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Court of Appeals No. 39333-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL W. GENDLER,

Respondent,

v.

JOHN R. BATISTE, et al.,

Petitioners.

Supplemental Brief of Petitioner – State of Washington

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I. INTRODUCTION

No party disputes the ruling from the court of appeals that RCW 42.56, the Public Records Act (PRA), could not be used to require the Washington State Department of Transportation (DOT) to produce collision reports from the protected database due to the federal privilege imposed by 23 U.S.C. § 409. *Gendler v. Batiste*, 158 Wn. App. 661, 675, 242 P.3d 947 (2010). This conclusion is driven by the undisputed facts that the specific form of the compilation of reports sought by the plaintiff's PRA, bicycle collisions on the Montlake Bridge, can only be accurately produced by accessing the protected database that was built and maintained by DOT for compliance with exacting Federal Highway Administration reporting requirements. 23 U.S.C. § 152. CP at 194-202.

The Washington State Patrol (WSP) does not collect or compile collision records by precise location, does not have the capability to accurately produce collision records at a precise location without accessing the protected § 152 database, and has no law enforcement need to be able to compile collision reports with the precision required by DOT. CP at 202.

The conclusion by the court of appeals that the WSP has a legal obligation under RCW 46.52.060 to produce collision reports in response to a public records request is contrary to the previous express ruling by

this Court in *Guillen. Pierce County v. Guillen*, 144 Wn.2d 696, 714, 31 P.3d 628 (2001). Nor can the court of appeals decision be reconciled with the interpretation of § 409 mandated by the U.S. Supreme Court in *Pierce Cnty. v. Guillen*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). The court of appeals' decision requiring the WSP to access DOT's § 152 database in response to public records requests violates both state law and the federal § 409 privilege just as effectively as simply allowing the plaintiff to demand the collision reports directly from DOT.

The Court of Appeals should be reversed because: 1) collision reports are compiled and collected by DOT for federal reporting purposes and, therefore, come within the § 409 privilege, 2) the WSP does not collect or compile collision reports in a manner that would allow the WSP to accurately compile collision reports at locations as precise as the Montlake Bridge, and 3) collision reports are confidential under the plain language of RCW 46.52.080 and, therefore, are not subject to public disclosure requests.

II. ASSIGNMENTS OF ERROR

1. Where the Plaintiff used the PRA to demand a particular compilation of collision reports that can only be accurately produced from the protected § 409 database, did the court of appeals err in ruling the collision reports had to be produced if the PRA was directed to the WSP

even though the identical request would be barred if DOT was directly asked to produce the reports?

2. Where this court previously ruled that collision reports are confidential under state law and are not subject to public disclosure requests under RCW 46.52.080, did the court of appeals err in requiring the WSP to produce collision reports in response to a PRA?

III. STATEMENT OF THE CASE

A. Background

Mr. Gendler was injured in a bicycle accident while riding on a State road (the Montlake Bridge) on October 28, 2007. Mr. Gendler filed a personal injury action against DOT in Thurston County Superior Court alleging negligent maintenance and design of the bridge by DOT.¹ Desiring the collision reports for that location, but recognizing the § 409 privilege would bar DOT from producing collision reports, Mr. Gendler filed this separate PRA action against the WSP demanding all collision reports for bicycle accidents occurring on the Montlake Bridge. CP at 248.

On September 3, 2008, DOT moved to intervene in the PRA lawsuit on the basis that it was the real party in interest because the collision reports being sought could only be generated from the protected

¹ *Gendler v. State*, Thurston County Superior Court No. 09-2-00428-2. The Thurston County action for damages has settled.

§ 152 database. CP at 134-38. The collision records were being sought for use against DOT in the Thurston County tort action. On October 3, 2008, DOT's motion for intervention was granted over the objection of the plaintiff. CP at 167-68. The plaintiff did not appeal the ruling recognizing DOT's interest in records that necessarily involve access to its § 152 database.

