

NO. 94092-4

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KEVIN ANDERSON,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, DIVISION  
OF CHILD SUPPORT

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Under RCW 26.23.120, child support case records held by the Department of Social and Health Services, Division of Child Support (DCS) “shall be private and confidential and shall only be subject to public disclosure as provided in [RCW 26.23.120].” DCS maintains records on more than 350,000 active child support cases. Recognizing the wide reach of DCS’s services and the intimate nature of information obtained when providing those services, the legislature broadly exempted DCS case records from disclosure under the Public Records Act (PRA). Instead, the disclosure and production of such records is governed solely by RCW 26.23.120 and related rules.

Kevin Anderson is the noncustodial parent in a DCS support enforcement case. He unsuccessfully attempted to bypass the law established by the legislature in RCW 26.23.120 and use the PRA to access confidential DCS records.

In ruling against Mr. Anderson, the Court of Appeals held that RCW 26.23.120 is an “other statute” exemption to the PRA. It further held that RCW 26.23.120 does not conflict with the PRA because it provides an alternative statutory scheme for disclosure of the records it governs. Accordingly, it held that DCS did not violate the PRA when it responded to Mr. Anderson’s request for his child support case records.

Because the Court of Appeals decision is consistent with the plain language of RCW 26.23.120, does not conflict with existing case law, and does not raise an issue of substantial public interest, Mr. Anderson's Petition for Review should be denied.

## **II. IDENTITY OF RESPONDENT**

The Respondent is the State of Washington, Department of Social and Health Services, Division of Child Support.

## **III. COUNTERSTATEMENT OF THE ISSUES**

This case is not appropriate for review by this Court under the considerations governing acceptance of review. RAP 13.4(b). If review were granted, the issues presented would be:

1. Does RCW 26.23.120, which provides that certain child support case records "shall only be subject to disclosure as provided in [RCW 26.23.120]," preclude disclosure of the records it governs under the PRA?

2. Is there any genuine issue of fact that case comments and an e-mail regarding Mr. Anderson's child support case related to an individual child support case and, therefore, may only be disclosed under RCW 26.23.120?

#### IV. STATEMENT OF THE CASE

##### A. Mr. Anderson's Request for Records

On July 5, 2013, DCS received a request from Kevin Anderson, the noncustodial parent in a DCS case and an inmate under Department of Corrections supervision. CP at 228, 231. Mr. Anderson requested the personnel file for a Department employee and several child support case records, including his "complete case comment history printout" and a "copy of the e-mail sent from Judy Rupo<sup>1</sup> [sic] to the King County Prosecutor's office on 3/10/10 regarding [his] case." CP at 231.

Five business days after receiving the request, DCS responded to Mr. Anderson. CP at 166. DCS estimated that it would take about 45 business days to research, prepare, and provide responsive records. CP at 166. DCS also explained that child support case records are private and confidential under RCW 26.23.120. CP at 166.

In September 2013, DCS further responded, explaining again that child support case records are private and confidential under RCW 26.23.120. CP at 168. Pursuant to that statute, DCS provided Mr. Anderson with his case comment history records because, as the noncustodial parent, Mr. Anderson is one subject of the case records. CP at 168, 170, 173-91, 236. However, DCS redacted portions of the case

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<sup>1</sup> Judy Roppo is the DCS Support Enforcement Officer previously assigned to Mr. Anderson's support enforcement case.



comments to keep the mother's information and communications with DCS confidential. CP at 173-91. DCS provided statutory authority and brief explanations for the redactions, and in the left margin of the case comments, DCS noted an explanation for each redaction. For example, where DCS redacted the custodial parent's address, it noted the number "2" in the left hand margin. CP at 174. On an accompanying page, next to the number "2" it explained that "[a]ddress and contact information of the parties, children and other individuals may not be disclosable under RCW 26.23.120, RCW 74.04.060, RCW 74.04.062, WAC 388-14A-2107 and WAC 388-14A-2135." CP at 170. It further explained that "[c]ontact information includes e-mail addresses, telephone numbers, fax numbers, employer and daycare information." CP at 170.

