBIA boundaries, the rates of special assessments, and the "uses to which the special assessment revenue shall be put," which must be consistent with the uses declared in the citizen-initiated petition. RCW 35.87A.100.

Recognizing the central role of the private sector in the activities that PBIAs manage, the statute expressly provides that the local authority may contract with a separate business entity to administer the operation of the PBIA:

> The legislative authority may contract with a chamber of commerce or other similar business association operating primarily within the boundaries of the legislative authority to administer the operation of a parking and business improvement area, including any funds derived pursuant thereto: PROVIDED, That such administration must comply with all applicable provisions of law including this chapter, with all county, city, or town resolutions and ordinances, and with all regulations lawfully imposed by the state auditor or other state agencies.

RCW 35.87A.110.

B. The Metropolitan Improvement District

The City of Seattle has 11 established PBIAs in neighborhoods such as Ballard, the University District,

Columbia City, SODO, and West Seattle.[1] One of these PBIAs is the Metropolitan Improvement District ("MID"). The MID was first formed in 1999 and was renewed in 2004, 2013, and in 2023, during this litigation. *See* CP 179, 563. The boundaries of the MID extend generally between Elliott Bay and Interstate 5 on the east and west; north to Denny Way; and south to the sports stadiums. CP 176. The MID's mission is "to provide comprehensive management tools and resources to enable downtown neighborhoods to collectively and efficiently address common problems and needs." CP 179.

In advance of the 2013 renewal of the MID, owners of 62 percent of the businesses, multi-family residential, and mixed-use properties within the MID filed a petition with the City to renew and expand the MID. CP 161. The City enacted Ordinance 124175 (the "Ordinance") to renew the MID for an

[1] *See* City of Seattle, Business Improvement Areas, https://www.seattle.gov/office-of-economic-development/business-districts/business-improvement-areas-.

additional ten years. CP 161. The Ordinance establishes the authority of the City, a Ratepayer Advisory Board, and a contracted Program Manager responsible for the day-to-day operations of the MID. *Id.*

1. The City of Seattle's Role

The City of Seattle's Director of the Department of Finance and Administrative Services administers the program for the City, with authority to collect assessments, calculate and collect interest, penalties, and processing fees for late payments, and accept and deposit advance payment of assessments and any donations. CP 173 § 16. The Director also has authority to contract for a Program Manager, with the recommendation of the Ratepayer Advisory Board. CP 172–73 §§ 15–17.

2. The Ratepayer Advisory Board

The Ratepayer Advisory Board is responsible for "adopting bylaws and policy guidelines, and for providing advice and consultation to the Director and to the Program Manager." CP 172 § 15. The Ratepayer Advisory Board is composed of

private citizens representative of the MID and its various property classifications. *Id*.

3. The Program Manager (DBIA)

Day-to-day operations of the MID are run by a non-profit contractor, the Program Manager. CP 173 § 17. The Ordinance states, "The Program Manager's duties, subject to the approval of the Ratepayers at each annual meeting, will be to manage the day-to-day operations of the MID and to administer the projects and activities." *Id*. The Program Manager determines the specific services to be provided. CP 163–64 § 5. The Program Manager is chosen through the recommendation of the private citizens on the Ratepayer Advisory Board. CP 171–73 §§ 15, 17.

The Program Manager submits a proposed work plan and budget to the Ratepayer Advisory Board for recommendation, and the ratepayers vote whether to approve it at an annual meeting. CP 106; *see* CP 171 § 15. Upon approval, the proposed budget and work plan are sent to the City. CP 106.

4. Special Assessments and MID Programs

Under the Ordinance, the City collects special assessments, which are deposited with the City treasury. CP 164 § 6. The contracted Program Manager submits documentation to the City, which authorizes expenditures permitted under the Ordinance. CP 169 § 9; CP 171 § 14. The Ordinance provides a non-exclusive list of programs that special assessment revenues may be spent on: "Clean Services," "Safety Outreach and Hospitality, including Law Enforcement," "Marketing and Communications Services," "Businesses Development and Market Research Services," "Transit, Bike and Parking Services" and "Management." CP 163–64 § 5.

C. DBIA Services

DBIA Services ("DBIA") has been acting as the contracted Program Manager since the MID was created in 1999, and the Ratepayer Advisory Board has consistently recommended retaining DBIA at the Board's annual meeting. CP 106. DBIA is a 501(c)(6) private non-profit

corporation. CP 104. DBIA is affiliated with the Downtown Seattle Association ("DSA"), a private non-profit corporation first founded in 1958. CP 103–04, 112–20. DSA has a governing Board of Directors, which oversees DSA and affiliated organizations, including DBIA. CP 105. "DSA's senior leadership team includes DBIA's VP of Public Realm and Ambassador Operations, who oversees all DBIA operations." *Id*. None of the board members or leadership of DBIA (or DSA) are City employees or officials, and DSA's executive employees are responsible for DBIA's day-to-day operations. *Id.*

In addition to the Program Manager contract with the City (CP 107), DBIA has a separate contract with the City's Department of Parks and Recreation to provide management and programming for two public parks (CP 108), and it contracts with King County, the Seattle Department of Transportation, and Seattle Public Utilities for services such as litter abatement and graffiti removal (CP 108, 344).

