

NO. 92846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALYNE FORTGANG,

Petitioner,

v.

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

Respondent.

**BRIEF OF *AMICI CURIAE* SERVICE PROVIDERS
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**

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Table of Contents

I.	INTRODUCTION	1
II.	IDENTITY AND INTEREST OF <i>AMICI</i>	2
III.	ARGUMENT AND AUTHORITY.....	6
	A. The <i>Telford</i> factors should only be applied after a court determines that it is ambiguous whether the subject of a PRA request is a state or local agency.	6
	1. Applying the <i>Telford</i> factors to unambiguously private entities is inconsistent with the case law.....	6
	2. Application of the <i>Telford</i> factors to unambiguously private entities is inconsistent with the structure and purpose of the PRA.	8
	B. If the <i>Telford</i> factors apply, little weight should be placed upon the amount of government funding.	11
	C. If the <i>Telford</i> factors apply, little weight should be placed on the amount of government regulation; greater weight should be placed on the amount of day-to-day control over the entity.....	14
IV.	CONCLUSION.....	16

Table of Authorities

Cases

<i>Board of Trustees v. Freedom of Info. Comm’n</i> , 181 Conn. 544, 436 A.2d 266 (1980)	15
<i>Cedar Grove Composting, Inc. v. City of Marysville</i> , 188 Wn. App. 695, 354 P.3d 249 (2015)	14
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009)	8
<i>Clarke v. Tri-Cities Animal Care & Control Shelter</i> , 144 Wn. App. 185, 181 P.3d 881 (2008)	7
<i>Domestic Violence Servs. v. Freedom of Info. Comm’n</i> , 704 A.2d 827 (Conn. App. 1997)	13, 15
<i>Dow v. Caribou Chamber of Commerce & Indus.</i> , 884 A.2d 667 (Maine 2005)	12
<i>Fortgang v. Woodland Park Zoo</i> , 192 Wn. App. 418, 368 P.3d 211 (2016)	11
<i>Frederick v. City of Falls City</i> , 857 N.W.2d 569 (Neb. 2015)	12
<i>Fromer v. Freedom of Info. Comm’n</i> , 875 A.2d 590 (Conn. App. 2005)	15
<i>Research & Def. Fund v. Cmty Dev. Ass’n</i> , 133 Wn. App. 602, 137 P.3d 120 (2006)	6, 8, 12
<i>State ex rel. Oriana House, Inc. v. Montgomery</i> , 854 N.E.2d 193 (Ohio 2006)	12
<i>Telford v. Board of Comm’rs</i> , 95 Wn. App. 149, 974 P.2d 886 (1999)	passim
<i>Worthington v. WestNET</i> , 182 Wn.2d 500, 341 P.3d 905 (2015)	6, 7

Statutes

RCW 42.56.010	6, 9
RCW 42.56.030	1, 10
RCW 42.56.040	5, 9
RCW 42.56.070	9
RCW 42.56.140	10
RCW 42.56.152	5, 10
RCW 42.56.270	10
RCW 42.56.550	17

I. INTRODUCTION

The Public Records Act (“PRA”), RCW Chapter 42.56 *et seq.*, is a powerful tool that allows the people to stay informed “so that they may maintain control over the instruments they have created.” RCW 42.56.030. But an overly-expansive interpretation of the PRA may inadvertently provide control over private entities – entities the people did not create - by requiring them to provide information that was never intended to fall within the definition of a public record.

Most private entities are unambiguously not public agencies because they possess no material governmental attributes or characteristics. The appellate court below erred in not first considering whether the WPZS’s status as a public agency was ambiguous. There is no need to apply any test of functional equivalence unless it is *ambiguous* whether the entity is a public agency.

If, however, the Court adopts and applies a functional equivalent test, *Amici* agree with WPZS that it should adopt the factors set forth in *Telford v. Board of Comm’rs*, 95 Wn. App. 149, 974 P.2d 886 (1999). *Telford*, however, identified the four factors by label only—(1) government function, (2) government funding, (3) government control, and (4) entity’s origin—without articulating what facts within each label are important. Many private entities receive substantial funding through fee-for-services

and grants from government sources. Many private entities are subject to regulation and contractual restrictions which control some of their activities. *Telford* should be interpreted to clarify that receipt of substantial government funds and government regulation alone should not weigh heavily in favor of finding that a private entity is the functional equivalent of a public agency.