DCS also responded to Mr. Anderson's request for "the e-mail sent from Judy Rupo [sic] to King County Prosecutor's office on 3/10/10 regarding [his] case." CP at 168, 171. DCS searched for the requested e-mail and found a copy of it located within an e-mail chain sent by a King County prosecutor and received by Ms. Roppo. CP at 164, 243. DCS determined that all of the e-mails contained in the chain related to Mr. Anderson's child support case *and* were privileged attorney-client communications in which Ms. Roppo sought, and the prosecutor provided, legal advice regarding that case. CP at 164. Accordingly, DCS withheld

the e-mail and provided an exemption log and brief explanation. CP at 164, 169-70. The exemption log identified the e-mail's author as the prosecutor and the recipient as Judy Roppo. CP at 169. The brief explanation stated that "[i]nformation related to communications between the Division of Child Support (DCS) and the Attorney General (AG), prosecutor or other attorney representing them may not be disclosable under RCW 5.60.060." CP at 169-70.

**B. Mr. Anderson's Administrative Appeal**

Mr. Anderson asked DCS to review its response to his request for child support case records in a letter dated October 2, 2013. CP at 233. He did not ask DCS to review the redactions to his case comment history. CP 233. With regard to the e-mail related to his child support case, Mr. Anderson asked DCS to clarify which subsection of RCW 5.60.060 applied. CP at 233-34. Within a few days, DCS responded that subsection (2)(a) of RCW 5.60.060 codifies the attorney-client privilege referenced in its earlier response. CP at 195.

Although Mr. Anderson does not challenge the response to his request for the personnel file, CP at 62, he does discuss a second administrative appeal. Pet. for Review at 2. This second appeal, dated October 14, 2013, related solely to his request for Judy Roppo's personnel

file. *See* CP at 221. This second appeal letter did not address the case comments or the e-mail at issue here. CP at 221.

**C. Superior Court Proceedings**

In June 2014, Mr. Anderson filed a complaint alleging that DCS's response to his July 5, 2013, records request did not comply with the PRA. CP at 1. The complaint includes factual allegations regarding his request for the March 10, 2010, e-mail between DCS and a King County prosecutor. CP at 2-6. It makes no specific mention of the case comments, nor does it claim that DCS's redactions to the case comments were improper. *See* CP at 1-10.

Mr. Anderson first expressed concern about case comment redactions during discovery. CP at 228. Upon receiving Mr. Anderson's discovery requests that expressed concerns about redactions to the case comments, DCS promptly reviewed the redactions and provided a revised case comment history under RCW 26.23.120. CP at 236-38; *see also* CP at 103-11 (Pl.'s First Set of Reqs. for Admis. and Def.'s Resp. Thereto). In a cover letter, DCS explained again that child support case records are only subject to disclosure under RCW 26.23.120 and that the case comment history was redacted where Mr. Anderson was not the subject of or did not provide the information. CP at 236.

On February 2, 2015, Mr. Anderson filed a pleading entitled “Plaintiff’s Motion to Show Cause,” which asked the court to conclude that DCS’s response to his request for child support case comments violated the PRA. CP at 11-12; *see also* Br. of Appellant at 3. DCS responded with a cross-motion for partial summary judgment, explaining that records and information held by DCS concerning individual support enforcement cases, including case comments, are only subject to disclosure and production under that statute, not the PRA. CP at 35-36. The trial court denied both motions, remarking that DCS could move for summary judgment at a later date. RP at 13-14; CP at 48, 157.