On January 27, 2009, the trial court heard cross-motions for summary judgment. The issues were whether RCW 46.52.060 imposed a duty on the WSP to produce the specific compilation of collision reports demanded by plaintiff and whether production of the reports was barred by 23 U.S.C. § 409. On February 2, 2009, the trial court ruled in favor of the plaintiff. CP at 500-02. The trial court's decision was affirmed by the court of appeals on November 24, 2010. *Gendler*, 158 Wn. App. at 676.

B. The Collection And Use Of Uniform Police Traffic Collision Reports (PTCRs) In Washington.

1. Development Of Collision Report Forms

The current collision report form used by all law enforcement agencies in Washington contains data points that are extracted by DOT analysts in determining accident locations down to 1/100th of a mile. CP 194-95. DOT requires and utilizes the data embedded in the collision report form to meet the specificity requirements of federal highway safety

reporting under § 152. CP at 194.² The United States Department of Transportation encouraged the collection of this location data by conditioning receipt of Federal Highway Safety Act of 1973 funding based upon an analysis of the compilation of that information. CP at 194.

Local and state law enforcement agencies submit raw collision reports from the field to the WSP Collision Records Section (CRS). CP at 195-96, 201. Drivers involved in collisions may also submit Vehicle Collision Reports (VCR). CP at 196. The raw data for the federal reporting is collected in the uniform PTCR by simply filling out the collision report form. CP at 194.

Implementing federal regulations for the federal Hazard Elimination Act of 1973 requires each state to maintain collision reports in a comprehensive computerized database. CP at 195. This is known as the § 152 database or is sometimes referred to as the Data Mart. CP at 195. DOT collects and compiles the data, including collision reports, in compliance with federal highway safety reporting requirements. CP at 195.

² The decision by the court of appeals contains a factual error in its statement that the information collected in Washington's collision reports predates the federal reporting requirements. *Gendler*, 158 Wn. App. at 674. Although a variety of forms predated the federal Federal Highway Safety Act of 1973, the undisputed record describes the information collected in Washington's collision report forms evolving over time in response to increasingly specific federal requirements. CP at 193-97.

The federal regulations under § 152 require DOT to analyze the raw collision reports and to locate all collisions that occur on public roadways with an accuracy down to 1/100th of a mile. CP at 195. The raw reports, as received by DOT from the WSP, do not contain sufficient information to produce an accurate compilation of collision reports for a precise location. CP at 202. The ability to produce collision reports for a precise location only exists after DOT has analyzed the reports as part of its § 152 responsibilities. CP at 202.

As the states increasingly began to adopt computerized databases in order to comply with § 152 requirements, an issue arose over the application of the § 409 privilege in states where the database was integrated or shared among more than one agency. In Washington, this issue exists because the collision records database is partially shared between the WSP and DOT. CP at 197, 202. The Federal Highway Administration has addressed this issue:

One such issue involves the situation where a State or local government stores crash report information only in a single set of electronic files that all government agencies having a need for such information could access by the use of a networked computer system. In such a situation, we believe that Section 409 would apply to all crash reports contained within the system, regardless of the agency that may possess or retrieve a report. This is so because all of the crash reports in such a system would be stored in the database, at least in part, for a Section 409 purpose.

CP at 200 (emphasis added).

2. Collision Reports And The WSP

The extent of WSP involvement with collecting and coding the raw collision reports was described by WSP/CRS supervisor Kip Johnson:

The CRS collects, then scans, collision reports to create an image in the Washington State Department of Transportation's (WSDOT) collision database. The CRS indexes the reports by PTCR or VCR number (numbers on paper PTCRs are pre-assigned on the PTCR form, while SECTOR (electronic) PTCRs and paper VCRs are assigned by WSDOT), individual driver or property owner, date of collision, and name of roadway or county if included. The WSP does not analyze collision records by location and cannot confirm the accuracy of any location information included on the collision reports it receives.

Once the collision reports are entered into WSDOT's database, WSDOT confirms the accuracy of location information and analyzes and codes the reports, making them searchable by WSDOT by location.