D. Mr. Horvath's Records Requests

Members of the public can access records retained by the City regarding the MID, including the annual work plan and other documents, through public records requests directed to the City. *See* CP 109–10. Here, Mr. Horvath requested and received records from the City regarding the MID through a public records request. CP 98–102. Mr. Horvath then requested records from DBIA. CP 109. While DBIA maintained that, as a private nonprofit, it was not subject to the PRA, Mr. Horvath concedes that DBIA produced "most of the requested records." CP 43. The only requested information that DBIA did not provide was certain compensation information for employees of the DSA. CP 110.

E. Superior Court Proceedings

Mr. Horvath filed a Complaint against DBIA Services, alleging violations of the Public Records Act. CP 1. Ruling on the parties' cross-motions for summary judgment, the superior court issued a detailed 12-page order, determining that DBIA is

not subject to the PRA. CP 734–45. The court concluded that, while the funding factor weighed in favor of functional equivalence, the remaining factors weighed against applying the PRA to DBIA:

> Having considered the factors on balance, even construing the [PRA] liberally in favor of the fullest possible records access, the Court concludes the factors do not weigh in favor of PRA coverage. The factors regarding governmental function and city involvement in day-to-day functioning are the most persuasive to the Court. They strongly weigh against PRA coverage. This conclusion is also supported by the last factor, government creation, which also weighs against PRA coverage. Finally, while the Court finds the funding factor weighs in favor of functional equivalency, it does not do so convincingly. The Court is persuaded that the factors demonstrate that DBIA Services is not a private surrogate for the City, but is a government contractor not subject to the PRA. Overall, the Court is satisfied that impermissible avoidance of the PRA is not shown.

CP 742. The superior court entered a declaratory judgment in favor of DBIA, holding that DBIA is not subject to the PRA. CP 745.

F. Court of Appeals Decision

Mr. Horvath appealed the superior court's order. On appeal, Petitioner's argument depended almost entirely on its incorrect conflation of DBIA Services (a private nonprofit entity contracting with the City) with the MID (a parking and business improvement assessment area created by City ordinance). *E.g.*, Appellant's Br. at 15 (arguing superior court erred by analyzing whether DBIA is subject to PRA); *id*. at 18 (arguing MID created by ordinance); *id.* at 37 (arguing Ordinance obligates MID to perform government functions); *id.* at 51, 56 (arguing out of state authority supports position that MID should be subject to PRA). Petitioner's briefing did not apply the four *Telford* factors to Respondent DBIA Services, but to the MID. *E.g.*, *id.* at 17–18, 30, 37.

This conflation of the MID and DBIA was the focus of the briefing and oral argument.[2] The Court of Appeals properly rejected this conflation, affirming the trial court's conclusion that the MID was a geographic assessment area, not a separate entity.

> By concluding that the Metropolitan Improvement District is a geographic area, and is not an actor, the trial court determined that the District was not an entity capable of taking action and therefore was not itself capable of creating or possessing public records as defined by the Public Records Act. Moreover, the party identified in both Horvath's complaint and the case caption in this matter further suggest that the entity that was alleged to be "acting in the shoes of the government" was DBIA Services, not the geographic area identified by ordinance as the Metropolitan Improvement District. Thus, the trial court did not err by analyzing this case based on the actor in question—DBIA Services—rather than based on a business improvement area incapable

[2] Division 1 Court of Appeals, Argument April 19, 2024, available at https://tvw.org/video/division-1-court-of-appeals-2024041195/?eventID=2024041195.

> of creating or possessing public records.

Horvath v. DBIA Servs., 31 Wn. App. 2d 549, 573, 551 P.3d 1053 (2024). The Court of Appeals also noted that Horvath had sued DBIA Services, and therefore its status under the PRA was before the court on appeal:

> Horvath next contends that "[a]ny argument focused solely on DBIA Services' status under the *Telford* test is simply not relevant in resolving this issue." Reply Br. of Appellant at 8. However, given that Horvath submitted the records request in question to the Downtown Seattle Association requesting records about the Metropolitan Improvement District from DBIA Services, whether DBIA Services is an agency under the act—and thus must respond to Horvath's requests or else face imposition of penalties—is plainly relevant on appeal.

Id. at 574.

The Court of Appeals also determined that the appropriate standard of review was abuse of discretion. *Id*. at 563. Applying this standard, the court concluded the superior court's "well-

reasoned" 12-page written findings and conclusions "properly applied the law to [the] facts." *Id.* at 570.

