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NO. 36054-7-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ANDREA WILKERSON,

Respondent,

v.

EUGENE MEDUTIS,

Respondent,

v.

STATE OF WASHINGTON, by and through its agency subdivision,
DEPARTMENT OF CORRECTIONS

Appellant.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

The Department of Corrections (Department) appeals the trial court's permanent injunction prohibiting the Department from releasing any portion of records of an internal investigation of one of its employees to requester Eugene Medutis. Through this appeal, the Department does not address the merits of whether Mr. Medutis ought to ultimately receive these records; rather, it challenges the legally untenable substance of the trial court's order. The trial court erred in concluding that these records—records of a public agency's investigation of a public employee—were not public records under the Public Records Act (PRA). Because the trial court's injunction was based on the erroneous conclusion that the requested records were not public records, this Court should reverse and remand for further proceedings.

In addition, the trial court further erred in issuing an injunction that was significantly broader than appropriate under the facts of this case. Specifically, the trial court disregarded the narrow evidence and controversy before it and enjoined the release of these records in response to any request by any person. In addition to reversing the trial court's conclusion that the employment investigation records are not public records, this Court should correct the trial court's misinterpretation of the appropriate scope of an injunction under RCW 42.56.540 based on the

evidence before the trial court. This Court should therefore reverse and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that records of the Department's personnel investigation of a Department employee are not public records under RCW 42.56 et. seq.

2. The trial court erred in enjoining the release of records beyond the scope of the public record request, parties, and evidence presented.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in determining that records of a Department personnel investigation conducted by the Department are not public records as defined by the PRA?

2. Did the trial court err in failing to appropriately tailor the injunction to the request, parties, and evidence before it by issuing an overly broad injunction that does not conform to the evidence and interferes with the rights of third parties to request and obtain these records in the future?

IV. STATEMENT OF THE CASE

In November 2017 the Department received a public records request from an employee regarding a disciplinary investigation of another Department employee. In this request, Mr. Medutis sought the disciplinary

findings, related emails, and other communications relating to allegations that Ms. Wilkerson provided personal information to an offender regarding Department staff. CP 33. The Department timely acknowledged the request and assigned it tracking number PRU-50301. CP 33.

The Department subsequently searched for and gathered 237 pages of records in its initial search. CP 29-30. The records include a work safety plan, summaries of interviews with numerous staff and offenders, incident reports, and a memorandum of concern—all related to a just cause investigation where no formal disciplinary action was taken. CP 29-30. These records became the first installment of records in response to PRU-50301, but did not include the entirety of potentially responsive records. *See* CP 29-30. These 237 pages were gathered from Human Resources and involved staff. CP 29-30. Except for minor redactions, the Department determined that the records were not exempt from production under the PRA. CP 30. Because of the nature of the request and records identified, the Department provided Ms. Wilkerson and a number of other Department staff members notification under RCW 42.56.540 that the records were going to be released to Mr. Medutis. CP 30.

Ms. Wilkerson filed this action in Walla Walla Superior Court requesting that the court enjoin the production of records under

RCW 42.56.540. CP 3-6. Ms. Wilkerson alleged that the request was intended for harassment, the records were not of public interest, and that the release of the records would place her at risk. CP 3-6. The court entered a temporary restraining order enjoining the Department from releasing the records to Mr. Medutis. CP 14-16. The court also set a future date for a permanent injunction hearing. CP 14-16.

Both the Department and Mr. Medutis submitted responses to Ms. Wilkerson's motion. CP 22-33, 38-42. Mr. Medutis, acting pro se, stated that that he had no intent to harass Ms. Wilkerson and argued that records of employment investigations are public records and not exempt under the PRA. CP 38-42. The Department took no position on Mr. Medutis's intent but explained to the court why it had determined that the records were non-exempt.¹ At the March 5, 2018 hearing, the court ordered that the 237 pages of the initial installment be submitted for in camera review. VRP 4.