The CRS can only access and search collision reports using the original information that it indexed from the reports. It does not have access to the WSDOT data. Accordingly, the CRS cannot perform an accurate search of collision reports solely by location. In order to locate a PTCR, the CRS must have either: a PTCR number; or the name of one of the involved parties, the date of the collision, and preferably the county in which the collision occurred. The only way for the CRS to accurately search by location would be to manually search each record. This is not feasible because the CRS receives between 140,000 and 150,000 collision reports each year – currently there are more than 950,000 reports being maintained by CRS (the WSP CRS retention schedule requires that copies of collision reports be kept for the current year and the six preceding years). However, even if a manual search could be performed, it would still not be accurate because the reports do not contain the WSDOT corrections to collision

locations and other coding.

The CRS also cannot search collision reports by “bicycle collisions” or any other type of vehicle.

CP at 202.

The WSP does not have the capability to accurately retrieve collision reports based on a search by location as specific as the Montlake Bridge. CP at 202. During her deposition, Ms. Johnson was questioned about WSP doing precise location coding:

Q. So you [WSP] could index by location; you just don't feel the need to do it because WSDOT is doing that, correct?

A. No.

Q. No what?

A. We [WSP] don't index by location. We don't have the resources to do that, we don't have the knowledge to do that anymore, and we don't have the fields.

CP at 329.

The ability to accurately retrieve collision reports at a location as specific as the Montlake Bridge only exists after DOT's analysis of collision reports for federal § 152 purposes. CP at 194-98, 202, 329.

3. The WSP Does Not Compile Collision Reports At Precise Locations Under RCW 46.52.060

The court of appeals in this case erroneously assumed under RCW 46.52.060 that the WSP indexed the raw collision reports by “particular location” and could, therefore, retrieve reports by “particular location”.

Gendler, 158 Wn. App. at 669. As explained above, neither assumption is correct. CP at 194-98, 202, 329.

RCW 46.52.060 does not command reporting at a “particular location” as asserted by the court of appeals. The statute refers more generally to “location” and for many decades “location” in the RCW 46.52.060 report was not much more specific than the county where the accident occurred. Most importantly, there is absolutely no evidence that the RCW 46.52.060 report has ever included the level of detail that would identify collisions at anything close to a location as particular as the Montlake Bridge.³

In 2004, the responsibility for producing this annual report was transferred from the WSP to DOT through an interagency agreement (memorandum of understanding - MOU). CP at 197, 202, 205-17. The MOU reflected the practical differing business needs of the agencies – DOT has vastly superior reporting and analysis capabilities due to its responsibility to perform § 152 functions, but WSP has no similar law enforcement need for such an analysis. CP at 197. There is no evidence that the RCW 46.52.060 report was materially different when produced by the WSP, nor that it ever reported collisions at precise locations. While

³ The RCW 46.52.060 report is publicly available at www.wsdot.wa.gov/mapsdata/collision/pdf/Washington_State_Collision_Data_Summary_2009.pdf. See Attachment A.

specific accident location data is used by DOT to prioritize the expenditure of federal and state funds for highway improvement, there is no evidence the WSP needs or has ever collected or compiled such information for law enforcement purposes.

The Legislature has never requested more specificity about the location of collisions as have been historically reported under RCW 46.52.060, nor has the Legislature overridden the MOU and ordered the WSP to produce the RCW 46.52.060 report. For state law purposes, the legislature has directed the compilation of statistical information regarding accidents involving the driver being distracted by:

[o]perating a handheld electronic telecommunication device; operating a hands-free wireless telecommunication device; other electronic devices (including, but not limited to, PDA's, laptop computers, navigational devices, etc.); adjusting an audio or entertainment system; smoking; eating or drinking; reading or writing; grooming; interacting with children, passengers, animals, or objects in the vehicle; other inside distractions; outside distractions; and distraction unknown.

See RCW 46.52.060.

IV. ARGUMENT

A. This Court Should Modify Its *Guillen* Ruling To Conform To the Interpretation Of 23 U.S.C. § 409 Announced By The U.S. Supreme Court.