On March 6, 2015, DCS made a last attempt to explain the application of RCW 26.23.120 to Mr. Anderson’s records request. CP at 240-42. DCS explained that, under RCW 26.23.120, all records and information “[o]btained or maintained by DCS that concern an individual who owes a child support obligation or for whom support enforcement services are being provided are private and confidential. Such records and information are subject to disclosure only under RCW 26.23.120.” CP at 240. DCS explained that RCW 26.23.120 applied to all records regarding Mr. Anderson’s child support case, including the case comments and the e-mail between Support Enforcement Officer Judy Roppo and a deputy prosecutor regarding Mr. Anderson’s child support case. CP

at 241-42. Even where Mr. Anderson was the subject of the records, DCS withheld child support case records where RCW 26.23.120 precluded disclosure. CP 241-42.

On May 11, 2016, over two months after DCS sent this additional explanation, the superior court granted DCS's motion for summary judgment. CP at 58. The court concluded that RCW 26.23.120 is an "other statute" exemption from the PRA and that Mr. Anderson was not entitled to any of the records that were withheld. CP at 57-59.

#### **D. Court of Appeals Decision**

The Court of Appeals upheld the trial court's order granting summary judgment, holding that the response to a request for records governed by RCW 26.23.120 "cannot be the basis for a PRA penalty regardless of when disclosure occurred." *Anderson v. Dep't of Soc. & Health Servs., Div. of Child Support*, 196 Wn. App. 674, 685 n.14, 384 P.3d 651 (2016). It further held that even though Mr. Anderson falls within the category of individuals who can access some child support case records under the rules set out in RCW 26.23.120, he was nonetheless not entitled to receive the contents of the requested e-mail because it was a privileged attorney-client communication. *Anderson*, 196 Wn. App. at 685-86.

Mr. Anderson moved for reconsideration, which the Court of Appeals denied. Order Denying Mot. for Recons., *Anderson*, 196 Wn. App. 674 (No. 47660-6-II). Mr. Anderson timely petitioned this Court for review.

#### **V. REASONS WHY REVIEW SHOULD BE DENIED**

A petition for discretionary review by this Court must show that the Court of Appeals decision meets the factors in RAP 13.4(b), which provides:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Anderson raises numerous issues for review by this Court. However, he does not show that any of these issues meet the requirements of RAP 13.4(b). Mr. Anderson cannot show that this case conflicts with a decision of this Court or with another decision of a Washington State Appellate Court. Nor does he show how the petition raises an issue of substantial public interest because the Court of Appeals decision still allows access to child support case records while protecting the privacy of

those individuals involved in child support cases from inappropriate disclosures under the auspices of the PRA.

**A. The Decision Does Not Conflict With a Decision of This Court or Another Division of the Court of Appeals**

- 1. The Court of Appeals correctly concluded that RCW 26.23.120 is an “other statute” that exempts child support case records from disclosure under the PRA and provides the exclusive process for accessing such records.**

The Court of Appeals held that redactions within records governed by RCW 26.23.120 “cannot be the basis for a PRA penalty regardless of when disclosure occurred.” *Anderson*, 196 Wn. App. at 685 n.14. Mr. Anderson claims that this holding conflicts with prior decisions of this Court and the Court of Appeals. Pet. for Review at 5-6. He is incorrect. Although no appellate case has explicitly addressed RCW 26.23.120, the Court of Appeals’ reasoning rests firmly on long-standing precedent.

The PRA generally requires agencies to make public records available for inspection by the public. RCW 42.56.070. Not all public records, however, are available to the public under the PRA. The requirement to make records available for public inspection does not apply to records that fall “within the specific exemptions of [the PRA] *or other statute which exempts or prohibits disclosure of specific information or*

*records.*” RCW 42.56.070(1) (emphasis added). Where an “other statute” prohibits disclosure of specific public records in their entirety, the record or information may be withheld in its entirety, notwithstanding the PRA’s redaction requirement. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (discussing Trade Secrets Act). Thus, this Court has recognized that some “other statute” exemptions may wholly exempt public records under the PRA.

In concluding that RCW 26.23.120(1) is an “other statute” that wholly exempts child support case records from disclosure or production under the PRA, the Court of Appeals relied on the plain language of the statute and on long-standing case law interpreting similar statutory language governing child support records.