After reviewing the 237 pages in camera and without allowing further argument, the trial court ruled that the Department could not

¹ The PRU-50301 request involved a requester who was a Department employee (Mr. Medutis) and sought records about another Department employee (Ms. Wilkerson). Mr. Medutis and Ms. Wilkerson have significantly different views about whether the records ought to be released and the purpose behind the request. In the trial court, the Department attempted to avoid advocating for one particular view of the facts or taking a position on who should ultimately prevail. Instead, the Department explained its legal position as to why the records are non-exempt public records and provided information to aid the trial court in making an informed decision.

release the records. Ms. Wilkerson drafted and submitted a proposed order. *See* CP 61. Pursuant to the local court rules, the Department submitted objections to the scope and language of Ms. Wilkerson’s proposed order. CP 53-57. The trial court subsequently entered an order permanently enjoining the release of the 237 pages because they were “not public records as defined by Chapter 42.56 RCW and its interpretive caselaw.” CP 64-66. The operative language is: “The State of Washington Department of Corrections is hereby permanently restrained and enjoined from releasing the records identified as PRU #50301, pages 1-237, herein....” CP 65.

The trial court’s order injected uncertainty into the definition of a “public record” and imposed a significant burden in applying this order to future unspecified requests. As such, the Department appeals this order for clarity on the appropriate interpretation of the PRA. Because the trial court’s order was based on the erroneous conclusion that the records were not public records and was overly broad, this Court should reverse.²

² As it has maintained throughout this contentious litigation between two of its employees, the Department does not take an interest in whether the records requested ought to be provided to Mr. Medutis. CP 22-33. This Court can leave that question to the trial court on remand.

V. STANDARD OF REVIEW

A decision granting or denying an injunction under the PRA is reviewed de novo. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 418 P.3d 102 (2018). Where the record consists only of affidavits, memoranda of law, and other documentary evidence, an appellate court stands in the same position as the trial court in reviewing agency action challenged under the PRA. *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 328 P.3d 905 (2014).

VI. ARGUMENT

The trial court erred in concluding that the Department's records of Ms. Wilkerson's personnel investigation are not public records. Independent of this error, the trial court also erred in issuing an overly broad injunction. Such broad relief is not appropriate based on the evidence or argument presented in this case and is in conflict with the general rules governing the scope of injunctions. This injunction is also inconsistent with the liberal disclosure policy of the PRA, inappropriately interferes with other requesters' ability to receive the same records, and creates uncertainty and administrative burden for the Department in complying with this order. This Court should reverse.

A. The Trial Court Erred by Determining that Records of Staff Misconduct Investigations are not Public Records

The PRA is a “strongly-worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA requires state and local agencies to disclose all public records upon request, unless the record falls within a specific exemption. RCW 42.56.070(1). If a portion of a public record is exempt, that portion should be redacted and the remainder disclosed. *Id.*

The requirements of the PRA only apply where records are indeed public records under the statute. *See Germeau v. Mason Cty.*, 166 Wn. App. 789, 271 P.3d 932 (2012). As such, the issue of whether records are public records under the PRA is distinct from whether they are exempt from production under the PRA. *See Tiberino v. Spokane Cty.*, 103 Wn. App. 680, 687, 13 P.3d 1104 (2000) (first analyzing whether the records were public records then considering whether they were exempt under the PRA). Under the statutory definition, a public record is 1) a writing, 2) containing information relating to the conduct of government or the performance of any governmental or proprietary function, and 3) prepared, owned, used, or retained by any state or local agency. RCW 42.56.010(3); *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015). There does not appear to be any reasonable dispute that the records in question are “writings” as defined by the

PRA, so the primary inquiries are whether these records meet the second and third elements of the definition.