In *Guillen*, this Court analyzed the interplay of Washington's PRA and the federal privilege enacted in 23 U.S.C. § 409. *Guillen*, 144 Wn.2d 696, 713, 31 P.3d 628 (2001). In *Guillen*, a PRA was filed for a variety of transportation records relating to a roadway owned by Pierce County where the plaintiff had been involved in an accident. *Guillen*, 144 Wn.2d at 702. Collision reports for the specific location were part of the request. *Guillen*, 144 Wn.2d at 702. Subsequently, the plaintiff's tort action was joined with the PRA action. *Guillen*, 144 Wn.2d at 703.

The public records request was specifically limited to records held by the Pierce County Sheriff and did not request records held by the county's transportation agency. *Guillen*, 144 Wn.2d at 707. The county objected to a number of the requests, including the request for collision reports, on the basis of the privilege in 23 U.S.C. § 409. The court of appeals affirmed the trial court and ordered production of the collision reports over the county's § 409 objection. *Guillen*, 144 Wn.2d at 702.

This Court accepted review of *Guillen* and made three rulings bearing on this issue. First, this Court ruled the amendment expanding the scope of the § 409 privilege by Congress in 1995 was broad enough to

bring collision records within the § 409 privilege. *Guillen*, 144 Wn.2d at 726-27. Second, this Court held the 1995 amendment to the § 409 privilege to be unconstitutional. *Guillen*, 144 Wn.2d at 730-45. Only the amendment which added the phrase “or collected” to § 409 was held unconstitutional. The amendment was stricken by this Court as unconstitutional, but the original enactment was not stricken. *Guillen*, 144 Wn.2d at 730-45. Third, this Court ruled that collision reports are confidential pursuant to RCW 46.52.080 and not subject to public disclosure requests, but would be available for discovery in a tort action. *Guillen*, 144 Wn.2d at 702, 716.

This Court also interpreted § 409, sans the 1995 amendment, to apply only to records “originally created” for 23 U.S.C. § 152 purposes and remanded the case to apply its interpretation of § 409. *Guillen*, 144 Wn.2d at 702-03. Before remand occurred, the United States Supreme Court accepted review and partially reversed this Court. *Guillen*, 537 U.S. 129 (2003). This Court’s rulings and the effect of the U.S. Supreme Court’s partial reversal are discussed below.

1. This Court's Conclusion That Collision Records Are Within The Scope Of The Privilege In 23 U.S.C. § 409 Is Consistent With The U.S. Supreme Court's Interpretation Of That Statute

An extensive discussion of the requirements of the federal Highway Safety Act and Congress' subsequent decision to enact the § 409 privilege to protect the States was provided by this Court in its *Guillen* decision. *Guillen*, 144 Wn.2d at 716-30. This Court specifically quoted the following portion of the Congressional Record in discussing the purpose of the 1995 amendment to § 409:

This section amends Section 409 of Title 23 to clarify that *data "collected" for safety reports or surveys* shall not be subject to discovery or admitted into evidence in Federal or State court proceedings. *This clarification is included in response to recent State court interpretations of the term "data compiled" in the current Section 409 of Title 23.* It is intended that *raw data* collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention[ed] or addressed in such data.

H.R. Rep. 104-246 § 328 at 59 (1995) (emphasis added); see Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591.

Guillen, 144 Wn.2d at 723.

Based on this evidence, this Court concluded:

[T]he accident reports, photos, collision diagrams, and other related materials and "raw data" sought by the

respondents in these consolidated cases would appear to be covered by § 409 as amended in 1995.

Guillen, 144 Wn.2d at 726 (emphasis in original).

After determining the 1995 amendment was unconstitutional this Court ruled the scope of § 409 was limited to data that was “originally created” for § 152 purposes. *Guillen*, 144 Wn.2d at 702. The U.S. Supreme Court reversed this Court’s ruling on the constitutionality of the 1995 amendment to § 409 thereby reinstating the privilege as amended by Congress. *Guillen*, 537 U.S. at 140. With the amendment having been found constitutional, this Court’s analysis of § 409 as “covering” accident reports was restored.

This Court has already answered the dispositive question on this appeal – collision records in Washington are “covered” by 23 U.S.C. § 409. *Guillen*, 144 Wn.2d at 726.