II. IDENTITY AND INTEREST OF AMICI

All *Amici* are incorporated as private entities in Washington state. They, or where applicable, their members, all provide educational, social or health services. They or their members all receive a substantial amount of their funding from government sources, on a fee-for-service or contractual basis.

Amicus SEIU Healthcare Northwest Training Partnership is a Washington Trust recognized by the IRS as a § 501(c)(3) tax-exempt educational trust. It provides training classes to long-term care workers. It receives payment from private employers and the state of Washington for tuition for its training services. Its private documents have been the subject of an alleged “public records request” under the Public Records Act. This dispute is pending in King County Superior Court before Judge Beth Andrus in an action titled, *Freedom Foundation v. SEIU Healthcare Northwest Training Partnership*, Cause No. 16-2-08924-1 SEA.

Amicus Association of Washington Public Hospital Districts (“AWPHD”) is a nonprofit membership organization representing Washington’s 53 public hospital districts. AWPHD provides education and training about the legal powers and duties of public hospital districts and advocacy on behalf of its members. AWPHD receives a portion of its revenues in the form of dues from public entities to the Public Records Act.

Amicus Community Health Plan of Washington (“CHPW”) is a nonprofit Washington corporation that manages the delivery of care to more than 300,000 Medicaid enrolled, underinsured and indigent Washington citizens. CHPW is a controlled affiliate of Community Health Network of Washington, a tax-exempt member organization created in 1992 by a group of Washington’s federally-qualified health centers. CHPW contracts with the Washington State Health Care Authority to provide managed care and other services to qualified beneficiaries of the joint federal and state funded Medicaid program, the federally-funded Medicare program, and other public and private health care insurance programs. CHPW receives almost all of its revenue from public sources.

Amicus Coordinated Care of Washington, Inc. is a Washington corporation, and is a managed care organization that provides health care services to members across Washington State. It is also the only managed

care plan to provide services to members under the Apple Health Foster Care program. It receives essentially all of its revenue from public sources.

Amicus Planned Parenthood of the Great Northwest and the Hawaiian Islands is a Washington nonprofit corporation recognized by the IRS as a 501(c)(3) tax-exempt organization. It provides a full-range of reproductive health services in Washington, Alaska, Idaho and Hawaii, including abortion services. Over one-half of its clients are covered by Medicaid, or receive discounted services because of state and federal grants

Amicus Washington State Hospital Association (“WSHA”) is a nonprofit membership organization representing Washington’s 105 community hospitals and several health-related organizations. WSHA works to improve the health of the people of the state by becoming involved in all matters affecting the delivery, quality, accessibility, affordability, and continuity of health care. Fifty-five of WSHA’s members are private nonprofit and for-profit hospitals that provide services to a significant number of state Medicaid patients on a fee-for-service and managed care basis and to public employees. WSHA itself receives a portion of its revenues in the form of dues from public entities subject to the Public Records Act.

All of the Service Providers recognize the importance of government transparency that is aided by the Public Records Act (“PRA”),

RCW Chapter 42.56. At the same time, the Service Providers' have been subjected to, or they fear their records may be subjected to, overreaching PRA requests that (1) seek private, non-public information, (2) divert needed resources away from mission or business-related activities in order to respond or object to the requests, or (3) are intended to undermine the missions and activities by those who disagree with those missions and activities.

The decision in this case interpreting the PRA and considering whether entities are functional equivalents of public agencies has the potential for far-reaching impact on *Amici* Service Providers. The impact would be devastating if the PRA is interpreted in such a way as to render private entities as public agencies simply because they (1) receive substantial government funding or (2) are subject to governmental regulation. If they are deemed functional public agencies, they may be subject to all of the provisions of the PRA, including, for example, the duty to designate a public information officer under RCW 42.56.152, to maintain a list of publicly available documents under RCW 42.56.040, and to sanctions under the PRA if they do not comply. For some Service Providers, such an outcome could force them to withdraw from contracting with governmental entities altogether.