1. The Department’s personnel investigation records relate to the conduct of government

The records meet the second element of the “public record” definition because they relate to the conduct of a state agency. In furtherance of the liberal disclosure principles underpinning the PRA, a record’s relationship to the conduct of government is interpreted broadly. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 747, 958 P.2d 260 (1998). Records of a personnel investigation conducted by and for a state agency pertaining to a state employee carrying out her official duties plainly relate to the conduct of government. These types of investigations are integral in discovering employee misconduct by individuals the Department employs to carry out the essential functions of the agency as directed by Department policy. Not only are these records related to the conduct of the individuals who are subject to an employment investigation, but these records are also related to the conduct of the Department’s investigation of such misconduct. *See Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 905, 346 P.3d 737 (2015) (“A public employer’s investigation is an act of the government....”) In this way, it is hard to imagine records more closely related to the conduct of government than employment

investigations of the individuals entrusted to carry out the work of a state agency.

2. The records of Ms. Wilkerson’s personnel investigation are prepared, owned, used, and retained by the Department

The records satisfy the third element of the “public record” definition because the Department prepares, owns, uses, and retains these records. An agency uses a record when the requested record bears a nexus with the agency’s decision-making process. *Concerned Ratepayers Ass’n v. Pub. Util. Dist. No. 1 of Clark Cty.*, 138 Wn.2d 950, 960, 983 P.2d 635 (1999). Similarly, records are prepared by an agency when “put together” or “put into written form” by agency employees. *Nissen*, 183 Wn.2d at 876 (citing *Dawson v. Daly*, 120 Wn.2d 782, 789, 845 P.2d 995 (1993) (public records were “prepared by the prosecutor’s office” because two employees created and compiled them)). Here, the Department conducted a just cause personnel investigation relating to allegations that Ms. Wilkerson had been sharing personal information with an offender. CP 29-30. The 237 pages of records were created and generated as a result of the Department’s investigation, and include a work safety plan, interview summaries, incident reports, and a resulting memorandum of concern. CP 29. These records of the Department’s investigation of a Department employee are therefore prepared and used by the Department.

The record also demonstrates that the Department both owns and retains the records at issue here, further satisfying the third element of the “public record” definition. In the PRA context, “own” means “to have or hold [it] as property” and “retain” means “to hold or continue to hold in possession or use.” *Nissen*, 183 Wn. 2d at 881. The declaration of the Department’s public records officer demonstrates that the records were gathered through contacting Department staff and Human Resources. CP 29. This is sufficient to show that the Department both owns and retains the records at issue.

The Department’s preparation, ownership, use, and retention of the records would each be an independent basis to meet the third element of the definition of a public record. *See* RCW 42.56.010(3). The Department has demonstrated that it meets all four alternative criteria under the third element of the “public record” definition in RCW 42.56.010(3). The trial court improperly ordered the complete withholding of records that are public records under the plain language of the PRA. This Court should reverse that error.

3. The trial court’s conclusion that Ms. Wilkerson’s personnel investigation records are not public records conflicts with PRA precedent

The trial court’s holding that personnel investigation records are not public records is almost impossible to square with the numerous appellate decisions that have analyzed whether employee investigation records are

releasable under the PRA. Although not squarely addressing whether such records are public records under RCW 42.56.010(3), the wealth of PRA caselaw considering these records presumes that records of employment investigations are public records. For example, in *Bellevue John Does 1-11 v. Bellevue School District #405*, the court considered records relating to allegations of teachers' sexual misconduct and held that letters of counseling or direction mentioning substantiated misconduct are not exempt and must be disclosed under the PRA. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008). And in *Bainbridge Island Police Guild v. City of Puyallup*, the court similarly considered the disclosure of investigations regarding unsubstantiated sexual misconduct against a police officer and held that the records were not exempt and must be disclosed with the officer's name redacted. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 404, 259 P.3d 190 (2011). These are a few of many cases that analyze the application of exemptions to personnel investigations. *See, e.g. Predisik*, 182 Wn. 2d 896 (holding that records revealing the existence of an ongoing investigation of school district employees are not exempt and must be disclosed in their entirety); *West v. Port of Olympia*, 183 Wn. App. 306, 333 P.3d 488 (2014) (records of whistleblower complaint and investigation alleging failure to follow Port policies that could rise to a criminal offense is not exempt under

the PRA). If investigations of public employees were not public records, it would be nonsensical for these numerous courts to have allowed the release of such records in response to PRA requests.