First, the Court of Appeals properly recognized that the plain language of RCW 26.23.120(1) exempts all DCS records and information related to individuals who are subject to DCS child support enforcement services from the PRA:

Any information or records concerning individuals who owe a support obligation or for whom support enforcement services are being provided which are obtained or maintained by . . . the division of child support . . . shall be private and confidential and *shall only be subject to public disclosure as provided in subsection (2) of this section.*



RCW 26.23.120(1) (emphasis added). RCW 26.23.120(2), in turn, grants DCS broad discretion to adopt rules governing the disclosure of child support case records.

RCW 26.23.120 does not provide additional rules governing the disclosure of these DCS records; it provides the “only” permissible rules for disclosure. RCW 26.23.120(1). The PRA’s rules for disclosure and production of the records, therefore, cannot apply to DCS records governed by RCW 26.23.120.

Second, the Court of Appeals decision is consistent with its prior cases interpreting nearly identical language in RCW 13.50.100. *Anderson*, 196 Wn. App. at 683. Using language strikingly similar to RCW 26.23.120, RCW 13.50.100 “expressly provides that juvenile justice and care records ‘shall be confidential and shall be released only pursuant to this section and RCW 13.50.010.’” *Anderson*, 196 Wn. App. at 683-84 (quoting RCW 13.50.100(2)). In a series of cases addressing PRA claims related to requests for records governed by RCW 13.50.100, the Court of Appeals has held that “the language in chapter 13.50 RCW provides an exception to the general rule that all public records are subject to disclosure, and that this disclosure statute was consistent with the purpose of the PRA . . . .” *Anderson*, 196 Wn. App. at 684 (citing *Deer v. Dep’t of Soc. & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004)); *Wright v.*

*Dep't of Soc. & Health Servs.*, 176 Wn. App. 585, 309 P.3d 662 (2013), *review denied*, 179 Wn.2d 1021 (2014).

Like RCW 13.50.100, RCW 26.23.120 balances the PRA's policy of allowing access to records held by government agencies with the public interest in protecting the privacy of individuals involved in child support cases. *Anderson*, 196 Wn. App. at 684 (citing *Deer*, 122 Wn. App. at 93). Accordingly, the Court of Appeals properly held that RCW 26.23.120 exempts records from disclosure under the PRA, provides an alternative mechanism for disclosure, and does not conflict with the PRA. *Anderson*, 196 Wn. App. at 684.

DCS notes that Mr. Anderson did not raise concerns related to the case comments at any time before commencing his PRA lawsuit. CP at 233, 228. Once Mr. Anderson raised concerns about redactions, DCS reviewed the redactions and provided an updated copy of the case comments. CP at 229, 236-38. It left unredacted information that it could reasonably justify disclosing to Mr. Anderson under RCW 26.23.120. CP at 229, 236-38. But DCS's willingness to work with Mr. Anderson to provide records where permissible *under RCW 26.23.120* does not change that child support case comments are entirely exempt from disclosure under the PRA, and DCS's response to a request for the case comments cannot serve as the basis for a PRA claim.

**2. The Court of Appeals decision does not conflict with the PRA precedents of this Court or the Court of Appeals.**

Mr. Anderson's argument that the Court of Appeals decision conflicts with this Court's holdings in *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) and *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997), fails to recognize the nature of the exemption at issue here. RCW 26.23.120 explicitly exempts records from disclosure, not just production, except as provided therein.

In *Koenig*, the Court examined redactions to records that were otherwise disclosable under the PRA. In this case, however, the Court of Appeals properly held that the *entire* case comment history is exempt from disclosure under the PRA, and is instead only disclosable as provided in RCW 26.23.120. Accordingly, redactions within the case comment history are governed by RCW 26.23.120, not the PRA. *See Anderson*, 196 Wn. App. at 685 n.14.