2. The Proper Interpretation And Application Of § 409 As Articulated By The U.S. Supreme Court, While Different Than The Ruling By This Court, Yields The Same Result For Collision Records

The U.S. Supreme Court articulated the applicable scope of § 409 as follows:

The interpretation proposed by the [United States], however, suffers neither of these faults. It gives effect to the 1995 amendment by making clear that § 409 protects not just the information an agency generates, *i.e.*, compiles, for § 152 purposes, but also any information that an agency

collects from other sources for § 152 purposes. And it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

Having determined that § 409 protects only information compiled or collected for § 152 purposes, and does not protect information compiled or collection for purposes unrelated to § 152, as held by the agencies that compiled or collected that information, we now consider whether § 409 is a proper exercise of Congress' authority under the Constitution. We conclude that it is.

...

Guillen, 537 U.S. at 145-46 (emphasis added).

This Court has already determined collision reports in Washington are either collected or compiled for § 152 purposes. *Guillen*, 144 Wn.2d at 726-27. The record in this case reinforces this Court's previous conclusion that collision reports are collected and compiled for § 152 purposes. CP at 194-97, 202-03.⁴ Unlike the county sheriff in *Guillen*, there is no evidence the WSP collects, compiles, or maintains collision reports for precise locations for any non-§ 152 purpose. Therefore, the U.S. Supreme Court's articulation of the scope of the § 409 privilege does not change this Court's conclusion that the § 409 privilege "covers" collision reports.

⁴ This Court's previous interpretation of § 409 as being limited to records "originally created" for § 152 purposes was based on the assumption that the 1995 amendment to § 409 was unconstitutional. That interpretation was therefore reversed by the ruling of the U.S. Supreme Court, declaring the 1995 amendment to be constitutional.

B. This Court's Ruling That Collision Reports Are Not Subject To A PRA Request Pursuant To RCW 46.52.080 Is Correct And Consistent With The 1991 Amendment To § 409, But This Court's *Guillen* Ruling Should Be Corrected To Reflect That The Constitutionality of § 409 Also Precludes Discovery Of Collision Records.

1. This Court and the U.S. Supreme Court Have Ruled That Collision Records Are Not Available For Public Disclosure

Prior to adding the phrase "or collected" to § 409 in 1995, Congress expanded the protection of the statute in 1991 to expressly preclude pretrial discovery of reports supporting § 152 purposes. *See* Intermodal Surface Transp. Efficiency Act of 1991, § 1035(a). The U.S. Supreme Court held in *Guillen* that any records collected or compiled for § 152 purposes are privileged from a PDA for either admissibility or pretrial discovery. *Guillen*, 537 U.S. at 141-46.⁵ As described below, the privilege barring public records requests for collision records under § 409 as interpreted by the U.S. Supreme Court is consistent with the decision by this Court that collision records are not subject to public records requests under state law. *Guillen*, 144 Wn.2d at 714-15.

In addition to its analysis of federal law, this court also analyzed state law and ruled RCW 46.52.080 barred the production of collision reports when sought through a public records request. *Guillen*, 144 Wn.2d

⁵ The U.S. Supreme Court did not review this Court's ruling regarding the remand for discovery in the tort action on the basis that the U.S. Supreme Court did not believe this Court's discovery order was a final order. *Guillen*, 144 Wn.2d at 141-42.

at 714. This court specifically noted that if Guillen's request for collision records has been made solely through a PDA the request would have been barred by RCW 46.52.080. *Guillen*, 144 Wn.2d at 714. The confidentiality of collision records has been part of Washington law for decades. *See Op. Att'y. Gen., 24th Biennial Report* at 226 (1937-38).

Because it is undisputed that the compilation of collision records sought by the plaintiff in this case can only be accurately produced from the protected § 152 database, the supremacy clause dominates the confidentiality issues and precludes any pretrial discovery or admissibility of protected records. *Hillsborough Cnty., Florida v. Automated Medical Lab, Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). As mandated by the U.S. Supreme Court ruling in *Guillen*, all raw data and reports within the § 152 database are protected by § 409. *Guillen*, 537 U.S. at 141-46. The federally mandated confidentiality under § 409 is completely consistent with state law confidentiality for collision reports under RCW 46.52.080. *Guillen*, 144 Wn.2d at 714.