4. The trial court's ruling that the records were not public records is inconsistent with the framing of the issues and the briefing of the parties

Even if this Court determines that records of Ms. Wilkerson's personnel investigation are not public records based on the record before it, this Court should remand to provide the Department an opportunity to adequately address this argument. At no time in the proceedings did Ms. Wilkerson argue that the records were not public records. Instead, throughout the proceeding, Ms. Wilkerson, Mr. Medutis, and the Department framed the issue as whether the records were exempt from disclosure, thereby assuming the threshold issue that these records were public records. For example, Ms. Wilkerson's petition frames the issue as whether an "exception" to the PRA applies to the records and then cites a number of specific exemptions. CP 5. Ms. Wilkerson's motion for injunctive relief similarly relies upon specific exemptions she believes may apply to the records. CP 8. In response to this, both Mr. Medutis and the Department framed their responsive pleadings in the same manner and did not address the issue of whether the records were public records. It was not

until Ms. Wilkerson's proposed order that any party framed the issue as whether the records were public records.

Ms. Wilkerson's failure to raise the issue in the trial court likely waives any argument that the records are not public records and precludes pursuing this argument on appeal. More importantly, the order's departure from the issues as framed and briefed by the parties also deprived the Department of an opportunity to submit evidence and argument relating to this issue. Without notice that this was an issue in the proceedings below, the Department had no opportunity to address this issue factually or legally. The trial court's error is compounded by the failure to articulate any findings in the order which would clarify the ruling that personnel records of a state agency are not public records.

Therefore, the trial court erred in holding that records of a state agency's personnel investigation were not public records, and this Court should reverse on that basis.

B. The Trial Court Erred in Issuing an Overbroad Injunction, Which Improperly Affects the Rights of Nonparties and the Disclosure of Records Beyond the PRA

The trial court's far-reaching permanent injunction is incompatible with the principles of injunctive relief and the purpose of the PRA. Injunctions are to be narrowly tailored to remedy the specific harms shown and should not be more comprehensive than the scope of the controversy

before it. See *Kitsap Cty. v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986) (limiting injunction to prohibit operation of the business at issue and reversing portion which attempted to enjoin operation of all of defendants’ potential future erotic dance studios); *Hoover v. Warner*, 189 Wn. App. 509, 528–29, 358 P.3d 1174 (2015) (vacating injunction which precluded defendant from engaging in conduct broader than the conduct which was challenged); *Whatcom Cty. v. Kane*, 31 Wn. App. 250, 640 P.2d 1075 (1981) (“The trial court must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses....”). This is consistent with the principles of judicial restraint, which cautions against advisory opinions. See *Griffith v. Dep’t of Motor Vehicles*, 23 Wn. App. 722, 598 P.2d 1377 (1979) (rejecting challenge to an injunction holding that the scope of the injunction was proportionate to the threat of harm alleged in the action.)

The scope of injunctions is also conscripted by the civil rules. Civil Rule 65(d) requires that any injunction be reduced to a written order and “shall be specific in terms; shall describe in reasonable detail...the act or acts sought to be restrained; and is binding only upon the parties to the action...and upon those persons in active concert [with a party]....” Civil Rule 65(d). Together, these requirements limit the scope of an injunction by requiring that the terms be specific and clear and bind only parties who

have an opportunity to participate in the proceeding.³ Applying these principles to the injunction and record in this case requires the reversal of the trial court's order, because the evidence, argument, and parties before the trial court do not warrant an injunction prohibiting the release of these records to any party under any circumstances.

The requirement of appropriately tailored injunctions is particularly important in the context of PRA injunctions because of the liberal disclosure policies of the PRA. The Act mandates broad disclosure requiring that its provisions be construed liberally and its exemptions construed narrowly. *White v. City of Lakewood*, 194 Wn. App. 778, 374 P.3d 286 (2016). Where a record contains both exempt and non-exempt information, the exempt information must be redacted to allow for production of the remainder of the record. RCW 42.56.210(1); *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994).