With regard to the e-mail related to his child support case, Mr. Anderson argues that *Amren* required DCS to disclose and produce the e-mail in redacted form. But again, *Amren* addresses records which the Court explicitly held were *not* exempt from disclosure or production under the PRA. The Court stated that "if the requested material contains both exempt and non-exempt material," the non-exempt material must be

produced. 131 Wn.2d at 32. In this case, however, records related to individual support enforcement cases are entirely exempt from disclosure under the PRA by RCW 26.23.120(1). Mr. Anderson has never disputed that the e-mail in question related to his support enforcement case. *See, e.g.*, CP at 231 (requesting an e-mail “regarding” Mr. Anderson’s support enforcement case). Thus, it was exempt from disclosure under the PRA and only subject to disclosure and production as provided in RCW 26.23.120.

Mr. Anderson’s argument related to the requested attorney-client e-mail based on *O’Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010) and *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) is also misplaced. Again, Mr. Anderson’s argument rests on the presumption that DCS records concerning child support cases are subject to disclosure under the PRA, despite the fact that the legislature explicitly and specifically exempted such records from disclosure under the PRA. RCW 26.23.120(1). Mr. Anderson relies on cases in which records were publicly available under the PRA and exempt only to the extent they contained attorney client-privileged communications. In *O’Neill*, for example, this Court held that metadata related to a non-confidential, non-exempt e-mail was subject to disclosure under the PRA. 170 Wn.2d 138. Similarly in *Mechling*, the requestor sought

e-mails that included privileged, attorney-client communications, but the records were otherwise fully disclosable to the public under the PRA. 152 Wn. App. at 830.

The e-mail at issue here, unlike the e-mails in *O'Neill* or *Mechling*, is a confidential record about a child support case that is not disclosable to the general public. In effect, it is protected by two layers of confidentiality. First, the e-mail is a confidential record about a child support case that is entirely exempt from public disclosure by RCW 26.23.120. Second, the content of the e-mail communications is confidential and exempt from production by attorney-client privilege. Thus, while select individuals may be able to access case-related e-mails under RCW 26.23.120, as occurred here, such e-mails are *never* accessible under the PRA.

To the extent Mr. Anderson relies on *O'Neill* to argue that he is entitled to e-mail metadata, his argument is improper. In *O'Neill*, this Court held that a request for a copy of an e-mail is not equivalent to a request for metadata about that e-mail. 170 Wn.2d at 151-52. Instead, the requestor must explicitly state that he or she is seeking metadata. *Id.* Mr. Anderson did not raise metadata as an issue before the trial court or on appeal. *See* CP at 1-10 (Complaint); Appellant's Opening Br. at 7-8, *Anderson*, 196 Wn. App. 674 (No. 47660-6-II). Rather, he first raised an

argument related to metadata in his Motion for Reconsideration before the Court of Appeals. Appellant's Mot. for Recons. at 7, *Anderson*, Wn. App. 674 (No. 47660-6-II). Accordingly, this issue is not properly before this Court for review. *See* RAP 9.12 (limiting appellate review of an order granting summary judgment to evidence and issues called to the attention of the trial court). Regardless, the argument related to metadata lacks merit. Mr. Anderson requested "a copy of the e-mail sent from Judy Rupo [sic] to King County Prosecutor's Office on 3/10/10 regarding [his] case," but did not request metadata associated with that e-mail. CP at 231. Accordingly, even if disclosure of the e-mail was governed by the PRA rather than RCW 26.23.120, DCS would not be obligated to provide metadata in response to Mr. Anderson's request. *O'Neill*, 170 Wn.2d at 151-52.