Unlike the situation in *Guillen*, the plaintiff in this case did not combine his PDA with his tort action. Therefore, this case falls within the previous ruling in *Guillen* that a request for collision records made solely through a PDA would be barred by state law. *Guillen*, 144 Wn.2d at 714.

2. This Court's Ruling That RCW 46.52.080 Does Not Preclude Discovery Of Accident History Should Be Corrected

As noted above, in *Guillen* this Court ruled there was a distinction to be made between a public records request for collision records and discovery of collision records by a plaintiff in a tort action against the government. *Guillen*, 144 Wn.2d at 714-15. This Court further ruled under RCW 46.52.080 that, although information related to collisions would be available for pretrial discovery, the information is not admissible nor are the actual reports discoverable. *Guillen*, 144 Wn.2d at 714-15, 715 n.8, 746. This distinction, while immaterial to resolving this case, is inconsistent with § 409 and likely to create confusion in future cases.

In finding § 409 to be unconstitutional, this Court ruled that Congress' preclusion of information "collected" for § 152 purposes was unconstitutional and also ruled Congress' interference with state law regarding the discovery and admissibility of evidence was unconstitutional. *Guillen*, 144 Wn.2d at 744. Although this Court plainly struck the portion of § 409 precluding pretrial discovery, this Court referred only to the 1995 amendment and did not mention that the preclusion against pretrial discovery under § 409 was enacted in 1991.

The U.S. Supreme Court's ruling that all of § 409 was constitutional overrides any contrary ruling by this Court, including this

Court's rejection of the § 409 privilege against pretrial discovery of records compiled or collected for § 152 purposes. *Hillsborough*, 471 U.S. at 713. Therefore, to the extent this court held that RCW 46.52.080 allowed pretrial discovery of collision records, it is contrary to the express bar against "discovery" in § 409 and invalid. *See Hillsborough*, 471 U.S. at 713.

In addition to running afoul of § 409, this Court's ruling requiring production of collision records as part of discovery in a lawsuit cannot be reconciled with the plain language of RCW 46.52.080. The plain language of RCW 46.52.080 makes all collision reports confidential and contains no language creating an exception for producing the records during discovery.⁶

Upon closer review, neither of the cases cited by the court, *Superior Asphalt & Concrete Co. v. Dep't of Labor & Industries*, 19 Wn. App. 800, 578 P.2d 59 (1978), nor *Gooldy v. Golden Grain Trucking Co.*, 69 Wn.2d 610, 419 P.2d 582 (1966), support the conclusion that the confidentiality provision of RCW 46.52.080 does not apply to the discovery of collision reports submitted by police officers. To the

⁶ The legislature has specifically limited the distribution of collision records to specific law enforcement entities, the director of licensing, and certain interested persons. This court has ruled that a plaintiff in a personal injury lawsuit is not within the "interested person" language for purposes of obtaining records of collisions other than the one that plaintiff was involved in. *Guillen*, 144 Wn.2d at 715.

contrary, the actual holding in *Gooldy* was that the investigating officer's report filed pursuant to RCW 46.52.080 is confidential. *Gooldy*, 69 Wn.2d at 613-14. The decision in *Superior Asphalt* did not involve an officer's report and merely holds that the report of a person involved in an accident is confidential under RCW 46.52.080. *Superior Asphalt*, 19 Wn. App. at 806.

The Attorney General's Opinion issued on September 25, 2001, does not provide a basis for continuing the erroneous exception allowing "discovery" of collision reports under RCW 46.52.080. *See Op. Att'y Gen. 8 (2001)*. The Opinion was an explanation of the law post-*Guillen*, not a commentary on whether the decision was correct.

V. CONCLUSION

This Court should reverse the courts below and hold the plaintiff's action under the PRA is barred by 23 U.S.C § 409.

RESPECTFULLY SUBMITTED this 16th day of May, 2011.

ROBERT M. MCKENNA
Attorney General



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Assistant Attorneys General

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid

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

DATED this 16th day of May, 2011, at Olympia, WA.



LYNN JORDAN