The trial court's ruling is inconsistent with this principle in three important ways: the injunction erroneously interferes with the rights of third parties without providing them notice or an opportunity to be heard; the injunction affects the production of records beyond the PRA; and the

³ The Department does not question a court's ability to issue an order that prevents a party from using other individuals or other efforts to circumvent an injunction.

sweeping nature of the injunction is not supported by the evidence or argument of the parties. The injunction reads: “The State of Washington Department of Corrections is hereby permanently restrained and enjoined from releasing the records identified as PRU #50301, pages 1-237, herein, and any additional pages thereafter located [illegible.]” CP 72. As written, the injunction makes no reference to the individuals or circumstances that could allow for the release of these records. Without any such limiting language, the order forbids the Department from providing these 237 pages of records to any person for any purpose. This overbroad ruling extends beyond the controversy and evidence before the trial court and violates the PRA’s liberal disclosure policies.

1. The trial court’s order improperly affects the rights of third parties who are not parties to this action

Because of the sweeping language without limitations, the order prevents release of these 237 pages to any person under any circumstances. This order preventing disclosure in a wholesale manner interferes with the rights of any future person who may be entitled to these records without notice or an opportunity to participate in this proceeding. Specifically, this order frustrates the rights of any future PRA requesters.⁴ Requesters are

⁴ The interference is not limited to other requests under the PRA as argued in the following section, but the interference is especially sharp in light of the caselaw and policies underlying the PRA.

entitled to an opportunity to participate in an action in which a party is seeking to prevent the release of records to that requester. *See Burt v. Dep't of Corr.*, 168 Wn.2d 828, 231 P.3d 191 (2010), *as corrected* (Sept. 14, 2010) (holding that public records requesters are necessary parties to third-party injunction proceedings under CR 19(a)). The broad injunction made it such that this proceeding was the only opportunity for any person who may have a desire or need for these records in the future to defend their right to access these records. However, because those people had no notice of these proceedings and will have had no opportunity to intervene into these proceedings, the participation of these individuals is impossible. A properly tailored injunction would have avoided this untenable situation and demonstrates why the Court should reverse.

The individualized nature of relief under an RCW 42.56.540 injunction is also confirmed through the fact-specific inquiry that RCW 42.56.540 requires. In order for an injunction to be issued, a trial court must find that the release of records would not be in the public interest and that disclosure would substantially and irreparably damage a person or governmental interest. *Progressive Animal Welfare Soc'y*, 125 Wn. 2d at 257. Because of these equity considerations, courts generally consider the identity of the requester and the circumstances, to include timing and purpose, of the request. For example, a court very well may weigh a

requester's well-documented harassment of state employees differently than a media requester's legitimate need to protect the public's right to know. *See, e.g., Belo Mgmt. Servs., Inc. v. ClickA Network*, 184 Wn. App. 649, 661, 343 P.3d 370, 377 (2014)(recognizing the media's role in the public's right to know how public funds are spent); *DeLong v. Parmelee*, 157 Wn. App. 119, 152-53, 236 P.3d 936 (2010) (considering inmate Parmelee's stated intent to create and distribute false sexually violent predator flyers with the requested DOC employee pictures).

The trial court's error in burdening the rights of third parties without an opportunity to be heard is particularly problematic here where the trial court ordered the complete withholding of records despite the PRA's preference for redaction over complete withholding. *See* RCW 42.56.210(1); *Progressive Animal Welfare Soc'y*, 125 Wn. 2d at 261. Here, the order contains no findings or explanation demonstrating that the court engaged in a sufficiently record-specific inquiry. This is contrary to the PRA's liberal disclosure policy and demonstrates the danger of an overbroad order applicable to parties beyond the parties of the case.