**B. Mr. Anderson Has Not Raised an Issue of Substantial Public Importance**

**1. The Court of Appeals decision does not limit individuals' ability to access their own child support case records pursuant to RCW 26.23.120.**

Mr. Anderson mischaracterizes and misapplies the Court of Appeals decision when he alleges that it "limited over a million individuals' ability to access their own DCS records." Pet. for Review at 9. Consistent with the legislature's mandate that DCS child support

case records “shall only be subject to public disclosure as provided” in that statute, the Court of Appeals held that individuals must use the rules and processes laid out in RCW 26.23.120 to access such records. To the extent an individual believes DCS is wrongly withholding child support case records, he or she can make a motion under RCW 26.23.120(3)(d) or otherwise seek to enforce RCW 26.23.120 through judicial review of the agency’s decision.

**2. The Court of Appeals decision correctly applies unambiguous statutory language protecting important privacy interests of thousands of Washingtonians.**

Mr. Anderson correctly points out that DCS’s child support enforcement services involve hundreds of thousands of individuals, including custodial parents, noncustodial parents, and their minor children. Pet. for Review at 10; CP at 227. The information gathered and maintained by DCS in the course of providing these support enforcement services is deeply personal in nature. *See* CP at 227-28.

Accordingly, the legislature exempted DCS child support case records from disclosure under the PRA and provided an alternative structure for disclosure of such records to qualified individuals. The general rule provided by the legislature in RCW 26.23.120(1) is unambiguous: DCS records related to individual support enforcement cases “shall be private and confidential and shall only be subject to public

disclosure as provided in [RCW 26.23.120].” If, as Mr. Anderson argues, the PRA governs child support case records, anyone could access a specific, known individual’s confidential DCS records by asking for a de-identified copy of those records. Under the PRA, which Mr. Anderson claims governs disclosure of these DCS records, the identity of the requestor, the purpose of the request, and the fact that he already knows the identity of the custodial parent may not matter. *See* RCW 42.56.080 (forbidding agencies from distinguishing among requestors). DCS could be required to produce the records with the custodial parent’s name and other identifiers redacted. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 182, 142 P.3d 162 (2006) (holding that records subject to disclosure under the PRA must be produced with the name of the child victim of sexual assault redacted, even though such redaction would not protect the victim’s identity); *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 416-18, 259 P.3d 190 (2011) (plurality opinion) (explaining that where an individual’s identity is exempt under the PRA, an agency must produce records with that individual’s name redacted, even if, based on the requestor’s prior knowledge, such redaction will not protect the individual’s identity).

This cannot be the result intended by the legislature, which explicitly made all child support case records maintained by DCS private



and confidential. RCW 26.23.120(1). Instead, as the Court of Appeals correctly recognized, the legislature exempted the records from disclosure under the PRA and provided a separate statutory scheme governing their disclosure. This approach balances the PRA's "policy of allowing access to records held by government agencies" with the interest in protecting the privacy of the hundreds of thousands of Washingtonians involved in child support cases. *Anderson*, 196 Wn. App. at 684 (quoting *Deer*, 122 Wn. App. at 93).

## VI. CONCLUSION

Mr. Anderson has failed to meet the criteria in RAP 13.4(b) for granting a petition for review. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2017.

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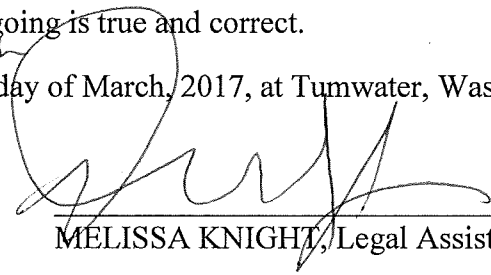
**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I served a copy of DSHS' Answer to Petition for Review upon all parties or their counsel of record as follows:

KEVIN ANDERSON, 727189 Airway Heights Correction Center P.O. Box 2049 Airway Heights, WA 9901	<input checked="" type="checkbox"/> <b>U.S. Mail Postage Prepaid</b> <input type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> Hand delivered <input type="checkbox"/> Email:
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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.

DATED this 13<sup>th</sup> day of March, 2017, at Tumwater, Washington.

  
\_\_\_\_\_  
MELISSA KNIGHT, Legal Assistant