III. ARGUMENT AND AUTHORITY

- A. **The *Telford* factors should only be applied after a court determines that it is ambiguous whether the subject of a PRA request is a state or local agency.**
1. **Applying the *Telford* factors to unambiguously private entities is inconsistent with the case law.**

The PRA defines an “agency” as follows:

“Agency” includes all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes 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.

RCW 42.56.010(1). If an entity is a public agency, there is no need to apply the *Telford* factors, because the entity is subject to the PRA. *See Worthington v. WestNET*, 182 Wn.2d 500, 508, n.6, 341 P.3d 905 (2015) (if interlocal agency had been an entity, it would clearly be a government agency and the *Telford* factors would be irrelevant). If an entity is not an agency, there is no need to apply the *Telford* factors because it is not subject to the PRA. *Research & Def. Fund v. Cmty Dev. Ass’n*, 133 Wn. App. 602, 607, 137 P.3d 120 (2006) (private nonprofit “possessed no material governmental attributes or characteristics”). Only if it is ambiguous whether an entity falls within the “agency” definition should a functional equivalent test be applied.

Amici agree with WPZS that the many private organizations that receive significant public funding or support clearly do not fall within the PRA's definition of "agency." See WPZS's Supp'l Br. at 4–9. These entities possess no material governmental attributes or characteristics and are outside this definition. There is no ambiguity as to that fact, and a court need not reach the *Telford* factors. In *Telford*, the court only articulated and applied a functional equivalency analysis after it determined the statute was ambiguous as applied to the "hybrid agencies" at issue there. *Telford*, 95 Wn. App. at 158.

In *Telford*, the independent nonprofits possessed material governmental attributes - their sole mission was to coordinate and support the functions of county administration. Similarly, in *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008), the court also recognized that it was ambiguous whether the private for-profit entity there was an "agency" before it considered the *Telford* factors. The governmental attribute of the entity in *Clarke* was that it was authorized to execute the County's police powers, activities that implicated due process concerns. *Id.* at 193. Both cases involved "private organizations that perform public functions." *Worthington*, 182 Wn.2d at 508, n.6.

In contrast, in *Research & Def. Fund, supra*, 133 Wn. App. at 607, the court correctly found the private nonprofit was unambiguously not an agency, without resorting to the *Telford* factors. Among other things, the nonprofit there did not make policy or legislate, did not execute or promulgate law or regulations or adjudicate disputes, and was not controlled by elected or appointed government officials. *Id.* at 608. The fact that it contracted with and received grants from the City of Spokane was not enough to create any ambiguity as to its status as an “agency” under the PRA. In *dicta*, the court then applied the *Telford* factors and determined the nonprofit would not qualify as a public agency under those factors. *Id.* at 608 (“applying *Telford* solely for argument, the result is the same”).

2. Application of the *Telford* factors to unambiguously private entities is inconsistent with the structure and purpose of the PRA.

If a private entity is deemed a “public agency” under the PRA, all of its written information becomes subject to a records request. The statute makes no allowance for an entity to be an “agency” for certain information but not for others. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (“either the entity maintaining a record is an agency under the PRA or it is not.”) There is no provision in the PRA for separating a private entity’s records into those that relate to its receipt of government

funding, for example, and those that relate solely to its own proprietary interests.

As an “agency,” the private entity would be subject to the broad definition of a “public record” in RCW 42.56.010(3). Read broadly, as the statute must be read, those records would include “any writing containing information relating to ... the performance of any ... proprietary function prepared, owned, used, or retained by any ... agency” In other words, if a private entity were an “agency” under the PRA, all of its otherwise proprietary records relating to internal decisions and activities that have nothing to do with the funding received become public records and are subject to disclosure. There is nothing in the PRA that suggests the Legislature intended the reach of the PRA to encompass information relating to the internal operations of private entities.

Moreover, an “agency” has compliance obligations under the PRA. If private entities are deemed “agencies,” will they be required to comply with those obligations, even though the obligations are not written to take into consideration the practicalities of such compliance? Those obligations include: (1) maintaining a list of certain of the entity’s publicly available documents, RCW 42.56.070(3); (2) publishing (if it is a “state” agency) procedures by which it makes decisions in the Washington Administrative Code, RCW 42.56.040; (3) appointing a public records officer who must

take required mandatory training under RCW 42.56.152; and (4) submitting exemption requests to the public records exemption accountability committee established in RCW 42.56.140(2). There is nothing to suggest the Legislature intended purely private entities to comply with these provisions that assume a connection with governmental infrastructure that private entities do not possess.