Regardless of whether the specific circumstances of a request may or may not change the outcome of an RCW 42.56.540 action, the nature of the overbroad relief provided here enjoins all future requesters from

receiving any portion of the records without notice or opportunity to participate in this proceeding. This is in error.

2. The injunction entered by the trial court here enjoined any other production of these 237 pages through any process even beyond the PRA, creating an untenable agency burden

In this same way, the relief afforded in the trial court's order is overbroad because it provides no limitation to production under the PRA. As written, this order would interfere with the Department's production of these 237 pages in response to a subpoena, written discovery, or other mechanism. In each of these circumstances, parties have legal rights, procedures, and standards to determine the appropriateness of production. But the trial court's order here supplants those procedures and forecloses any opportunity for entities to pursue these records through other processes where they may otherwise have a right to receive these records.

The prospect of such a broad injunction also places the Department in an untenable position in complying with this order. Requiring the Department, a large state agency with thousands of employees, to locate all copies of these 237 pages of records and essentially sequester these records so they are not produced in any manner is unmanageable. In addition to the administrative burden, this order creates uncertainty for the Department in how to reconcile competing legal obligations—to comply with an overly

broad order or meet its obligations in response to a discovery request or future public record request. This tension further illustrates the error in the trial court's order and this Court should reverse.

3. The breadth of the injunction entered by the trial court is not supported by the record

Even if the injunction was not in conflict with the principles of the PRA, the trial court erred by issuing an injunction far more broad than the evidence supports. The sweeping language forbidding any release of the records to any person is untethered to the evidence before the trial court. Specifically, the entirety of the factual trial court record consisted of two declarations of Ms. Wilkerson and a declaration of the Department's public records officer. CP 11-13, 28-30, 43-46. While the first declaration of Ms. Wilkerson contains allegations of broader harassment, this action was initiated because of the potential release of records to Mr. Medutis under PRU-50301. Instead, the injunction is far broader than even Ms. Wilkerson's evidence would support, as the evidence focuses on the potential release of records to Mr. Medutis in response to PRU-50301.

The evidence also does not support a finding that there is any well grounded fear of immediate invasion—that is to say that there is no evidence of Mr. Medutis's intent to submit other public record requests regarding Ms. Wilkerson. Much like the court in *Kitsap Cty.* limited the

injunctive relief to the challenged business at issue, so too should this court limit the relief to the request and requester at issue. *See Kitsap Cty*, 106 Wn.2d at 143. The absence of evidence to support the trial court’s sweeping injunction is especially poignant given the failure of the order to “set forth the reasons for its issuance” as required in Civil Rule 65(d). Without this specificity in the order and the absence of evidence to support the scope of relief, the overbroad and unsupported injunction must be reversed.

The trial court erred in issuing an injunction prohibiting disclosure of 237 pages to any entity through any process irrespective of the narrow scope of the matter before it. The trial court’s sweeping injunction is also inconsistent with the PRA’s general policy of promoting disclosure. This ruling interfered with the rights of third parties who may need these records in the future and places a nearly unenforceable burden upon the Department. Lastly, the far-reaching injunction is unsupported by the factual record or legal arguments furthered by the parties. This Court should reverse.

VII. CONCLUSION

The trial court erred when it enjoined the Department from providing 237 pages of its personnel investigation records to any entity under any circumstances based on the trial court’s erroneous conclusion that records of a personnel investigation are not public records. This Court should reverse because records of a personnel investigation of a Department

employee are public records under RCW 42.56.010(3) and the trial court failed to tailor its injunction to the controversy before it. This Court should reverse these errors and remand this matter to the trial court for consideration of whether the records at issue are exempt under the PRA and, if so, the entry of an appropriately tailored order.

RESPECTFULLY SUBMITTED this 24th day of September, 2018.

ROBERT W. FERGUSON
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s/ Cassie B. vanRoojen
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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing OPENING BRIEF OF APPELLANT with the Clerk of the Court using the electronic filing system and I hereby certify that I have served as noted below the document to the following case participants:

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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 this 24th day of September, 2018, at Olympia,
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