III. ARGUMENT

The Opinion of the Court of Appeals analyzes a fact-specific inquiry: whether DBIA Services, a private nonprofit hired by contract to act as a program manager for a parking and business improvement area, is subject to the PRA. As both the superior court and Court of Appeals recognized, the clear answer to this question is no. Under the legal standard adopted by this Court in *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 532, 387 P.3d 690 (2017), and the undisputed facts, the result would be the same under either an abuse of discretion or de novo standard of review. This Court's review is not warranted.

A. The *Telford* Standard

The PRA is not intended "to sweep within PRA coverage every private organization that contracts with government." *Fortgang*, 187 Wn.2d 509 at 532. Subjecting a private entity to the PRA is only appropriate in limited circumstances where a

private entity has "effectively assumed the role of government." *Id.* at 526.

To determine whether a private entity is the "functional equivalent" of a public agency and subject to the PRA, courts employ the four-factor *Telford* test. *Id.* at 523 (adopting *Telford* as the test for determining "functional equivalence" under the PRA). The *Telford* test is a "practical" and fact-specific analysis where each organization "must be examined anew and in its own context." *Woodland Park Zoo v. Fortgang*, 192 Wn. App. 418, 427, 368 P.3d 211 (2016) (quotation and citation omitted), *aff'd*, 187 Wn.2d 509, 387 P.3d 690 (2017).

Under *Telford*, the court balances four considerations:

(1)	whether the entity performs a governmental function;
(2)	the level of government funding;
(3)	the extent of government involvement or regulation; and
(4)	whether the entity was created by government.

Fortgang, 187 Wn.2d at 517–18; *Telford v. Thurston Cnty. Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886 (1999). The

outcome turns on whether "the criteria on balance should suggest that the entity in question is the functional equivalent of a state or local agency" in light of the purposes of the statute, and no one factor is dispositive. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008); *see* Wash. AGO 2002 No. 2. The court's interpretation of the PRA must "be grounded in the PRA's underlying policy" and avoid absurd results. *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013).

Here, both the superior court and the appellate court properly applied the *Telford* test to the particular facts of this case, which were uncontested. Both courts carefully applied the law to the undisputed facts and reached a determination grounded in the PRA's underlying policy: DBIA Services is not subject to the PRA.

B. This Court Should Deny the Petition

Petitioner's sole argument for this Court's review is that the Court of Appeals erred by determining that the superior

court's determination should be reviewed for an abuse of discretion. Petition at 3.

As the Court of Appeals' Opinion acknowledges, both parties argued below that review of the parties' cross-motions for summary judgment was de novo. *Horvath*, 31 Wn. App. 2d at 558; Resp. Br. at 20–21.

However, it is clear from the Court of Appeals' opinion that, regardless of the standard of review applied, DBIA Services is not the functional equivalent of a public agency subject to the PRA. For example, the Court of Appeals determined that the superior court erred in determining that the agency funding factor weighed in favor of functional equivalence. *Horvath*, 31 Wn. App. 2d at 571 n. 18. Nonetheless, the Court noted that this error "does not change the outcome of this matter." *Id.* The appellate court's opinion does not indicate any other disagreement with the superior court's analysis as to any other factor, and the superior court determined each of the remaining three *Telford* factors weighed *against* functional equivalence. CP 742. Accordingly,

whether reviewed for an abuse of discretion or de novo, the outcome is the same: DBIA Services is not subject to the PRA.

Further, the dispositive question in this case was not the standard of review, but whether the *Telford* factors should be applied to the "MID," as Petitioner claimed, or DBIA Services, the entity to which he directed his records request and the entity he sued. *See, e.g.*, Appellant's Br. at 17 ("Throughout the litigation before the trial court, Mr. Horvath sought to hold MID BIA—not DBIA—subject to the PRA."). As both the superior court and the Court of Appeals correctly decided, the fact-specific *Telford* analysis must be applied to DBIA Services. *Horvath*, 31 Wn. App. 2d at 573–74. Analyzed appropriately on the uncontested facts, DBIA Services is plainly not directly subject to the PRA.

IV. CONCLUSION

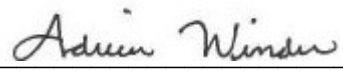
This case does not warrant this Court's review. Under any standard of review, the undisputed facts and well-established law demonstrate that the entity named as the defendant in this lawsuit—DBIA Services—is not the functional equivalent of a public agency or directly subject to the Public Records Act under *Telford*. The petition for review should be denied.

* * *

RAP 18.17(b) Certificate of Compliance with Word Limitations: The undersigned attorneys certify that this pleading contains 2,833 words, in compliance with RAP 18.17(c).

Respectfully submitted this 2nd day of January, 2025.

FOSTER GARVEY PC



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CERTIFICATE OF SERVICE

I hereby certify that I am a legal assistant at Foster Garvey PC and that on January 2, 2025, I filed this pleading with the Washington Supreme Court and served the pleading via e-mail on the following:

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

Executed at Seattle, Washington, on January 2, 2025.

/s/ McKenna Filler
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January 02, 2025 - 4:00 PM

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