The statute's exemption provisions could not easily be applied to private entities. For example, the PRA exempts many types of private documents, including certain financial, commercial, and proprietary information, from disclosure. RCW 42.56.270. If a private entity provides a government agency proprietary information as defined in that section, that information is exempt from disclosure under the PRA. But if the private entity itself were deemed to be an "agency," the same proprietary information in its own files would not be exempt because that information was not received from an outside entity. It makes no sense to interpret the PRA in such a way as to afford less protection to an entity's confidential, financial or proprietary information than the statute intended.

The statute is to be broadly construed, and its exemptions narrowly construed, so that "the people ... may maintain control over the instruments that they have created." RCW 42.56.030. The people, however, are not the "creators" of private entities. There is no public interest in controlling the

private activities of private entities. These questions and problems underscore that fact that the PRA was not intended to apply to private entities.

B. If the *Telford* factors apply, little weight should be placed upon the amount of government funding.

If the Court considers and balances the *Telford* factors, the amount of government funding should not be given great weight. *Amici* agree with the WPZS that if the amount of government funding is an insignificant amount of an entity's overall budget, that weighs heavily against finding that the entity is a public agency. The converse, however, is not true. The mere fact that an agency receives substantial government funding, either in total dollars or as a percentage, should not tip the scales in favor of finding the entity an agency.¹ If great weight is placed on the percentage of public funding received by a private entity, many private entities could unwittingly become "public agencies" just because they receive much of their revenue, on a fee-for-service basis or through grants, from government sources, even though they act wholly independently of the funding source.

¹ On this point, *Amici* disagree with the Court of Appeals' suggestion that "the government funding factor weighs in favor of applying the PRA when the entity at issue receives the majority of its revenue from public funds." *Fortgang v. Woodland Park Zoo*, 192 Wn. App. 418, 433, 368 P.3d 211 (2016).

Washington courts have recognized that the percentage of government funding alone bears little weight. In *Research & Def. Fund*, 133 Wn. App. at 609, the court would have placed little weight on the fact that the entity received 75% of its funding from public sources through arm's-length contractual arrangements.

Courts in other jurisdictions that have applied a similar functional equivalence test have also placed little weight on the fact that a private entity receives most of its funding from government sources.

The fact that an entity receives a substantial amount of government funding is also not sufficient to render that entity a public agency. If this were so, any private organization that received grant money, for example, could arguably be deemed a public agency.

Dow v. Caribou Chamber of Commerce & Indus., 884 A.2d 667, 671 (Maine 2005) (fact that over 60% of private entity's funding was from government grants insufficient to deem entity a public agency). *See also*, *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193, 201 (Ohio 2006) (fact that entity received 88% of funding from government sources insufficient to tip scales); *Frederick v. City of Falls City*, 857 N.W.2d 569, 579 (Neb. 2015) (little weight placed on fact that a majority of funding was from government sources, because otherwise "any private organization that received grant money ... could arguably be deemed a public agency"); *Domestic Violence Servs. v. Freedom of Info. Comm'n*, 704 A.2d 827, 833

(Conn. App. 1997) (majority of funding from government sources did not satisfy government funding prong).

The question should be neither the percentage nor the dollar amount received. Rather, the analysis should consider, in addition to the amount or level of funding, the nature of the government's financial involvement with the entity. There must be something more than payment for services or an arm's-length contractual relationship between the government and the entity before affording much weight to this factor.

In *Telford*, the "government funding" analysis was not limited to the amount of funding the entities received (although "most" of their funding was from government sources). Instead, it considered also the fact that the funding received was not on a fee-for-service basis, the payments were outside the ordinary method of distributing funds to private entities, and the subject entities there had access to the financial infrastructure of the government. It was a combination of all these facts that put weight on the "government funding" factor. *Telford*, 95 Wn. App. at 164-65.

A balance that places minimal emphasis on the amount of funding received does not shield truly public documents from legitimate PRA requests. Private entities that receive government funding and contracts must report to the government and account for the funds spent. Those non-exempt documents created by a private entity and provided to a true

government agency are subject to the PRA. Moreover, if a private entity acts as a functional equivalent of a government employee with respect to particular government funding or contract payments at issue, the government cannot hide the documents by leaving them in the hands of the private entity. *See Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 720, 354 P.3d 249 (2015) (documents in the possession of an entity that acted as the functional equivalent of an employee were subject to a PRA request). But documents created for a private entity's own use—like the WPZS documents at issue here—should not be subject to the PRA.

C. If the *Telford* factors apply, little weight should be placed on the amount of government regulation; greater weight should be placed on the amount of day-to-day control over the entity.

Under the *Telford* factors, if adopted, the balance should weigh heavily on the amount of day-to-day control over the private entity by the government agency. It should not weigh heavily on whether the private entity is subject to government regulation.

Although *Telford* labeled the third factor of its functional equivalent test as “government control,” in weighing that factor, it required much more than mere regulation. Most significant was that the entities there were “completely controlled by elected and appointed county officials,” and there

was no private sector involvement or membership. *Telford*, 95 Wn. App. at 165

Petitioner inaccurately claims that *Telford* “rejected” a requirement for substantial, day-to-day government control by adopting the four-factor test from *Board of Trustees v. Freedom of Info. Comm’n*, 181 Conn. 544, 436 A.2d 266, 270–71 (1980). That Connecticut test has been interpreted and applied by courts in that state to require day-to-day control. *Domestic Violence Servs. v. Freedom of Info. Comm’n*, , 704 A.2d 827, 833 (Conn. App. 1997) (“because the government does not have day-to-day involvement in the ongoing activities of the [private entity], the third prong of the functional equivalent test is not met”); *Fromer v. Freedom of Info. Comm’n*, 875 A.2d 590, 594 (Conn. App. 2005) (the key to determining whether an entity is a public agency “is whether the government is really involved in the care of the program”).

Control of certain activities through government regulation is a poor indicator of the control necessary to render a private entity a public agency. Regulations apply to many private entities. For example, a building contractor with a government contract is subject, like all contractors, to the building codes and will be subject to inspection and regulation. That does not make the contractor a government “agency” for purposes of the PRA. Similarly, private hospitals and nursing homes are subject to licensing,

inspection, and extensive regulatory control. There is much government oversight over these outside entities, but the government does not “control” the entity on a day-to-day basis.

Neither should “control” through contractual agreements be the touchstone of government equivalency. A lease agreement, for example, almost always restricts or controls the manner in which a tenant can use leased property. That does not mean that the landlord “controls” the tenant. A private entity should be able to contract, at arm’s length, its various rights and responsibilities with a government agency without fearing that the contractual arrangement may subject it to the PRA.

Significant government involvement in a private entity’s governance and activities should be required before placing weight on this factor. If the government has no control over the decision-making body or personnel—the board of directors or executive director, for example—or has no control over how the entity operates, it has no control. Contractual or statutory requirements or regulations are insufficient evidence of governmental control.

IV. CONCLUSION

An expansive interpretation of a “public agency” that arguably sweeps many private service providers into its definition would at best impose untenable administrative burdens never intended to be shouldered

by private entities and at worst could turn the PRA into a tactical nuclear weapon aimed at destroying private entities with missions disfavored by the requesters. Private entities like *Amici* here that receive substantial government funding may be subject to PRA requests simply because of the possibility they could be deemed a public agency. The private entities will incur substantial legal fees in their efforts to prove they are not the functional equivalent of public agencies. In the alternative, they will be forced to follow all the steps outlined above to comply with the PRA. If they erroneously, but in good faith, contest their status as a public agency, they run the risk of having to pay the requester's attorney fees in addition to penalties of up to \$100 per day per document under RCW 42.56.550(4). Entities may withdraw from contracting with the government altogether. As a result, an expansion of the definition could have an unintended chilling effect on private entities' ability to provide needed services.

DATED: September 12, 2016.

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Certificate of Service

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on September 12, 2016, a true copy of the foregoing BRIEF OF AMICI CURIAE SERVICE PROVIDERS was served by First-Class mail and email upon counsel of record as indicated below:

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